29 October 1975 on the common organization of the market in poultry-meat.

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Bosco Due

Delivered in open court in Luxembourg on 22 January 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 27 NOVEMBER 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Bundesverwaltungsgericht.

The appellant before that Court is the Land of Berlin. The respondent is the Firma Wigei Wild-Geflügel-Eier-Import GmbH & Co. KG, which I shall call for short "Wigei".

In July 1976 Wigei imported into West Berlin a number of consignments of deep-frozen poultry from Hungary. Pursuant to the relevant German legislation the Land of Berlin assessed Wigei, on those importations, to charges at the rate of 2 pfennigs per kg in respect of public health inspections. Wigei paid the charges but subsequently sued for restitution of the amount of them in the Verwaltungsgericht of Berlin on the ground that their imposition was incompatible with Community law. The Verwaltungsgericht upheld Wigei's contention and ordered the Land of Berlin to repay the amount of the charges, viz 7 636.60 DM, to Wigei.

The Land of Berlin now appeals (by way of "Sprungrevision") to the Bundesverwaltungsgericht.

Council Regulation (EEC) No 2777/75 on the common organization of the market in poultry-meat (which replaced

as from 1 November 1975 the oft-amended Council Regulation No 123/67/EEC establishing that common organization) provides, by Article 11 (2):

"Save as otherwise provided in this Regulation or where derogation therefrom is decided by the Council acting by a qualified majority on a proposal from the Commission, the following shall be prohibited:

— the levying of any customs duty or charge having equivalent effect,

— the application of any quantitative restriction or measure having equivalent effect."

It is clear from the context in which that provision appears (and no one disputes) that it is a provision that applies to trade with third countries.

Nor does anyone now dispute that, as was held by the Verwaltungsgericht, and as is unequivocally stated by the Bundesverwaltungsgericht in the Order for Reference, the charges that Wigei was called upon to pay were charges having an effect equivalent to customs duties. The German Government's written observations made it seem that it challenged that proposition, but, in a written answer to a question put to it by the Court and again at the hearing, it was made clear on its behalf that that was not so.

There is no provision in Regulation No 2 777/75 itself that exempts the charges in question from the prohibition in Article 11 (2). Whether or not they are compatible with Community law thus depends upon whether there is in any other Community instrument a relevant derogation from Article 11 (2) "decided by the Council acting by a qualified majority on a proposal from the Commission".

The contention of the Land of Berlin, which is supported by the German Government and by the Commission, is that such a derogation is to be found in Council Directive No 71/118/EEC on *(inter alia)* health problems affecting intra-Community trade in poultry-meat. That Directive was, according to its preamble, adopted by the Council on a proposal from the Commission, and moreover — I mention this in view of an argument put forward before us on behalf of Wigei — after obtaining the opinion of the European Parliament and of the Economic and Social Committee. Article 15 of that Directive provides:

"Until the entry into force of Community provisions concerning imports of fresh poultry-meat from third countries, Member States shall apply to such imports provisions which are at least equivalent to those of this Directive."

No "Community provisions concerning imports of fresh poultry-meat from third countries" had entered into force at the time of the importations here in question. Indeed I do not think that any have yet entered into force.

In Case 70/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453 (which I shall refer to as Case 70/77 in order to distinguish it from other *Simmenthal* cases) the Court had to consider the parallel provisions of the Community legislation relating to trade in fresh meat, i.e. essentially Article 20 (2) of Council Regulation (EEC) No 805/68 on the common organization of

the market in beef and veal, which contains a prohibition of charges having an effect equivalent to customs duties, and of quantitative restrictions or measures having equivalent effect, in terms similar to those of Article 11 (2) of Regulation No 2 777/75; and Article 9 of Council Directive No 64/433/EEC on health problems affecting intra-Community trade in fresh meat, which contains a provision as to imports from third countries similar to that in Article 15 of Directive No 71/118. The Court held that the purpose of Article 9 was "to lay down, on a provisional basis pending the implementation of the Community system for imports of fresh meat from third countries, a rule applicable to the national arrangements remaining in force in order to prevent their being less strict or less onerous than the inspection arrangements laid down in the directive for intra-Community trade". The rule was "clearly intended to ensure that traders who put on the market fresh meat originating within the Community should not be treated less favourably than their competitors who import meat from third countries". It must therefore be taken to relate not only to the inspections themselves but also the charges imposed in respect of them (see the original Italian text of the Judgment in Raccolta 1978 p. 1475-76; the text at [1978] ECR 1476-77 is defective). After referring to other Community instruments containing similar rules, including Article 15 of Directive No 71/118, the Court concluded:

"It follows from these considerations that, as regards veterinary and public health inspections of fresh meat from third countries, Article 9 of Directive No 64/433 in conjunction with Article 20 (2) of Regulation No 805/68 derogates from the prohibition on the imposition of health inspection charges to the extent necessary to ensure non-discriminatory treatment, on the one hand, of traders who put fresh meat on the market in intra-Community trade and thereby become liable to pay health inspection charges in the exporting Member State and, on the other hand, of those who import from third countries, provided that those charges do not exceed the actual cost of the inspections." (Paragraph 65 of the Judgment).

The reference there to "health inspection charges in the exporting Member State" is of course a reference to charges levied in accordance with the law as laid down by the Court in Case 46/76 *Bauhuis* v *Netherlands* [1977] 1 ECR 5.

The application of provisions such as those of Article 9 of Directive No 64/433 and Article 15 of Directive No 71/118, as interpreted by the Court in Case 70/77, gives rise to two problems.

The first arises from the fact that the level of charges in respect of exports is not the same in all Member States. In *Bauhuis* v *Netherlands* the Court acknowledged that that would be inevitable in the absence of harmonization (see paragraphs 35 and 36 of the Judgment). There is thus no definite yardstick by reference to which the minimum level of charges to be levied on imports from third countries can be determined.

It is clear from the Order for Reference that the Bundesverwaltungsgericht considers the solution of that problem to be obvious, and to be for each Member

State to use as a yardstick the charges that it levies in respect of exports to other Member States. That solution seems to me to accord with common sense and not to be incompatible with anything in Article 15 of Directive No 71/118 or in any relevant Judgement of this Court. At all events the Bundesverwaltungsgericht asks the Court no question about it.

The second problem arises in this way.

As was explained to us by the Commission there are two kinds of system that a Member State may choose to adopt in order to ensure the wholesomeness of imports of poultry-meat from third countries.

One is for the Member State simply to arrange for the inspection of the meat at the time of importation. In that case the present problem does not arise.

The Member State may however adopt what the Commission calls a "mixed" system, under which it allows such importations only if certain prescribed steps have been taken in the exporting third country to ensure the wholesomeness of the meat and under which it also itself inspects the meat on importation. The Commission says that, for technical reasons, such a mixed system is more effective. It adds that such a system makes it possible for the inspections at the point of importation to be less thorough and therefore less costly.

It is such a mixed system that applies under the legislation of the Federal Republic of Germany. That legislation permits the importation of poultry-meat into the Federal Republic from a third country only if it is the meat of birds killed in that country in a slaughterhouse that has been approved by the German authorities; if the meat has been subjected in the third country to inspection in a manner prescribed by the German legislation and is accompanied by a certificate to that effect; and if all ancillary operations (such as cutting up, freezing, packaging and storage) have been carried out in accordance with standards prescribed by that legislation. We are told by the Bundesverwaltungsgericht in the Order for Reference that in fact those requirements do not materially differ from the requirements of Directive No 71/118 as respects poultry-meat to be exported from one Member State to another.

In addition, the German legislation provides for inspection of the meat at the point of importation. The Bundesverwaltungsgericht states that such inspection is designed to ascertain whether the meat bears the requisite marks and is accompanied by the requisite certificate, and also, on the basis of samples that are taken, whether it is fit for human consumption. The Bundesverwaltungsgericht adds that, because the inspection is less thorough than the inspection of home-produced meat destined for export to another Member State, the charge is less. I have already mentioned that it is 2 pfennigs per kg. On meat for export to another Member State the German legislation prescribes 4 pfennigs per kg, reduced to 3 pfennigs per kg for quantities exceeding 5 000 kg.

Your Lordships will have in mind that, under the law as laid down in *Bauhuis* v *Netherlands*, a Member State is entitled to charge for inspecting in accordance with Directive No 71/118 meat intended for export to another Member State (so long as the charge does not exceed the cost of the inspection), but that an

importing Member State may make only occasional checks and may not charge for them.

It was submitted on behalf of Wigei before the Bundesverwaltungsgericht that, since an exporting third country (in this instance Hungary) charged for carrying out the inspections required by German law, and since what was required of an exporting third country by German law corresponded to what was required of an exporting Member State by Directive No 71/118, there would be discrimination as against importers from third countries if they were required to pay in addition for the inspections carried out by the German authorities themselves at the frontier.

Such are the circumstances in which the Bundesverwaltungsgericht has referred to this Court the following question:

"Does Article 15 of Council Directive No 71/118/EEC ... authorize the levying of charges intended to cover the cost of an inspection on importation of fresh poultry-meat from third countries which is designed to ascertain whether the consignments bear the requisite marks and are accompanied by the requisite certificates and, on the basis of samples taken, whether the poultry-meat intended for importation is fit for consumption, where under the law of the Member State concerned the importation of such meat is permitted only on condition that in the exporting country all the public health requirements that that directive imposes on an exporting country in intra-Community trade have been complied with and where charges are imposed therefor in the third country under its national law? Is the level of the charges imposed in the third country decisive?"

In my opinion the answer to Wigei's submission is that there is no principle of Community law that forbids discrimination against imports from third countries as compared with imports from other Member States. On the contrary there is a principle of Community preference. The existence of the Common Customs Tariff is enough to demonstrate that. Article 15 of Directive No 71/118 reflects that principle, inasmuch as it requires Member States to apply to imports from third countries provisions "at least equivalent" to those of that Directive, not provisions "equivalent" to them. Moreover, the words "at least equivalent" clearly confer on Member States a discretion, albeit a discretion limited, as the Court said in Case 70/77, by the requirement that the charges imposed should not exceed the cost of the inspections. If they did exceed that cost they would amount to a unilateral addition to the charges imposed by the Common Customs Tariff, which of course would be unlawful. The absence of discrimination that the Court was concerned to uphold in Case 70/77 was absence of discrimination in favour of importers from third countries as against importers from other Member States. The Court's Judgement in that case cannot be interpreted as calling for absence of discrimination the other way.

It seems to me manifest that the charges imposed in an exporting third country must be ignored. Either they do not exceed the cost of carrying out in that country the inspections required by the law of the importing Member State, in

which case they correspond to the charges permitted by Community law in the sphere of intra-Community trade, or they exceed that cost, in which case they amount to a tax imposed by the country in question on its own exports, a matter that cannot be the concern of Community law.

As to charges imposed by a Member State for inspections carried out at its own frontier, I think it enough to say that their imposition is within the scope of the discretion conferred on Member States by Article 15, provided of course that they do not exceed the cost of those inspections.

Before this court Wigei widened the argument. It contended that Article 15 of Directive No 71/118 could not operate as a derogation from Article 11 (2) of Regulation No 2777/75, or at all events could not operate as a derogation from the provisions of Article 11 (2) relating to charges having an effect equivalent to customs duties. That amounted of course to a contention that what the Court said on the subject in Case 70/77 was wrong.

In support of that contention Wigei referred to Council Directive No 72/462/EEC and to Council Directive No 77/99/EEC, and pointed out that, whereas those Directives expressly mention costs of inspections, Directive No 71/118 does not.

That seems to me wholly irrelevant.

Directive No 72/462 is about "health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries". (the definition of "fresh meat" in that Directive excludes poultry-meat). The Directive was thoroughly examined by the Court in Case 70/77, but the only conclusion that the Court could reach about it there was that, for want of implementing measures taken at Community level, the Directive was not yet in operation, except as to goods in transit through the Community from one third country to another. The provisions of Directive No 72/462 had nothing to do, nor could they logically have had anything to do, with the part of the Court's Judgment in Case 70/77 that is in point here.

Directive No 77/99 is about "health problems affecting intra-Community trade in meat products". Meat that has only undergone a process of chilling or freezing, such as the poultry-meat here in question, is not a "meat product" within the definition in that Directive. However, unlike Directive No 72/462, Directive No 77/99 is concerned with intra-Community trade, and is parallel to Directive No 71/118 in the sense in which I used the term "parallel" earlier.[1] But the only reference to the cost of an inspection in Directive No 77/99, or at all events the only reference thereto to which our attention was drawn on behalf of Wigei and that I have been able to find, is in the fifth paragraph of Article 7. The reference there is to inspections carried out by "experts of the Member States and of the Commission" of establishments approved under Article 6. That is hardly germane to the present question.

Wigei also submitted that an act derogating from Article 11 (2) of Regulation No 2777/75 must be adopted by the Council in accordance with the procedure prescribed by Article 43 (2) of the Treaty and must be precise. Article 15 of Directive No 71/118 did not satisfy the requirement of being precise and the German legislation in point did not satisfy the requirement of having been adopted in accordance with the procedure prescribed by Article 43 (2).

Directive No 71/118 was, as I have already mentioned, adopted by the Council on a proposal from the Commission and after consulting the European Parliament, so that it was adopted in accordance with the procedure prescribed by Article 43 (2). From the point of view of Community law the validity of the German legislation in question depends only on its being compatible with the provisions of Article 15. I know of no rule that precludes the Council from leaving to Member States a limited discretion of the kind contained in that Article, nor did Wigei cite any authority for the existence of such a rule.

I would therefore reject Wigei's wider contention.

In the result I am of the opinion that, in answer to the question referred to the Court by the Bundesverwaltungsgericht, Your Lordships should rule that, in the circumstances set out in the question, Article 15 of Directive No 71/118 does authorize the levying of charges not exceeding the cost of the inspections carried out on importation and that the level of any charges imposed in the exporting third country is irrelevant.