JUDGMENT OF THE COURT (Fourth Chamber)
15 April 1997 *

In Case C-272/95,

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

Bundesanstalt für Landwirtschaft und Ernährung

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 EC Treaty,

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of: J. L. Murray, President of the Chamber (Rapporteur), C. N. Kakouris and P. J. G. Kapteyn, Judges,

Advocate General: P. Léger,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Bundesanstalt für Landwirtschaft und Ernährung, 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 its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Bundesanstalt für Landwirtschaft und Ernährung, represented by Jörg Schmidt, Rechtsanwalt, Frankfurt am Main, and Professor Christian Koenig, lecturer at the Philipps University, Marburg, Deutsches Milch-Kontor GmbH, represented by Barbara Festge, and the Commission, represented by Ulrich Wölker, at the hearing on 28 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 9 January 1997,

gives the following

Judgment

1 By order of 30 March 1995, received at the Court on 11 August 1995, the Bundesverwaltungsgericht (Federal Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty several questions 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 EC Treaty.

2 Those questions were raised in proceedings between Deutsches Milch-Kontor GmbH (hereinafter 'DMK') and the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry) (hereinafter 'BEF'), concerning liability for the costs relating to systematic inspections carried out on exports by DMK to Italy of skimmed-milk powder attracting export refunds.

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

4 Under paragraph (2) of that provision 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 granting aid are laid down by Regulation No 1624/76, as amended by Regulation No 1726/79. 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, provided for in Article 10 of Regulation No 1725/79, relates to the composition and quality of the skimmed-milk powder and takes place in the exporting State. 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 DMK exports to Italy skimmed-milk powder which it buys in Germany. This milk is intended to be processed in the recipient State into compound feedingstuffs. Transport is effected in lorries, each one conveying a batch of around 25 tonnes.

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

9 To that end it arranged for the customs office responsible for exports within the country to take a sample from each lorry-load for analysis. For financial and practical reasons, those inspections were carried out by the German customs at the same time as the other export formalities under arrangements for administrative assistance.

10 BEF 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). Between 29 April and 8 September 1980 payment notices were issued totalling DM 17 081.28 in respect of 152 samples.

11 An action brought by DMK challenging those notices was dismissed at first instance by decision of 20 April 1983 of the Verwaltungsgericht (Administrative Court), Frankfurt am Main.

12 That decision came on appeal before the Hessischer Verwaltungsgerichtshof (Regional Administrative Court, Hesse), which judgment of 5 June 1989 set aside the contested notices. It based its decision on the finding that Article 10(2)(c) of Regulation No 1725/79 provides merely for random sampling. In view of the fact that the exporter is unable for technical reasons to transport the skimmed-milk powder in loads greater than 25 tonnes, a systematic inspection of each load would constitute a degree of control not envisaged by the Community provisions. Furthermore, DMK would be 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 costs of DM 112 per 25 tonnes demanded by the BEF would no longer represent the 'normal cost of inspections' as stated by the Court of Justice in Case 233/81 *Denkavit Futtermittel* v *Germany* [1982] ECR 2933.

13 BEF appealed against that decision on a point of law to the Bundesverwaltungsgericht.

14 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 Hessischer 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?'

15 In the judgment in Case C-426/92 *Germany* v *Deutsches Milch-Kontor* [1994] ECR I-2757 (*Deutsches Milch-Kontor I*), the Court held:

'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 Article 1 of 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.'

16 The Bundesverwaltungsgericht is of the view that the replies given by the Court do not dispel its doubts concerning the interpretation of Community law.

17 In fact, it considers that, in *Deutsches Milch-Kontor I*, the Court relied on findings of fact which depart appreciably from those set out in the order for reference.

18 Thus, it is apparent from the grounds of its judgment that the Court in its reasoning referred to inspections carried out at or close to the frontier.

19 However, according to the Bundesverwaltungsgericht, the order for reference mentioned the fact that the contested inspections did not take place at or close to the frontier, but within the exporting State, far from the frontier to be crossed.

20 The national court is therefore of the view that doubt remains as to whether systematic inspections carried out within the exporting State are to be equated with those carried out at Community frontiers or on the border with a transit country.

21 Accordingly, it decided to stay the proceedings and to refer the same questions that it had already submitted to the Court in *Deutsches Milch-Kontor I* :

'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?'

The first and second questions

22 It is apparent from the order for reference that in the first two questions, which must be examined together, the Bundesverwaltungsgericht is essentially asking whether Article 2(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 preclude systematic inspections to verify 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, where those inspections are carried out, with a view to subsequent export of the goods inspected, inside the exporting State and not at the frontier.

23 As a preliminary observation it should be recalled that, under Articles 30 and 34 of the EC Treaty, quantitative restrictions on imports and exports and all measures having equivalent effect are prohibited as between the Member States.

24 The Court has consistently held that those prohibitions extend to cover all trading rules of the Member States which are likely to impede, directly or indirectly, actually or potentially, intra-Community trade (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case 29/87 *Dansk Denkavit* [1988] ECR 2965, paragraph 22, and Case C-69/88 *Krantz* [1990] ECR I-583, paragraph 9).

25 So far as health inspections carried out at frontiers are concerned, the Court has held that, as a result 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 (Case 35/76 *Simmenthal* v *Italian Minister for Finance* [1976] ECR 1871, paragraph 7).

26 The Court has also held that principle to be applicable to other types of frontier inspections, in particular national rules which provide for systematic inspections of goods when they cross a frontier (see Case 190/87 *Moormann* [1988] ECR 4689, paragraph 8).

27 With regard to the inspections at issue in the main proceedings, the Court held in *Deutsches Milch-Kontor I*, first, 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, did not require them to be carried out at the frontier. On the basis of the principles previously cited, it went on to hold that, because they were carried out at the frontier and in a systematic manner, those inspections infringed Article 34 of the Treaty.

28 The Court also considered that the inspections could not be justified under Article 36 for practical and financial reasons, by the voluntary nature of the system put in place, or again by the concern to prevent fraud. However, it added that neither Article 2(1) and (4) of Regulation No 1624/76, as amended by Regulation

No 1726/79, nor Article 10 of Regulation No 1725/79 in conjunction with Article 34 of the Treaty precluded frontier inspections, provided that they are carried out only by means of spot checks.

29 The reply given by the Court to the first two questions in *Deutsches Milch-Kontor I* cannot be called in question by the fact that the inspections of the goods concerned were carried out not at the frontier but within the country, since they were conducted with a view to subsequent export of those goods.

30 The determining factor in the Court's reasoning is not the place where the inspections were carried out but, on the one hand, the reason why they are carried out, namely when a border transit is contemplated, and, on the other hand, the manner in which they are conducted.

31 It would run counter to the sense and purpose of Article 34 to take the view that only restrictions occurring at or close to the frontier are capable of coming within its scope. If that were in fact the case, it would be easy to circumvent the prohibition contained in that provision by moving the place in which the restriction occurs to another location.

32 In the light of the foregoing the reply to the first and second questions must 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 preclude systematic inspections to verify 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, where those inspections are carried out, with a view to subsequent export of the goods inspected, inside the exporting State and not at the frontier. However, those provisions do not preclude such inspections if they are carried out only by means of spot checks.

The third question

33 In this question the national court asks essentially whether the costs charged to traders of systematic inspections carried out inside the exporting State, with a view to export of the goods inspected, constitute charges having equivalent effect 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.

34 In that connection it should be pointed out that, in *Deutsches Milch-Kontor I*, the Court began by recalling that it had 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, constituted 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, Case 158/82 *Commission* v *Denmark* [1983] ECR 3573, paragraph 18).

35 The Court went on to recall that the abolition as between the 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 exception, which in any event must be strictly interpreted, must be clearly laid down (see Joined Cases 90/63 and 91/63 *Commission* v *Luxembourg and Belgium* [1964] ECR 625 and Joined Cases 80/77 and 81/77 *Commissionnaires Réunis and Another* v *Receveur des Douanes* [1978] ECR 927, paragraph 24).

36 The Court acknowledged that in its judgment in *Denkavit* (Case 233/81, cited above) it had held that Article 10 of Regulation No 1725/79 did not prohibit a Member State 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 was asked to pay represented the normal costs

of inspections of that nature and were not so great as to be liable to deter undertakings from carrying out the activities which the aid was intended to encourage.

37 The Court considered, however, that this principle is applicable only to inspections carried out in accordance with Regulations Nos 1624/76 and 1725/79, which was not in the event the case, since the inspections in question were carried out at the frontier on a systematic basis.

38 Accordingly, the Court concluded that, in the absence of a legal basis, the charges in question constituted charges having equivalent effect to customs duties on exports, prohibited under Articles 9 and 12 of the Treaty, even though they corresponded to the actual costs of the inspections carried out; consequently, there was no need to examine their compatibility with Article 95 of the Treaty.

39 In the light of the reply given to the first two questions and, in particular, of the reasoning set out in paragraphs 30 to 32 of this judgment, the fact that the inspections at issue were carried out inside the exporting State with a view to subsequent export of the goods inspected, and not at the frontier, does not affect that conclusion.

40 The reply to the third question must therefore be that a charge levied in respect of systematic inspections carried out inside the exporting State with a view to subsequent export of the goods inspected constitutes a charge having an effect equiva-

lent to customs duties on exports, prohibited under Articles 9 and 12 of the Treaty, even if it corresponds to the actual cost of each inspection.

Costs

41 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 30 March 1995, 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 Article 1 of 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 EC Treaty, preclude systematic inspections to verify compliance with the condi-

tions 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, where those inspections are carried out, with a view to subsequent export of the goods inspected, inside the exporting State and not at the frontier. However, those provisions do not preclude such inspections if they are carried out only by means of spot checks.

2. A charge levied in respect of systematic inspections carried out inside the exporting State with a view to subsequent export of the goods inspected constitutes a charge having an effect equivalent to customs duties on exports, prohibited under Articles 9 and 12 of the EC Treaty, even if it corresponds to the actual cost of each inspection.

Murray Kakouris Kapteyn

Delivered in open court in Luxembourg on 15 April 1997.

R. Grass G. F. Mancini

Registrar President of the Fourth Chamber