JUDGMENT OF THE COURT (Grand Chamber)

11 July 2006 *

In Case C-313/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Frankfurt am Main (Germany), made by decision of 24 June 2004, received at the Court on 26 July 2004, in the proceedings

Franz Egenberger GmbH Molkerei und Trockenwerk

v

Bundesanstalt für Landwirtschaft und Ernährung,

intervening party:

Fonterra (Logistics) Ltd,

* Language of the case: German.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Malenovský, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, J. Klučka, U. Lõhmus and E. Levits (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 27 September 2005,

after considering the observations submitted on behalf of:

— Franz Egenberger GmbH Molkerei und Trockenwerk, by C. Bittner and J. Gündisch, Rechtsanwälte,

— the Bundesanstalt für Landwirtschaft und Ernährung, by K.-D. Lutz, Verwaltungsangestellter,

— Fonterra (Logistics) Ltd, by E. Gibson-Bolton, Solicitor, A. Rinne, Rechtsanwalt, C. Firth and C. Humpe, Solicitors,

— the German Government, by C. Schulze-Bahr, acting as Agent,

— the French Government, by G. de Bergues, S. Ramet and A. Colomb, acting as Agents,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the Commission of the European Communities, by C. Cattabriga, F. Erlbacher and F. Hoffmeister, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 December 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the validity of the first subparagraph of Article 25(1) and Article 35(2) of Commission Regulation (EC) No 2535/2001 of 14 December 2001 laying down detailed rules for applying Council Regulation (EC) No 1255/1999 as regards the import arrangements for milk and milk products and opening tariff quotas (OJ 2001 L 341, p. 29).

2 The reference was made in the context of proceedings between Franz Egenberger GmbH Molkerei und Trockenwerk ('Egenberger'), a company governed by German law, and the Bundesanstalt für Landwirtschaft und Ernährung (Federal Office for Agriculture and Food) ('the BLE') concerning the issue of an import licence for New Zealand butter at reduced duty.

Legal context

Community legislation

Regulation No 1255/1999

3 Article 26(1) of Council Regulation (EC) No 1255/1999 of 17 May 1999 on the common organisation of the market in milk and milk products (OJ 1999 L 160, p. 48) provides that imports into the Community of any of the products listed in Article 1 of that regulation — including butter — are to be subject to the presentation of an import licence.

4 Article 26(2) of that regulation states as follows:

'Licences shall be issued by Member States to any applicant, irrespective of his place of establishment in the Community ...

Import and export licences shall be valid throughout the Community. Such licences shall be issued subject to the lodging of a security guaranteeing that the products are imported or exported during the term of validity of the licence; except in cases of force majeure, the security shall be forfeited in whole or in part if import or export is not carried out, or is carried out only partially, within that period.'

5 Pursuant to Article 26(3)(c) of the regulation, the other detailed rules for the application of this article are to be adopted by the Commission of the European Communities.

6 Article 29(2) of Regulation No 1255/1999 determines the methods which may be applied to management of the tariff quotas and states that they are to avoid any discrimination between the operators concerned.

Regulation No 2535/2001

7 The first subparagraph of Article 25(1) of Regulation No 2535/2001 provides that:

'Import licences for the products listed in Annex III at the rate of duty indicated shall be issued only on presentation of a corresponding IMA 1 [Inward Monitoring Arrangement] certificate, for the total net quantity indicated therein.'

8 In that regard, Annex III to that regulation defines the volume of the quota and the rate of import duty for New Zealand butter. Furthermore, it is clear from recital 9 in

the preamble to that regulation that the IMA 1 certificate, issued by the competent authorities of the exporting States, certifies that the conditions of eligibility for reduced rates for products imported into the European Community are met.

9 In accordance with Article 32(2) of Regulation No 2535/2001, IMA 1 certificates are to be valid only if issued by the issuing body of the exporting State listed in Annex XII to the regulation. With regard to New Zealand, that annex designates as the issuing body the Food Assurance Authority of the Ministry of Agriculture and Forests. In addition, Annex IV to that regulation defines the method to be used to check the weight and fat content of New Zealand butter and the conditions for the completion and checking of the IMA 1 certificate for that product.

10 Under Article 34 of Regulation No 2535/2001, the provisions of Articles 34 to 42 of that regulation apply to New Zealand butter. Article 35(2) of the regulation provides:

'Import licence applications may be submitted only in the United Kingdom.

The United Kingdom shall monitor all IMA 1 certificates issued, cancelled, amended, corrected, or in respect of which copies have been issued. It shall ensure that the total quantity for which import licences are issued does not exceed the quota for any import year.'

World Trade Organisation rules

11 Article XVII(1)(a) of the General Agreement on Tariffs and Trade of 30 October 1947, in the version applicable with effect from 1 March 1969 ('GATT'), provides:

'Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.'

12 Article 1(3) of the Agreement on Import Licensing Procedures, annexed to the Agreement establishing the World Trade Organisation of 1994 ('WTO'), adopted in the context of the multilateral negotiations of the Uruguay Round (1986 to 1994) (OJ 1994 L 336, p. 151), provides that the rules for import licensing procedures are to be neutral in application and administered in a fair and equitable manner.

The main proceedings and the questions referred for a preliminary ruling

13 By the Dairy Industry Restructuring Act 2001 ('the DIRA 2001'), which entered into force on 27 September 2001, the New Zealand legislature granted an exclusive

licence to export New Zealand butter at reduced duty to the European Union to the New Zealand Dairy Board ('NZDB'), which recently merged with other milk producers to become Fonterra Cooperative Group Ltd ('Fonterra'), a cooperative marketing agency governed by New Zealand law. The DIRA 2001 prohibits any assignment of that export licence to third parties. Fonterra exports New Zealand butter to the European Union exclusively through NZMP Logistics ('NZMP'), another of its subsidiaries, established in the United Kingdom. It follows that NZMP is the exclusive importer of New Zealand butter at reduced duty into the European Union.

14 In that respect, the import procedure may be described as follows: the IMA 1 certificate is issued by the Food Assurance Authority to NZDB, which transfers it to NZMP after having sold it the butter. That subsidiary lodges the application for an import licence in accordance with Regulation No 2535/2001, together with the IMA 1 certificate, in the United Kingdom, imports the New Zealand butter into the European Union, sells it on free of duty and subject to tax and thus earns the difference between the import price and the higher Community price.

15 On 25 August 2003, Egenberger lodged with the BLE an application for an import licence for New Zealand butter at reduced duty. By decision of 2 October 2003, the BLE refused the application on the grounds that Egenberger had not produced an IMA 1 certificate to it and that applications for import licences for New Zealand butter could be introduced solely in the United Kingdom.

16 Egenberger appealed against that decision before the Verwaltungsgericht Frankfurt am Main (Frankfurt am Main Administrative Court), claiming that certain provisions of Regulation No 2535/2001 are contrary to Article 28 EC, the second subparagraph of Article 34(2) EC and Article 82 EC. Egenberger observes, in that

regard, that it had previously submitted an offer to purchase New Zealand butter to Fonterra in April 2001. However, that offer was rejected on the ground that Fonterra exported butter at reduced duty to the European Union solely through NZMP. Consequently, Egenberger was unable to obtain the required IMA 1 certificate or to purchase butter for import.

17 The referring court shares the doubts expressed by Egenberger concerning the validity of Article 35(2) and the first subparagraph of Article 25(1) of Regulation No 2535/2001. In that regard, it bases its reasoning on four points.

18 Firstly, that court suggests, on the one hand, that Article 35(2) of Regulation No 2535/2001 conflicts with the second subparagraph of Article 34(2) EC, in that it permits potential importers of New Zealand butter established in the United Kingdom to lodge their application for an import licence with the authorities managing the markets in their own State whereas all other importers must lodge such applications in another Member State, namely the United Kingdom. This gives rise to additional costs for those importers and has a dissuasive effect in particular on small and medium-sized undertakings. In addition, that provision is contrary to Article 26(2) of Regulation No 1255/1999, which provides that import licences are to be issued by all Member States.

19 On the other hand, the first subparagraph of Article 25(1) of Regulation No 2535/2001 is also contrary to the prohibition on discrimination laid down in the second subparagraph of Article 34(2) EC and Article 29(2) of Regulation No 1255/1999, since in practice it has the effect of excluding any potential importer of New Zealand butter under the export quota at reduced duty, with the exception of NZMP, which is the only undertaking likely to obtain an IMA 1 certificate.

20 Secondly, the referring court takes the view that the contested provisions of Regulation No 2535/2001 conflict with Article 28 EC.

21 It takes the view, on the one hand, that Article 35(2) of that regulation makes access to the import quota for New Zealand butter at reduced duty more difficult for undertakings not established in the United Kingdom and thus restricts free trade within the Community.

22 On the other hand, the first subparagraph of Article 25(1) of the regulation limits the movement of New Zealand butter within the Community because of Fonterra's anti-competitive conduct in refusing to sell that product at reduced duty to importers other than NZMP.

23 Thirdly, the referring court points out that the first subparagraph of Article 25(1) of Regulation No 2535/2001 imports into the Community legal order the New Zealand legislation which grants a monopoly to Fonterra for the export of New Zealand butter at reduced duty. In that respect, the provision is also contrary to Article 82(1) EC.

24 Finally, and fourthly, the contested provisions of Regulation No 2535/2001 are contrary to Article XVII(1)(a) of GATT and Article 1(3) of the Agreement on Import Licensing Procedures. The referring court takes the view that, in adopting Regulation No 2535/2001, the intention of the Community legislature was to implement obligations assumed in the context of the WTO. Thus, according to the case-law set out in Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, the legality of that act can be assessed in the light of the applicable WTO rules.

25 On the one hand, inasmuch as it imports the New Zealand legislation, contrary to the provisions of GATT, into Community secondary legislation, Article 25(1) of Regulation No 2535/2001 is contrary to the principle of non-discrimination as laid down in Article XVII(1)(a) of GATT.

26 On the other hand, the rules laid down in Articles 35(2) and 25(1) of Regulation No 2535/2001 are neither neutral nor appropriate and are therefore contrary to Article 1(3) of the Agreement on Import Licensing Procedures.

27 It is on that basis that the Verwaltungsgericht Frankfurt am Main decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 35(2) of ... Regulation No 2535/2001 ... contrary to higher-ranking Community law, in particular the prohibition in Article 28 EC of quantitative restrictions on imports and of measures having equivalent effect, the prohibition of discrimination in the second subparagraph of Article 34(2) EC and Article 26(2) of ... Regulation No 1255/1999, and is it therefore invalid?

(2) Is Article 25(1) of ... Regulation No 2535/2001 contrary to higher-ranking Community law, in particular the prohibition of discrimination in the second subparagraph of Article 34(2) EC, the prohibition of discrimination in the second subparagraph of Article 29(2) of ... Regulation No 1255/1999, Article 28 EC and the first paragraph of Article 82 EC, and is it therefore invalid?

(3) Are Articles 25(1) and 35(2) of ... Regulation No 2535/2001 contrary to Article XVII(1)(a) of [GATT] and Article 1(3) of the Agreement on Import Licensing Procedures, and are they therefore invalid?'

The questions referred for a preliminary ruling

The first question

28 By its first question, the referring court asks whether, since it provides that it is mandatory that an application for an import licence for New Zealand butter be lodged in the United Kingdom, Article 35(2) of Regulation No 2535/2001 is invalid on the grounds that it is contrary to the principle of non-discrimination laid down in the second subparagraph of Article 34(2) EC and Article 26(2) of Regulation No 1255/1999, and to the prohibition in Article 28 EC of quantitative restrictions on imports and of measures having equivalent effect.

Observations submitted to the Court

29 Egenberger, the BLE and the German, French and Polish Governments submit that the discrimination at issue concerns the method of management of the import quota, that is to say the place where applications are to be lodged (the United Kingdom) to obtain an import licence for New Zealand butter. They point out that for the other products covered by the common organisation of the market in the sector of milk and milk products applications for import licences may be made to the different national bodies.

30 Moreover, the fact of having to lodge an application for an import licence in the United Kingdom disadvantages the economic operators established in another Member State since such a requirement gives rise to additional costs for those operators. However, there is nothing to justify such a difference in treatment.

31 Fonterra and the Commission submit that in matters of agricultural policy the latter has a wide margin of discretion. Thus, the fact that a single measure has different repercussions for certain importers does not constitute discrimination, since that measure is determined on the basis of objective criteria, formulated to meet the needs of the general common organisation of the market. In that regard, the contested provision is intended to ensure correct use of the tariff quota in question and to make it easier to check.

32 The inconvenience arising from that procedure for potential importers of New Zealand butter established in other Member States is very slight, since Regulation No 2535/2001 allows them to lodge an application in the language of their choice and the costs thus caused do not exceed those incurred in the course of normal commercial relations. Thus that difference in treatment is justified on objective grounds and remains within the limits of what is necessary to achieve the objective.

Findings of the Court

33 As a preliminary point, according to settled case-law, the second subparagraph of Article 34(2) EC, which prohibits all discrimination in the context of the common agricultural policy, is merely a specific expression of the general principle of equal treatment, which requires that comparable situations must not be treated differently

and different situations must not be treated alike unless such treatment is objectively justified (see, inter alia, Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraph 35; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39; Case C-14/01 *Niemann* [2003] ECR I-2279, paragraph 49; and Joined Cases C-87/03 and C-100/03 *Spain* v *Council* [2006] ECR I-2915, paragraph 48).

34 In the present case, it cannot be disputed that the position of the importers of New Zealand butter established in the United Kingdom is comparable to that of importers established in another Member State.

35 However, by requiring the latter to lodge applications for import licences in a Member State other than that in which they are established, Article 35(2) of Regulation No 2535/2001 leads to a difference in treatment between these potential importers and those established in the United Kingdom. The fact that the importers have to lodge an application in a different Member State is likely to lead to their encountering difficulties which importers established in the United Kingdom do not. In that regard, it is less the use of language thus imposed, since the application forms for the licence are available in all official languages, than the difficulties linked to an administrative and possibly contentious procedure under a foreign administrative and legal system which are likely to put importers established in another Member State at a disadvantage and to dissuade them from lodging applications for import licences.

36 With regard to the argument put forward by the Commission and Fonterra that the Court's review of a provision adopted by the Commission in the sphere of the common agricultural policy is limited to assessment of whether there has been a manifest error of assessment, or abuse or misuse of powers, it should be noted that

Regulation No 2535/2001 is based on Articles 26(3) and 29(1) of Regulation No 1255/1999 and that the Council expressly indicated in Article 29(2) that the established methods of management of the import quota are to 'avoid any discrimination between the operators concerned'.

37 In those circumstances, it is appropriate to consider whether the contested provision is, as the Commission submits, objectively justified by the need to ensure correct use of the tariff quota in question and to make it easier to check.

38 The Commission submits that the fact that the competent authorities of the other Member States are authorised to issue import licences for New Zealand butter at reduced duty is not sufficient to achieve the aims which justify the limitation of the power to issue those licences to a single Member State, aims which can be met only by way of the system put into place by Article 35(2) of Regulation No 2535/2001.

39 In that regard, it should be noted that, for the import of other agricultural products, the competent authorities of each Member State are given the power to issue import licences (see, inter alia, with regard to other milk products subject to the requirement of an IMA 1 certificate, Section 1 of Chapter III of Title 2 of Regulation No 2535/2001 and Articles 11 to 16 of that regulation, with regard to milk products for which no IMA 1 certificate is required). Accordingly, it cannot be claimed that the limitation to a single Member State of the power to issue import licences for New Zealand butter is necessary to ensure correct use of the tariff quota in question and to make it easier to check.

40 The aim mentioned by the Commission therefore cannot justify the difficulties, arising from the requirement to lodge applications for import licences in the United Kingdom, for economic operators which are not established in that Member State or, consequently, the difference in treatment as between importers resulting from Article 35(2) of Regulation No 2535/2001.

41 It follows that that provision is discriminatory and therefore contrary to the second subparagraph of Article 34(2) EC.

42 Consequently, and without it being necessary to answer the other limbs of the first question, it must be held that Article 35(2) of Regulation No 2535/2001 is invalid inasmuch as it provides that applications for import licences for New Zealand butter at reduced duty may be lodged solely with the competent authorities of the United Kingdom.

The second question

43 By its second question, the referring court asks essentially whether the provisions of Regulation No 2535/2001 implementing the detailed rules for import of New Zealand butter at reduced duty, that is to say Articles 25 and 32 of that regulation, read in conjunction with Annexes III, IV and XII to that regulation, are invalid on the grounds that they are contrary to the principle of non-discrimination as laid down in the second subparagraph of Article 34(2) EC and Article 29(2) of Regulation No 1255/1999, and with Articles 28 EC and 82 EC, inasmuch as in practice they give rise to a system of management of the tariff quotas for the product which, as in the circumstances of the present case, limit to a single undertaking the possibility of obtaining an import licence.

44 Egenberger and the German and Polish Governments submit that the provision in the first subparagraph of Article 25(1) of Regulation No 2535/2001 is contrary to the prohibition on discrimination laid down in the second subparagraph of Article 34(2) EC. In that regard, Egenberger points out that that provision has the effect of encouraging Fonterra's anti-competitive conduct and strengthening its dominant position, which results in discrimination between potential Community importers of New Zealand butter and the European subsidiary of Fonterra, NZMP.

45 The Commission and Fonterra take the view that the latter's allegedly anti-competitive conduct does not, even indirectly, fall within the scope of the legislative content of Article 25(1) of Regulation No 2535/2001, since that provision does not distinguish between potential Community importers of New Zealand butter at reduced duty.

46 As a preliminary point, it should be noted that the second subparagraph of Article 34(2) EC and Article 29(2) of Regulation No 1255/1999 express one and the same principle, that is to say that of non-discrimination.

47 It follows from Articles 26(3) and 29 of Regulation No 1255/1999 that the Council imposed the obligation on the Commission to define, in compliance with the principle of non-discrimination, the detailed rules for the management of the tariff quota for New Zealand butter at reduced duty.

48 For that purpose, the Commission opted for the system of import licences issued on presentation of IMA 1 certificates. According to recital 9 in the preamble to Regulation No 1255/1999, that system, under which the exporting country gives an assurance that the exported products conform with their description, considerably simplifies the import procedure.

49 With regard to New Zealand butter, responsibility for issuing IMA 1 certificates for butter imported at reduced duty into the Community was given, in accordance with Annex XII to Regulation No 2535/2001, to the Food Assurance Authority. Pursuant to Article 25(1) of that regulation, an import licence for New Zealand butter at reduced duty is issued only on presentation of a corresponding IMA 1 certificate to the competent authorities.

50 It is appropriate to note that the Commission enjoys a degree of latitude in choosing the administrative methods which it uses to fulfil the task conferred on it by the Council under Articles 26 and 29 of Regulation No 1255/1999.

51 It is for the Commission to ensure that its methods comply with the principle of non-discrimination as set out in Article 29(2) of Regulation No 1255/1999.

52 It is in the light of those considerations that the compatibility of the system for issuing import licences for New Zealand butter at reduced duty, put into place by the relevant provisions of Regulation No 2535/2001, with the principle of non-discrimination must be examined.

53 Pursuant to Article 24(1) of the DIRA 2001, NZDB is granted an exclusive licence for the export of New Zealand butter at reduced duty to the European Community. Thus NZDB is the sole undertaking able to hold export licences and IMA 1 certificates corresponding to the quantity of butter exported.

54 It is common ground that NZDB sells the butter covered by the corresponding IMA 1 certificates, with a view to its import into the Community, exclusively to its European subsidiary, NZMP. Consequently, NZMP is the sole undertaking able to import New Zealand butter at reduced duty.

55 Although the choice of the IMA 1 certificate procedure, as implemented by Regulation No 2535/2001, meets the objectives of simplification of the import

procedure and better monitoring of compliance with the tariff quotas, such a method of management of those quotas cannot permit the exclusion from the procedure for butter imports into the Community of all potential importers of that product with the exception of one undertaking and result in discrimination between those economic operators.

56 The system for the import of New Zealand butter at reduced duty as laid down in Articles 25 and 32 of Regulation No 2535/2001, read in conjunction with Annexes III, IV and XII to that regulation, allows such discrimination.

57 By entrusting the New Zealand authorities with the issuing of IMA 1 certificates, whilst the DIRA 2001 instituting an export monopoly in favour of NZDB was in force, the Commission failed to take the necessary steps to prevent discrimination in the issue of import licences, whereas such an obligation had been imposed on it pursuant to Article 29(2) of Regulation No 1255/1999.

58 Consequently, without its being necessary to answer the other limbs of the second question, it must be held that Articles 25 and 32 of Regulation No 2535/2001, read in conjunction with Annexes III, IV and XII to that regulation, are invalid since they permit discrimination in the issue of import licences for New Zealand butter at reduced duty.

The third question

59 In the light of the answers to the first two questions, it is not necessary to answer the third question.

Costs

60 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 35(2) of Commission Regulation (EC) No 2535/2001 of 14 December 2001 laying down detailed rules for applying Council Regulation (EC) No 1255/1999 as regards the import arrangements for milk and milk products and opening tariff quotas is invalid inasmuch as it provides that applications for import licences for New Zealand butter at reduced duty may be lodged solely with the competent authorities of the United Kingdom.**

2. **Articles 25 and 32 of Regulation No 2535/2001, read in conjunction with Annexes III, IV and XII to that regulation, are invalid since they permit discrimination in the issue of import licences for New Zealand butter at reduced duty.**

[Signatures]