Case 73/84

Denkavit Futtermittel GmbH
v
Land Nordrhein-Westfalen

(reference for a preliminary ruling
from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen)

'Health checks in respect of animal feeding-stuffs'

Summary

Free movement of goods — Derogations — Protection of health — Health checks on the importation of compound feeding-stuffs for animals — Permissibility — Conditions
(EEC Treaty, Arts 30 and 36; Council Directive 79/373, Arts 3 and 9)

The provisions of Council Directive 79/373 on the marketing of compound feeding-stuffs for animals, in particular Articles 3 and 9 thereof, in conjunction with Article 30 of the EEC Treaty, must be interpreted as meaning that Member States are not prohibited from subjecting, in reliance on Article 36 of the EEC Treaty, the importation from other Member States of compound feeding-stuffs for animals, within the meaning of Article 2 (b) of Directive 79/373, of the exporting State or an import licence issued by the veterinary authorities of the importing State, provided that such a licence is issued on terms that are in reasonable proportion to the requirements referred to in Article 36.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 14 February 1985 *

Mr President,
Members of the Court,

1. The reference for a preliminary ruling now before the Court concerns in essence a question which the Court has already considered in detail in its judgment of 8 November 1979 in Case 251/78 (*Denkavit Futtermittel GmbH* v *Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen*).[1] In this case, as in the previous one, it is a question of ascer-

* Translated from the French.

1 — [1979] ECR 3369.

taining the precise extent of the powers still retained by the Member States, at the present stage of development of Community law in the field in question, to subject the importation of compound feeding-stuffs for animals to certain prior supervisory measures on the ground of the protection of public health. However, it is necessary first to consider the circumstances which led to the reference to the Court in this case.

2. Denkavit Futtermittel GmbH (hereinafter referred to as 'Denkavit') regularly imports into the Federal Republic of Germany milk-based compound feeding-stuffs for animals from its subsidiary in the Netherlands. Those imports are subject to supervisory measures on the part of the German authorities. Although by a decision dated 19 August 1980, the Minister for Food, Agriculture and Forestry of North Rhine-Westphalia granted Denkavit a licence to import an unlimited amount of feeding-stuffs, such imports were subjected to the following preconditions: production to the German customs office, on each occasion, of the aforementioned licence or a certified copy thereof together with a Dutch veterinary certificate, valid for one year, to the effect that the imported feeding-stuffs have undergone a specific process. To be precise, the certificate must state that the feeding-stuffs consist, as regards products of animal origin, solely of powdered milk products and animal fats, that the milk products were manufactured exclusively from pasteurized milk, that the fats were heated to a temperature of at least 85° centigrade and that the whole manufacturing process was an integrated operation; in addition the licence is subject to a proviso for its revocation in the event of a danger of epizootic disease.

Those supervisory measures, adopted within the context of German legislation concerned with the control of epizootic diseases, [2] are based on Paragraphs 3 (1) and 8 of the Verordnung über die Einfuhr und Durchfuhr von Futtermitteln tierischer Herkunft und von Knochenmaterial [3] [regulation on the importation and transit of feeding-stuffs of animal origin and of bone material].

The arrangements thus adopted by the German authorities are less restrictive than the system which had been operated previously. Some import conditions have in fact been abolished following the Court's ruling in Case 251/78 and the judgment given by the court which requested that ruling.

3. Nevertheless, Denkavit took the view that the Minister no longer has the power to impose such restrictions on imports since the entry into force on 1 January 1981 of Directive 79/373 of 2 April 1979 on the marketing of compound feeding-stuffs, [4] which could not be taken into account by the Court in Case 251/78 because the period prescribed for its implementation had not expired. Denkavit therefore brought an action before the Verwaltungsgericht [Administrative Court] Düsseldorf, which dismissed the action as unfounded; it then appealed to the Oberverwaltungsgericht, which referred the following question to the Court of Justice:

'Is Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feeding-stuffs, in particular Articles 3 and 9 thereof, in conjunction with Article 30 of the EEC Treaty, to be interpreted as meaning that Member States are not allowed to subject, in reliance on Article 36 of the EEC Treaty, the importation of compound feeding-stuffs within the meaning of Article 2 (b) of Directive 79/373/EEC from other Member States to the production of an import licence issued by the veterinary authorities or of a cer-

2 — Paragraph 7 (1) of the Viehseuchengesetz [Law on infectious diseases of cattle], as last amended on 23 February 1977 (Bundesgesetzblatt I, p. 313).

3 — As last amended on 19 July 1983 (Bundesgesetzblatt I, p. 999).

4 — Official Journal 1979, L 86, p. 10.

tificate issued by the veterinary authorities of the exporting State?'

4. Before summarizing the main points contained in the observations made to the Court I should like, in order to clarify the issue before the Court, to point out that the argument in this case relates solely to the power of a Member State, under Article 36 of the EEC Treaty, to check that each consignment of imported feeding-stuffs is free of pathogenic organisms.

No one doubts that the system of controls adopted by the Federal Republic of Germany amounts to an obstacle to trade. The question referred to the Court only relates to the applicability of the derogation provided for in Article 36 'on the grounds of ... the protection of health and life of humans, animals ...' in the light of the entry into force on 1 January 1981 of Directive 79/373 of 2 April 1979 on the marketing of compound feeding-stuffs. In other words, it is necessary to determine whether that directive provides 'for the harmonization of the measures necessary to guarantee the protection of animal and human health' against the presence of pathogenic organisms and establishes 'procedures to check that they are observed'. [5] If it does make such provisions, recourse by the Member States to the exceptions provided for in Article 36 of the Treaty is no longer justified.

5. In fact, Denkavit maintains that the directive does encompass protection against pathogenic organisms. It contends that the purpose of Article 3 is to ensure the marketing of compound feeding-stuffs for animals that do 'not represent a danger to animal or human health'. Furthermore, that purpose is consistent with the general objective of all the legislation relating to feeding-stuffs for animals, namely to ensure the use of feeding-stuffs of good quality. It takes the view that such an interpretation of Article 3 is confirmed by Articles 1, 4, 8 and 12 of the directive.

Unlike Directive 80/502 of 6 May 1980 [6] amending Directive 74/63 concerning undesirable substances and products in feeding-stuffs [7] and Directive 82/471 of 30 June 1982 concerning certain products used in animal nutrition, [8] Article 1 of Directive 79/373 does not expressly exclude provisions concerning pathogenic micro-organisms. In fact Directive 82/471, by providing that it is to apply

'without prejudice to Community provisions concerning:

...

(e) pathogenic micro-organisms in feeding-stuffs',

necessarily refers to pre-existing Community provisions, which, according to Denkavit, can only be provisions of Directive 79/373.

Article 4 of Directive 79/373 enables contamination to be prevented by providing for the marketing of feeding-stuffs in sealed packages or containers. Article 8 serves the same purpose by authorizing Member States to maintain national measures restricting the marketing of feeding-stuffs obtained from or free from certain ingredients. Finally,

5 — Case 251/78, paragraph 14.

6 — Official Journal 1980, L 124, p. 17.

7 — Official Journal 1974, L 38, p. 31.

8 — Official Journal 1982, L 213, p. 8.

Article 12 provides for appropriate controls by authorizing the Member States to inspect by sampling.

The absence from the directive of provisions referring expressly to protection against pathogenic organisms does not, according to Denkavit, contradict the interpretation proposed by it, in view of the general nature of the obligation laid down by Article 3 and in view of the system of inspection provided for in Article 12.

In the light of that analysis, Denkavit concludes that Directive 79/373 contains an exhaustive statement of the law. It states that in none of its provisions is it contemplated that imports of compound feeding-stuffs for animals are to be subject to restrictions of the type imposed by the German authorities on health grounds. It points out that Article 9 of the directive prohibits Member States from subjecting feeding-stuffs to marketing restrictions 'other than those provided for by this Directive'. It concludes from that provision that after 1 January 1981, the German authorities were no longer able to subject its imports from the Netherlands to the controls provided for. In its view, imports of feeding-stuffs for animals should be effected from that date without any restrictions: pursuant to Directive 79/373, the exporting State guarantees that the animal feeding-stuffs produced in its territory are harmless; the importing State may only carry out those checks authorized by Article 12. Only where the feeding-stuffs are contaminated may the relevant national rules be applied.

In the alternative, Denkavit states that even if the directive is not to be regarded as an exhaustive statement of the law, as it contends, recourse to Article 36 is not justified since its entry into force marked the completion of the programme of harmonization announced by the Council in its resolution of 22 July 1974. [9]

6. As has been clearly shown by the defendant in the main proceedings, by the Danish Government and by the Commission, Denkavit's arguments are contradicted by the wording, scheme and purpose of Directive 79/373.

7. The Court stated in its judgment in Case 251/78 [10] that the directives prior to Directive 79/373 were either not concerned with the presence of pathogenic organisms or not intended to determine the substantive conditions and controls to ensure their absence. In fact some directives contain a provision excluding their application to pathogenic micro-organisms. I am referring here to Article 1 of Directive 76/371 establishing Community methods of sampling for the official control of feeding-stuffs, [11] Article 1 (2) (d) of Directive 74/63, as amended by Directive 80/502, and finally Article 1 (2) (e) of Directive 82/471.

No such provision is contained in Article 1 (2) of Directive 79/373, which defines the scope of the directive. In a matter as sensitive as combating epizootic diseases, that fact alone cannot mean that pathogenic micro-organisms are included within the scope of the directive. Such an interpretation would only be possible if the directive included provisions dealing with the

9 — Official Journal 1984, C 92, p. 2.

10 — Cited above, paragraphs 15 to 17.

11 — Official Journal 1976, L 102, p. 1.

'harmonization of veterinary and public health prevention and supervision of the presence' of pathogenic organisms in compound feeding-stuffs for animals. [12]

8. Let us briefly analyse the provisions of the directive. Its purpose is to harmonize the measures required to ensure the *marketing* of 'suitable, good-quality' compound feeding-stuffs for animals (first recital in the preamble).

To that end, Member States must ensure that feeding-stuffs:

Are 'wholesome, unadulterated and of merchantable quality';

Do not represent 'a danger to animal or human health'; and

Are not marketed 'in a manner liable to mislead' (third recital).

That triple obligation, reiterated in Article 3 of the directive, is the subject of detailed provisions in Articles 4 to 8:

Article 4 ensures that, in principle, feeding-stuffs are marketed in sealed packages or containers in order to prevent their re-use (ninth recital).

Article 5 lays down the information to be shown on the package, container or label (fourth, fifth, sixth and eighth recitals).

The subsequent provisions of the directive, in particular the references therein to the annex to the directive, relate both to that information and to information concerning the ingredients of animal feeding-stuffs (seventh recital). Article 8, in particular, authorizes the Member States to restrict the marketing of feeding-stuffs obtained from, or free from, certain ingredients.

Those provisions as a whole indicate the scope and purpose of the harmonization effected by Directive 79/373. Its main objective is 'to provide the user with accurate and meaningful information on the compound feeding-stuffs at his disposal' (fourth recital). To that end, it provides for measures relating to the labelling and packaging of the products in question. None of those measures is intended to prevent contamination by pathogenic organisms.

9. In the absence of express provisions, no such requirement can be found by implication in Article 3. The spread of epizootic diseases is too serious a risk to be dealt with by implication by the Community legislature. As has been pointed out by both the Danish Government and the Commission, such a risk makes it necessary to define precisely what treatment feeding-stuffs must undergo in order to be germ-free and what methods of inspection are required in order to verify that they are germ-free. A good example is provided by the directives on animal health problems affecting meat products and the directives introducing measures for the control of classical swine fever. [13] It must also be added that the effect of the interpretation proposed by Denkavit would be to prevent Member States from taking any effective preventive measures at the time of importation and to restore to them their freedom

12 — Case 251/78, paragraph 15.

13 — Directives 80/215 and 80/217 of 22 January 1980 (Official Journal 1980, L 47, pp. 4 and 11).

of action only when the infection had been disclosed.

It is therefore certain that, by adopting Directive 79/373, the Community legislature did not intend to deprive Member States of their power to adopt appropriate measures for the protection of health under Article 36 of the Treaty.

10. It remains to be considered whether the system adopted by the German authorities amounts to a 'justifiable restriction' within the meaning of that article.

First, it must be noted that as a consequence of the Court's judgment in Case 251/78, the German legislation has relaxed the restrictions which had previously been applicable. Secondly, it must be noted that Denkavit has conceded that the restrictions were not in themselves excessive.

In fact, far from subjecting imports to double controls, the provisions in question are based on mutual trust between Member States, since the German authorities accept as sufficient proof the production of a Dutch veterinary certificate.

Having regard to the aim pursued by the contested rules, the foregoing is sufficient to show that they comply with the principle of proportionality and do not constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States' (Article 36 of the EEC Treaty).

11. In conclusion, I propose that the Court should rule that:

Council Directive 79/373 of 2 April 1979, on the marketing of compound feeding-stuffs for animals, does not prohibit Member States from subjecting, in reliance on Article 36 of the EEC Treaty, the importation of compound feeding-stuffs for animals from other Member States to the production of a certificate issued by the veterinary authorities of the exporting State and certifying that the imported feeding-stuffs are free of pathogenic germs.