OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 19 October 1989 *

Mr President,
Members of the Court,

1. In the present application for a declaration that the Federal Republic of Germany has failed to fulfil its obligations, the Court is asked to decide whether the German rules in force governing the importation of fresh poultrymeat, which it has already considered in connection with the questions referred to it for a preliminary ruling by the Bundesverwaltungsgericht in the *Moormann* case, are compatible with Community law.

2. Following the Court's judgment in that case, [1] the Commission withdrew some of its conclusions, maintaining only the two following complaints:

(i) the import inspections are carried out by veterinarians;

(ii) a prior declaration is required.

I shall consider those aspects in turn.

3. With regard to the first point, it must be borne in mind that, in its judgment in the *Moormann* case, the Court held that

'when products covered by Directive 71/118 cross an intra-Community frontier they may be made subject systematically only to the inspections of an administrative nature to which all goods crossing the frontier are subject', [2]

having first pointed out that

'only occasional health inspections carried out by the State of destination are permissible', [3]

a 'health inspection' being defined as

'any inspection carried out by the importing State in order to establish that the prescribed hygiene requirements were in fact complied with, where such inspection requires the intervention of a veterinarian or a hygiene expert'. [4]

The Court added that

'these health inspections must be distinguished from general verification that the goods transported correspond to the accompanying documents'. [5]

4. The Court also stated that

* Original language: French.

1 — Judgment of 20 September 1988 in Case 190/87 *Oberkreisdirektor des Kreises Borken and Another* v *Handelsonderneming Moormann BV* [1988] ECR 4689

2 — Paragraph 16
3 — Paragraph 13.
4 — Paragraph 14
5 — Paragraph 15

'the expression "administrative formalities" must be understood as referring to all operations which involve the checking of documents and certificates accompanying the goods and are intended to ensure by simple visual inspection that the goods correspond to the documents and certificates, where such operations may be carried out by officials having general authority to inspect goods at the frontier'.[6]

5. The Court then held that

'the expression "physical inspections" must be understood as referring to all inspections of goods which involve physical contact with them'[7]

and that

'[the term "inspections" in Article 2 of] Directive 83/643 must be interpreted as meaning that only physical inspections within the meaning of Article 1(1) of the directive are to be carried out solely by means of spot checks, and no conclusion can be drawn from that article regarding the manner in which administrative formalities are to be completed'.[8]

6. Those statements may, I think, be summarized as follows: the 'conformity check' provided for in the German legislation constitutes an administrative formality the systematic completion of which is not rendered unlawful either by Directive 83/643 or by Directive 71/118, provided that its nature is such that it may be carried out by officials having general authority.

7. It must be said that that solution does not correspond precisely to the one which I had suggested that the Court should adopt, since I considered that the concept of 'physical inspection' included any physical contact with the goods *or* the means of transport. The visual inspection involved in the conformity check requires the opening of lorries, handling of cases, etc., and therefore seemed, in my view, to extend beyond the concept of 'administrative formalities' within the meaning of Directive 83/643 so as to constitute an inspection which can be carried out solely by means of spot checks, again within the meaning of the directive. That view, apparently, did not sway the Court. The Commission has modified its action accordingly; it no longer claims, as it did in its original action — and in its observations in the *Moormann* case — that the conformity check is unlawful in principle.

8. The Commission now asks the Court to find that the fact that the inspection is carried out by veterinarians constitutes an infringement of Community law.

9. I should like to state unambiguously that I do not believe that the terms of the Court's judgment in *Moormann* can provide a firm basis for such a view. In that case, it was held that inspections which *require* the intervention of a veterinarian or hygiene expert and inspections which *cannot be carried out* by officials having general authority are contrary to Community law. In other words, the Court took, as a criterion of lawfulness, the *nature* or *import* of the checks themselves rather than the type of staff who carry them out.

10. The German legislation, however, provides for systematic inspections intended

6 — Paragraph 29.
7 — Paragraph 28.
8 — Paragraph 35.

to ensure that the documents correspond to the goods designated therein, and that certain markings have been affixed. Such measures certainly do not constitute veterinary inspections the systematic carrying out of which is prohibited by the effect of Directive 71/118 and of the harmonization achieved thereby. That is the solution which the Court has endorsed in its judgment in *Moormann*.

11. Obviously, the fact that those checks are carried out by veterinarians raises the question whether the fact that the staff used are 'overqualified' is not likely to give rise, under cover of 'conformity checks', to the carrying out of systematic, and not occasional, veterinary inspections. This is, of course, the crux of the question on which the Court must rule and those are the considerations with which the Commission is concerned when it asks the Court to find that the Federal Republic of Germany has failed to fulfil its obligations.

12. But I have not been able clearly to discern the legal grounds on which the Commission relies in support of the argument that Community law prohibits the carrying out of conformity checks by officials whose qualifications are higher than those which would normally suffice. I would, obviously, nevertheless propose that the Court should find that the Federal Republic of Germany had failed to fulfil its obligations if, in such a situation, it were proven that veterinary inspections were carried out otherwise than occasionally. Here, however, the Commission has clearly not provided the Court with any evidence of such a situation the existence of which, though it may be suspected, cannot be presumed. It has merely referred — and for the first time at the hearing — to statements by a Minister of a *Land*, from which it might be inferred that the inspections in question go beyond mere conformity checks. Likewise, but without being able to provide any specific details, the Commission has referred — again for the first time at the hearing — to complaints from importers. The vagueness of those allegations, raised, moreover, at that stage in the procedure, renders them insufficient to enable the Court to find that the true nature of the inspections systematically carried out at the frontier goes beyond that of conformity checks. That being so, I propose that the Court should dismiss the application on that specific point.

13. I do not consider, on the other hand, that the requirement that importers must make a prior declaration should escape the Court's censure. In that regard, I should like first to dismiss the textual arguments submitted by the German Government. Despite the ambiguity which may be found in the German version,[9] it cannot be assumed, as it is maintained in the rejoinder, from Article 6a of Directive 83/643, as amended by Council Directive 87/53/EEC of 15 December 1986,[10] that the prior declaration is lawful. It is clear from all the other language versions,[11] which mention 'the necessary documents, checking the validity and authenticity thereof and making a summary check on the identity of the goods *declared in such documents*', that they refer to the description contained in the accompanying documents. There is no allusion to any prior declaration of importation.

9 — 'Die summarische Kontrolle der angemeldeten Waren'.

10 — OJ L 24, 27.1.1987, p. 33.

11 — 'Le contrôle sommaire de l'identité des marchandises déclarées dans ces documents'; 'en summarisk Kontrol af identiteten af det i disse dokumenter angivne gods', 'el control somero de la identidad de las mercancías declarados en dichos documentos', 'kai synoptikó élegxo thw taytóthtaw twn emporeymátvn poy dhloyntai s'aytá', 'il controllo sommario dell'identità delle merci dichiarate negli stessi', 'en een snelle identificatie van de in die documenten aangegeven goederen', 'ao controlo sumario da identidade das mercadorias declaradas nesses documentos'

14. Furthermore, the prior declaration must be interpreted as a formality within the meaning of Directive 83/643, which cannot therefore serve as a basis for concluding that it is unlawful. But that does not mean that it cannot be prohibited under other provisions of Community law — most importantly, by Article 30 *et seq.* of the EEC Treaty.

15. I have no hesitation in considering that the requirement of a prior declaration constitutes a measure having an effect equivalent to a quantitative restriction on trade within the meaning of the Court's judgment in *Dassonville*: [12] it does not appear to me to be possible seriously to call into question the reality of the restriction of trade to which it gives rise.

16. And I firmly maintain that such a restriction cannot be justified by the need to arrange for the presence of veterinarians whose qualifications are, in any event, greater than those required for the only checks which can be carried out systematically. The Federal Republic of Germany admitted at the hearing that the prior declaration is intended to coordinate the carrying out of the checks and did not deny that it might also serve to ensure that veterinarians were present at those frontier posts where they were not permanently on duty.

17. I, for my part, am convinced that no valid argument can be based on the need to arrange for the presence of 'qualified' staff, even if it is maintained that the real aim is to facilitate the crossing of the frontier, when the only systematic inspections which may lawfully be carried out must be capable of being carried out by 'ordinary' staff. In other words, the complication of the operations involved in crossing the frontier caused by the need to organize veterinary staff whose level of qualification is higher than that required for the only systematic inspections which may lawfully be carried out must be regarded as disproportionate and unjustified.

18. I therefore propose that the Court should:

(i) declare that, by requiring a prior declaration for the importation of fresh poultrymeat from other Member States, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 *et seq.* of the EEC Treaty;

(ii) dismiss the remainder of the application;

(iii) order each of the parties to bear its own costs.

12 — Judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.