JUDGMENT OF THE COURT (Sixth Chamber)
22 June 1994 *

In Case C-426/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht for a preliminary ruling in the proceedings pending before that court between

Federal Republic of Germany

and

Deutsches Milch-Kontor GmbH

on the interpretation of Article 2(1) and (4) of Commission Regulation (EEC) No 1624/76 of 2 July 1976 concerning special arrangements for the payment of aid for skimmed-milk powder denatured or processed into compound feedingstuffs in the territory of another Member State (OJ 1976 L 180, p. 9), as amended by Article 1 of Commission Regulation (EEC) No 1726/79 of 26 July 1979 (OJ 1979 L 199, p. 10), on the interpretation of Article 10 of Commission Regulation (EEC) No 1725/79 of 26 July 1979 on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves (OJ 1979 L 199, p. 1), and on the interpretation of Articles 9, 12, 16 and 95 of the EEC Treaty,

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, M. Diez de Velasco (Rapporteur), C. N. Kakouris, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Federal Republic of Germany, by Thomas Tschentscher, Rechtsanwalt, Frankfurt am Main,

— Deutsches Milch-Kontor GmbH, by Barbara Festge, Rechtsanwältin, Hamburg,

— the Commission of the European Communities, by Ulrich Wölker, of the Legal Service, acting as Agent, assisted by Georg M. Berrisch and Hans-Jürgen Rabe, of the Brussels and Hamburg Bars,

having regard to the Report for the Hearing,

after hearing the oral observations of the Federal Republic of Germany, represented by Thomas Tschentscher, assisted by Karl-Wolfgang Komarek, expert, of Deutsches Milch-Kontor GmbH and of the Commission at the hearing on 10 February 1994,

after hearing the Opinion of the Advocate General at the sitting on 21 April 1994,

gives the following

Judgment

1 By order of 27 August 1992, received at the Court on 22 December 1992, the Third Chamber of the Bundesverwaltungsgericht (Federal Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 2(1) and (4) of Commission Regulation No 1624/76 of 2 July 1976 concerning special arrangements for the payment of aid for skimmed-milk powder denatured or processed into compound feedingstuffs in the territory of another Member State (OJ 1976 L 180, p. 9), as amended by Article 1 of Commission Regulation No 1726/79 of 26 July 1979 (OJ 1979 L 199, p. 10), on the interpretation of Article 10 of Commission Regulation No 1725/79 of 26 July 1979 on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves (OJ 1979 L 199, p. 1), and on the interpretation of Articles 9, 12, 16 and 95 of the EEC Treaty.

2 Those questions arose in a dispute between Deutsches Milch-Kontor GmbH ('DMK') and the German authorities (the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry), hereinafter 'the Bundesamt') relating to the costs charged in respect of systematic frontier inspections of skimmed-milk powder qualifying for export refunds which DMK was exporting to Italy.

3 Article 10(1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176) provides for the granting of aid for skimmed-milk powder to be used as animal feed if certain conditions are satisfied.

4 Pursuant to Article 10(2) of that regulation, the Council adopted Regulation (EEC) No 986/68 of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (OJ, English Special Edition 1968 (I), p. 260).

5 As a general rule, aid is granted in the Member State in which the skimmed-milk powder is intended to be used as animal feed or for processing into compound feedingstuffs. However, the second subparagraph of Article 3(1) of Regulation No 986/68 also allows Member States to pay aid in respect of skimmed-milk powder produced in their own territory but denatured or used within the territory of another Member State. In such a case, the conditions for the granting of aid are laid down by Regulation No 1624/76, as amended by Regulation No 1726/79, cited above. Member States made use of this possibility only in the case of exports of skimmed-milk powder to Italy after 15 July 1976.

6 Article 2(1) of Regulation No 1624/76, as amended by Regulation No 1726/79, provides for two inspections to determine whether an export refund is due. The first of those inspections, which relates to the composition and quality of the skimmed-milk powder, takes place in the exporting State, while the second, which takes place in the processing State (Italy), consists in determining whether the product has in fact been used to manufacture animal feed.

7 The first inspection is that referred to in Article 10 of Regulation No 1725/79.

8 So far as the second inspection is concerned, Article 10(2) of Regulation No 1725/79 provides that:

'... the control measures, to be determined by the Member State concerned, shall fulfil at least the following conditions:

...

(b) inspections of undertakings shall be on the premises and shall relate in particular to the conditions of manufacture ...;

(c) such inspections shall be frequent and unannounced. An inspection shall be made at least once in every 14 days of manufacture. When their frequency is determined, account shall be taken of the quantities of skimmed-milk powder used by the undertaking and of the frequency of the scrutiny of its accounts carried out further to the requirement set out in (d) below;

...

(d) the inspections referred to in (c) shall be supplemented by thorough and unannounced scrutiny of commercial documents and of the accounts ...'.

9 DMK purchases skimmed-milk powder in Germany and exports it to Italy for processing into compound feedingstuffs. Transport is by lorry and each lorry carries a load of approximately 25 tonnes.

10 The Bundesamt carried out checks to determine whether the skimmed-milk powder exported to Italy by DMK could qualify for aid under Regulation No 986/68.

11 To that end, the Bundesamt arranged for samples to be taken by customs export offices from each lorry-load for subsequent analysis. For practical and financial reasons, those inspections were carried out at the same time as the other export formalities by the German customs authorities providing administrative assistance.

12 The Bundesamt charged to DMK the costs of analysing the samples thus taken, which came to DM 112 per sample, pursuant to Paragraph 12 of the Magermilch-Beihilfenverordnung (German regulation governing the grant of aid for skimmed-milk powder). Between 29 April 1980 and 8 September 1980, payment notices were issued totalling DM 17 081.28 in respect of 152 samples.

13 The action brought by DMK against those payment notices was dismissed at first instance by decision of 20 April 1983 of the Verwaltungsgericht (Administrative Court) Frankfurt am Main.

14 On the appeal against that decision, the Hessische Verwaltungsgerichtshof (Higher Administrative Court of the State of Hesse) set aside the contested payment notices by judgment of 5 June 1989. It based itself on the finding that Article 10(2)(c) of Regulation No 1725/79 provides merely for random inspections. In view of the fact that the exporter was unable for technical reasons to transport skimmed-milk powder in loads greater than 25 tonnes, a systematic inspection of

each load constituted a degree of control not envisaged by the relevant Community provisions. Furthermore, DMK was placed, by reason of the inspection costs charged to it, at a disadvantage vis-à-vis traders exporting skimmed-milk powder to Italy from other Member States. In view of the slender profits in the dairy industry, the Verwaltungsgerichtshof considered that DM 112 per 25 tonnes, as demanded by the Bundesamt, could no longer be regarded as 'the normal cost of inspections' as stated by the Court of Justice in Case 233/81 *Denkavit Futtermittel* v *Germany* [1982] ECR 2933.

15 The Bundesamt appealed against that decision to the Bundesverwaltungsgericht on a point of law.

16 Taking the view that the dispute raised a number of problems concerning the interpretation of Community law, the Bundesverwaltungsgericht, although bound, as a court dealing with an appeal on a point of law, by the findings of fact of the Hessische Verwaltungsgerichtshof, decided by order of 27 August 1992 to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the first subparagraph of Article 2(4) of Regulation (EEC) No 1624/76 of 2 July 1976, as amended by Article 1 of Regulation (EEC) No 1726/79 of 26 July 1979, to be interpreted as meaning that, where skimmed-milk powder produced in Germany is exported by lorry to Italy for use in the manufacture of compound feedingstuffs, the competent authority is required to take a sample from each lorry-load and have it analysed in order to be able to issue the certificate referred to in that provision?

2. If Question 1 is answered in the negative, what criteria are to be elicited from Article 2(1)(a) of Regulation (EEC) No 1624/76, as amended by Article 1 of Regulation (EEC) No 1726/79, in conjunction with Article 10 of Regulation (EEC) No 1725/79 for the purpose of determining the frequency with which

samples must and may be taken in the case of skimmed-milk powder exported by lorry to Italy?

3. Is it compatible with the prohibition of charges having an effect equivalent to customs duties (Articles 9, 12 and 16 of the EEC Treaty), the prohibition of discrimination (Article 95 of the EEC Treaty) and other provisions of Community law to make the exporter bear the full costs under national law of systematic or occasional inspections?'

17 The first two questions reflect two aspects of the same problem and should for that reason be examined together.

The first and second questions

18 The national court seeks by its first question to ascertain whether the certificate provided for in Article 2(4) of Regulation No 1624/76, as amended by Regulation No 1726/79, can be issued only where the competent authority has had a sample taken and checked from each lorry-load at the time when the skimmed-milk powder is exported. In the event of a negative reply, the second question seeks to determine the frequency with which inspections must be carried out.

19 It should be noted that the systematic inspections at issue in the main proceedings are carried out at the frontier.

20 So far as health inspections carried out at frontiers are concerned, the Court has already held that, as a result in particular of the delays inherent in the inspections and the additional transport costs which the trader may incur thereby, the inspections in question are likely to make imports or exports more difficult or more costly (see the judgment in Case 35/76 *Simmenthal* v *Italian Minister for Finance* [1976] ECR 1871, paragraph 7).

21 That principle also applies to other types of frontier inspections, in particular national rules which provide for systematic inspections of goods when they cross a frontier (see the judgment in Case 190/87 *Oberkreisdirektor des Kreises Borken and Another* v *Moormann* [1988] ECR 4689, paragraph 8).

22 It follows that, in intra-Community trade, any systematic inspection at a frontier constitutes an obstacle which may be in breach of Articles 30 and 34 of the Treaty. The introduction of such inspections can for that reason be permitted only in duly justified circumstances.

23 Those principles were incorporated in Council Directive 83/643/EEC of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States (OJ 1983 L 359, p. 8), replaced with effect from 1 January 1993 by Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit (OJ 1990 L 262, p. 1). As amended by Council Directive 91/342/EEC of 20 June 1991 (OJ 1991 L 187, p. 47), Article 2(1) of Directive 83/643, which does not apply to this case since it was adopted after the events material to the dispute, provides that frontier inspections must be carried out by means of spot checks, except in duly justified circumstances. As the Court has already pointed out at paragraph 14 of its judgment in Case C-186/88 *Commission* v *Germany* [1989] ECR 3997, Directive 83/643 does not permit formalities or constraints involving more than the normal requirements inherent in the crossing of the frontier by any goods, whatever their nature.

24 The first two questions in the reference must be examined in the light of the above principles.

25 The inspections at issue in the main proceedings were introduced with a view to ensuring compliance with the Community rules governing export refunds on skimmed-milk powder intended for processing into feedingstuffs in a Member State other than that in which the milk was produced. It is accordingly necessary to determine whether those inspections are expressly provided for under Community law.

26 It does not follow from an examination of the rules referred to by the national court, that is to say, Article 2(1)(a) and the first subparagraph of Article 2(4) of Regulation No 1624/76, as amended by Regulation No 1726/79, and Article 10 of Regulation No 1725/79, that inspections must be carried out at the frontier.

27 Article 2(1)(a) provides only that the skimmed-milk powder must be the subject of the inspection referred to in Article 10 of Regulation No 1725/79. In contrast, Article 2(1)(c), dealing with the inspection to be carried out in the country of destination, specifies that the goods must be subjected in the latter State 'to customs control or equivalent administrative control'. Article 2(1)(c) also refers to the 'day on which customs export formalities were completed' in respect of the skimmed-milk powder, but not to any possibility for the exporting Member State to carry out inspections at the time when the goods cross the frontier.

28 Article 10 of Regulation No 1725/79 provides for two separate inspections, the first of which relates to 'the maximum moisture content' of the skimmed-milk powder (Article 10(1)), while the second concerns 'the use of skimmed milk and skimmed-milk powder, whether as such or in the form of a mixture, in the manufacture of compound feed' (Article 10(2)).

29 The second of those inspections must satisfy a number of minimum conditions. It must have particular regard to the composition of the milk, of the mixtures utilized and of the compound feedingstuffs which are manufactured (Article 10(2)(a)); it must take place on the premises of the undertakings concerned (Article 10(2)(b)) at least once in every 14 days of manufacture (Article 10(2)(c)) and must be supplemented by thorough and unannounced scrutiny of commercial documents and accounts (Article 10(2)(d)) .

30 Article 10(1), however, does not specify where the inspections are to be carried out, while Article 10(2)(b) deals only with the inspections carried out in the manufacturing undertakings.

31 Finally, Article 2(4) of Regulation No 1624/76, as amended by Regulation No 1726/79, specifies the information which must feature on the certificate issued 'by the competent authority stating that it has verified that the provisions of paragraph 1(a) and (b) [of Regulation No 1624/76] have been complied with'. It adds that 'the certificate shall be retained by the customs office of departure'.

32 Article 2(4), however, does not provide for the certificate to be issued by the customs office of departure but only for it to be retained by that office. In so far as that provision draws a distinction between 'the competent authority', which dispatches the certificate, and 'the customs office of departure', which retains it, it would appear that the certificate in question is drawn up before the goods arrive at the frontier.

33 For that reason, Article 2(1) and (4) of Regulation No 1624/76, as amended by Regulation No 1726/79, and Article 10 of Regulation No 1725/79 do not require the inspections which are the subject-matter of the proceedings to be carried out at the frontier.

34 In the light of the above principles, therefore, the inspections in question are contrary to Article 34 of the Treaty since they are carried out at the frontier on a systematic basis.

35 However, it is necessary to determine whether those inspections may be justified under Article 36 of the Treaty.

36 According to the German Government, they have been carried out at the frontier for practical and financial reasons. In any event, it maintains, systematic frontier inspections merely constitute the counterpart of a system which is voluntarily accepted and is advantageous to traders.

37 The Commission considers that frontier inspections are the only way to prevent fraud during the journey between the factory where the goods are produced and the processing undertaking.

38 Those arguments cannot be accepted.

39 First, with regard to the practical and financial reasons invoked, it need only be pointed out that Article 36 of the Treaty cannot be relied on to justify rules or practices which, even though they are beneficial, contain restrictions which are explained primarily by a concern to lighten the administration's burden or reduce public expenditure, unless, in the absence of such rules or practices, this burden or expenditure clearly would exceed the limits of what can reasonably be required (see the judgment in Case 104/75 *De Peijper* [1976] ECR 613, paragraph 18). In this case, moreover, the costs are passed on to the traders in question.

40 Second, with regard to the argument that the inspections represent the counterpart of the advantages obtained from voluntary accession to a system of export refunds, suffice it to point out that systematic inspections not provided for under the relevant Community rules cannot constitute a counterpart of that kind.

41 Third, with regard to the concern to prevent fraud during transport within the territory of the exporting Member State, it must be borne in mind that although national authorities are free to use all the appropriate methods which their law provides to prevent the fraudulent evasion of Community rules, this cannot apply where the national law is based on criteria which do not conform to the system of guarantees and proof introduced by the Community rules (see the judgment in Case 39/70 *Norddeutsches Vieh- und Fleischkontor* v *Hauptzollamt Hamburg-St Annen* [1971] ECR 49, paragraph 5).

42 In the present case, as set out above, systematic frontier inspections are not compatible with the provisions governing the free movement of goods, in particular Article 34 of the Treaty.

43 Furthermore, even if the frontier inspections in question are likely to prevent fraud during transportation within Germany, they provide no guarantee that the goods will still satisfy the minimum conditions as to composition and quality required by the Community rules when they reach the processing undertaking. Fraud cannot be ruled out during transport within the territory of transit States or within that of the State of destination itself.

44 It must, however, be added that prevention of fraud with regard to the quality and composition of goods qualifying for export refunds is a legitimate concern of Member States. For that reason they cannot be prevented from maintaining fron-

tier inspections in respect of consignments intended for export, provided that such inspections take place on a random basis.

45 The answer to the first two questions referred to the Court must therefore be that Article 2(1) and (4) of Regulation No 1624/76, as amended by Regulation No 1726/79, and Article 10 of Regulation No 1725/79 in conjunction with Article 34 of the Treaty must be interpreted as not permitting systematic inspections to be carried out at the frontier with a view to verifying compliance with the conditions as to the composition and quality of skimmed-milk powder intended for processing into compound feedingstuffs in another Member State, on which entitlement to export refunds depends. However, those provisions do not preclude frontier inspections, provided that they are carried out only by means of spot checks.

The third question

46 In its third question, the national court asks whether the costs of systematic frontier inspections charged to exporters constitute charges having an effect equivalent to customs duties, contrary to Articles 9, 12 and 16 of the Treaty, or discriminatory internal taxation within the meaning of Article 95 of the Treaty.

47 The German Government argues that the charges in question are neither excessive when compared to the actual costs involved, nor of such a kind as to deter traders from exporting the goods to which those charges apply. Accordingly, they comply with the conditions laid down by the Court in its judgment in *Denkavit*. Furthermore, according to the German Government, they constitute payment, in return for a service actually provided to the exporter, of an amount commensurate with that service, and are for his benefit in that they guarantee him the right to export aid both in principle and in a specified amount. Since the inspection costs are payable on exports to Italy as well as on imports into Germany or when the goods are processed within German territory, the charges in question are not at variance with Articles 9, 12, 16 or 95 of the Treaty.

48 The Commission supports the views set out by the German Government. In its opinion, the inspections in question are not regulated in a restrictive sense by Community law. Nor does Community law specify who is to bear the costs. For that reason, Member States may pass those costs on to the traders involved, within the limits set by the Court in its judgment in *Denkavit*. As those limits were not exceeded in this case, according to the findings made by the national court, the costs at issue are compatible with Regulations No 1624/76 and No 1725/79. In order not to fall within the category of charges having an effect equivalent to customs duties, however, charges must, in the Commission's view, satisfy the conditions laid down by the Court in paragraph 8 of its judgment in Case 18/87 *Commission* v *Germany* [1988] ECR 5427, that is to say, they must be prescribed by Community law in the general interest of the Community, they must be obligatory and uniform for all the products concerned and they must not exceed the actual costs of the inspections in connection with which they are charged. The Commission considers that those conditions are satisfied in this case.

49 DMK takes the opposite view. In its opinion, the inspections provide no benefit for the exporter, since he is not the recipient of the aid but merely a vehicle for its transmission. Moreover, the financial burden of the charges is unduly high and liable to deter traders from carrying out the transactions in question. Finally, in so far as they are charged to the exporters, the inspection costs infringe the principle of equality since this situation does not arise in the other Member States or even in Germany in respect of skimmed-milk powder exported to Italy for purposes other than the manufacture of feedingstuffs.

50 The Court has consistently held that any pecuniary charge, whatever its designation or mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having an effect equivalent to a customs duty within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed on behalf of the State (see, in particular, the judgment in Case 158/82 *Commission* v *Denmark* [1983] ECR 3573, paragraph 18).

51 The abolition between Member States of customs duties and charges having equivalent effect constitutes a fundamental principle of the Common Market applicable to all products and goods with the result that any possible exception, which in any event must be strictly construed, must be clearly laid down (see the judgments in Joined Cases 90 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 625 and in Joined Cases 80 and 81/77 *Commissionnaires Réunis and Another* v *Receveur des Douanes* [1978] ECR 927, paragraph 24).

52 In its judgment in *Denkavit*, the Court concluded, at paragraph 13, that Article 10 of Regulation No 1725/79 does not prohibit Member States from charging, under national legislation, the cost of carrying out inspections pursuant to that article to the undertaking concerned, provided that the charges which the undertaking is asked to pay represent the normal costs of inspections of that nature and are not so great as to be liable to deter undertakings from carrying out the activities which the aid is intended to encourage.

53 That principle applies only to inspections carried out in accordance with Regulations No 1624/76 and No 1725/79. As was made clear in the reply to the first two questions, that condition is not satisfied in this case in view of the fact that the inspections at issue are carried out at the frontier on a systematic basis.

54 In the absence of a legal basis, therefore, the charges in question constitute charges having equivalent effect to customs duties on exports, which are prohibited under Articles 9 and 12 of the Treaty, even though they correspond to the actual costs of the inspections carried out.

55 In view of the fact that the provisions on charges having equivalent effect and those on discriminatory internal taxation cannot be applied together (see, in particular, the judgment in Joined Cases C-78 to C-83/90 *Compagnie Commerciale de*

l'Ouest and Others v *Receveur Principal des Douanes de la Pallice-Port* [1992] ECR I-1847, paragraph 22), there is no need to examine whether the charges in question are compatible with Article 95 of the Treaty.

56 The answer to the third question must therefore be that a charge levied in respect of the systematic frontier inspections referred to above constitutes a charge having an effect equivalent to a customs duty on exports which is prohibited under Articles 9 and 12 of the Treaty, even if it corresponds to the actual cost of each inspection.

Costs

57 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesverwaltungsgericht, by order of 27 August 1992, hereby rules:

1. Article 2(1) and (4) of Commission Regulation (EEC) No 1624/76 of 2 July 1976 concerning special arrangements for the payment of aid for

skimmed-milk powder denatured or processed into compound feedingstuffs in the territory of another Member State, as amended by Commission Regulation (EEC) No 1726/79 of 26 July 1979, and Article 10 of Commission Regulation (EEC) No 1725/79 of 26 July 1979 on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves, in conjunction with Article 34 of the EEC Treaty, must be interpreted as not permitting systematic inspections to be carried out at the frontier with a view to verifying compliance with the conditions as to the composition and quality of skimmed-milk powder intended for processing into compound feedingstuffs in another Member State, on which entitlement to export refunds depends. However, those provisions do not preclude frontier inspections, provided that they are carried out only by means of spot checks.

2. A charge levied in respect of the systematic frontier inspections referred to above constitutes a charge having an effect equivalent to a customs duty on exports which is prohibited under Articles 9 and 12 of the Treaty, even if it corresponds to the actual cost of each inspection.

Mancini Diez de Velasco Kakouris

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 22 June 1994.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber