Case 35/84

Commission of the European Communities
v
Italian Republic

(Health checks on imports of curds)

Summary

Free movement of goods — Quantitative restrictions — Measures having equivalent effect — Health checks on imports of curds — Detention of lorries at the frontier, excessive duration of the admission procedure and failure to notify refusal to admit goods in due time — Trend or general practice — Absence of proof — Isolated cases justified on grounds of the protection of health

(EEC Treaty, Arts 30 and 36; Regulation No 804/68 of the Council, Art. 22 (1))

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 8 May 1985 *

Mr President,
Members of the Court,

A. In this case, which concerns alleged restrictions on the importation of curds from the Federal Republic of Germany into Italy, a declaration is sought that by imposing such restrictions the Italian Republic has failed to fulfil its obligation under Article 30 of the EEC Treaty (according to which quantitative restrictions on imports and all measures having equivalent effect are prohibited) and under Article 22 of Regulation No 804/68 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176), which contains a similar prohibition.

* Translated from the German.

The case has its origin in complaints made by German undertakings with regard to time-consuming frontier checks from which the Commission concluded that Italy was carrying out *systematic* health checks on such products (which is, of course, no longer permissible according to the case-law of the Court).

First of all by a telex message dated 21 June 1982 the Director General for Agriculture drew attention to two cases in which lorries loaded with milk products were detained at the frontier for days for inspection purposes. He also complained that decisions on admission of imports were only being made a week (or even more) after the results of the analysis were known and that where the goods were refused admission written confirmation thereof was given only months later or not at all.

On 5 July 1982, in reply to a request to submit its observations with regard to those complaints, the *Permanent Representation of Italy* explained that, in the absence of Community rules concerning health requirements for curds, Italy carried out checks in that connection *at random* but not systematically. In the course of such checks it was discovered that, in breach of the standards fixed by the World Health Organization, *Escherichia coli* bacteria were present in consignments from several German dairies (whose consignments were therefore also checked subsequently). Such checks, which could not be eliminated completely for the reasons given, necessarily involved delays for imports since four days were normally needed to carry out the analyses. That inevitable delay at the frontier could be reduced, however, if the importers concerned undertook to comply with the regulations issued by the Italian Ministry of Health concerning the dispatch of inspected goods to their destination (subject to the health check). In addition the checks could be reduced considerably if the German authorities were to provide, as requested by Italy, that curds were to be manufactured from heat-treated milk only, as required in Italy (see the Ministerial circular dated 15 December 1978) and if a veterinary certificate were provided to the effect that such treatment had been effected, that the manufacturers were officially approved and that no powdered milk or casein had been used in the manufacture of the curds (in accordance with the prohibition laid down in the Italian Law of 11 April 1974).

Since it was not satisfied with that reply the Commission, by a letter dated 7 March 1983, instituted the procedure under Article 169 of the EEC Treaty. Its letter contained the following four complaints:

(1) Health checks (which according to the case-law of the Court are to be regarded in essence as measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the EEC Treaty) are totally unnecessary in relation to the products which are the subject-matter of this case and cannot therefore be justified under Article 36 of the EEC Treaty since the imported curds are intended for use in the manufacture of cheese and therefore undergo heat treatment which destroys any remaining germs contained therein. The checks in question are also to be regarded as discriminatory on the ground that similar checks are not provided for in respect of Italian curds.

(2) It was also objected that when checks were carried out lorries were detained at the frontier for several days and that they were not permitted to proceed to their destination in order to avoid a deterioration in the condition of their load.

(3) In addition the duration of the admission procedure was criticized; the carrying out of any necessary analyses should not take longer than four days (inclusive of weekends) and it was objected that a decision on admission of the imports was not taken immediately after completion of the analyses.

(4) Finally it was objected that in the case of a refusal to admit the imports the corresponding *written* confirmation thereof was given after much delay or not at all whereas experience showed that in order to be able to adopt the necessary measures (such as the improvement of production methods or the institution of legal proceedings), it was necessary to receive immediate written confirmation.

The Commission received *no reply* to its letter, which had also requested certain information (*inter alia*, with regard to the sampling and analysis of the products and to the conclusions to be drawn from the results of the analyses) and accordingly on 26 October 1983 the Commission delivered a reasoned opinion listing its complaints.

The Commission's request that the necessary measures be adopted within one month of delivery of the reasoned opinion was not complied with and finally, on 9 February 1984, the Commission brought the matter before the Court of Justice seeking a declaration that, by imposing restrictions on imports of sour milk products from another Member State, the Italian Republic had failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 22 (1) of Regulation No 804/68.

B. My views on that application, which the Italian Republic claims should be dismissed with costs, are as follows.

1. It should be stated immediately that of the *four* complaints made by the Commission, referred to in the description of the preliminary procedure, the one alleging that *systematic* checks of imports on curds are not permissible was omitted from its second statement.

The omission was made — I think, correctly, — as a result in the first place of the recognition that no objection may be taken to *occasional* checks for specific purposes and in the second place of the Italian statement, which was not refuted, that it had discovered on several occasions that curds imported from the Federal Republic of Germany were not in perfect condition and that accordingly consignments from the dairies in question were subjected to *random* checks. In that respect it was of particular importance that, according to information provided by the Italian Government, only 84 of 10 000 consignments of imported cheese (including deliveries of curds) were inspected in 1982.

Accordingly the question whether the Italian Republic can be charged with failing to fulfil its obligations under the aforementioned provisions of the Treaty must now be considered only in relation to the other three aspects previously referred to, which I shall consider shortly.

2. The criteria by which such a question is to be judged have long been settled in the case-law of the Court. In its judgment in Case 8/74 the Court stated that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions', (*Procureur du Roi* v *Dassonville*

[1974] ECR 837, paragraph 5 at p. 852). Mention may also be made of the Court's judgment in Case 35/76 (*Simmenthal* v *Italian Minister for Finance* [1976] ECR 1871 *et seq.*) according to which health inspections carried out on imports, whether of a systematic nature or not, constitute measures having an effect equivalent to quantitative restrictions and may be justified only under Article 36 (which means that they must be limited to what is absolutely necessary and may not result in a disproportionate restriction on trade). Finally the Court's judgment in Case 42/82 (*Commission of the European Communities* v *French Republic* [1983] ECR 1013, which concerned checks carried out on wine imports) is of relevance. In that judgment it was stressed that checks of that kind were likely, in view of the fact that they involved delays and additional storage costs for the importer, to make importation more difficult and it was also emphasized that, with regard to random analyses, the fact that the consignments were detained at the frontier until the results of the analysis were known constituted a *disproportionate obstacle* to imports.

3. In view of the foregoing it may be stated that conduct such as that complained of, namely that, in connection with the importation of curds and sporadic checks carried out in that respect, lorries were detained for several days at the frontier instead of being permitted — in order to avoid a deterioration in the condition of their load — to proceed to their destination under customs control, would amount to an infringement of Article 30 of the EEC Treaty because it would obviously be likely to discourage undertakings from importing. Moreover, it is not possible to conclude from the small numbers of cases referred to by the Commission that the complaint is unjustified since, as the Court has held on many occasions, the *degree* to which imports are restricted is irrelevant.

It is, however, not clear that the existence of such a failure to fulfil Treaty obligations has actually been sufficiently established.

The Italian Government stated in that connection that although in some cases there were lengthy delays at the frontier for the purpose of taking samples, that was to be ascribed solely to the decision of the importers concerned and was not the fault of the relevant frontier officials. It refers in that regard to a notice dated 31 October 1975 issued by the Italian Ministry of Health from which it is clear that where samples are taken the consignments may be sent to their destination subject to customs control, if the importer so wishes. However, if the notice (which has been produced, on request, to the Court) is examined in greater detail it may be seen that the meaning attributed to it by the Italian Government is by no means unequivocal since under point 3 reference is made merely to the fact that consignments from which a sample has been taken may be detained at the frontier or sent on to their destination subject to the health check. It appears from that, therefore, that the competent veterinary officer has a discretion in the matter for the exercise of which no criteria are laid down. Accordingly the notice certainly does not make it clear that transportation may continue in each case at the desire of the importer and therefore it can hardly be claimed that the Commission's complaint is unjustified merely by reference to the aforementioned notice.

For its part the Commission relies in that connection on two cases referred to in its telex message of 21 June 1982 (Annex 1 to

its application), the one relating to a lorry belonging to Molkereizentrale Süd, Nuremberg, which was detained at the frontier from 27 May to 3 June 1982 — that is, for seven days — and the other relating to four lorries belonging to Milchwerk Jäger, Haag, which were detained at the frontier on 7 June 1982 and were taken to the cold stores only after three days. It also refers to the fact, which is also mentioned in the aforementioned telex message, that attention was already drawn in a letter dated 26 March 1982 to the obstruction of a consignment of French *cheese* in Aosta. Finally it refers to a letter dated 17 November 1983 from Molkereizentrale Süd (Annex 2 to its application) from which it may be seen that a consignment of *cheese* was returned to Germany because inspection took too long.

If it is assumed, as I think it must be, that the Commission is under a duty to prove its allegations, it is difficult to accept that, in view of the explanations given by the Italian Government in which it vigorously denies any misconduct on the part of its authorities, the Commission has succeeded in proving an infringement of the Treaty in the aforementioned manner.

In that respect it is of importance that the final two cases referred to by it concern the transportation of *cheese* and therefore do not constitute appropriate evidence in proceedings concerned only with the importation of *curds*, which is an intermediate product the condition of which easily deteriorates. It must be recognized too — and this applies to all four cases referred to — that it is not clear from the documents relied upon in the proceedings that detention at the frontier occurred as a result of the instructions of the Italian authorities and not as a result of the importers' own decisions. It is true in this respect that it is difficult to dismiss completely the Commission's statement that it can hardly be imagined that importers, in view of the costs involved in a delay at the frontier, the danger that the condition of the load would deteriorate and the uncertainty regarding the length of an inspection, would of their own accord give up the opportunity of having their consignment dispatched to its destination in accordance with the aforementioned notice. However, it is not possible to exclude that possibility since, in any such decision expectations with regard to the results of the checks may also be relevant and the distance between that destination and the frontier may very well make it seem advisable not to dispatch the goods to their destination. Moreover it is also relevant, as the Italian Government has shown, that in 16 other cases, to which I shall refer shortly, the journey to the destination did in fact continue after samples had been taken.

In view of the foregoing it is necessary to declare that the allegation that consignments of curds have been *wrongly detained* at the frontier for a considerable period *has not been proved sufficiently* and that on that point the claim made by the Commission, which should have produced clear proof in relation to the undertakings concerned, should have been produced in view of the Italian Government's vigorous denial, cannot be accepted.

4. There is a further complaint that in some cases random checks had taken too long (because it must be accepted in any case that the period needed for the carrying out of analyses is four days including weekends) and furthermore that the decision as to the admission or rejection of the goods was often issued only weeks later.

It is, without doubt, clear that such a practice may have the effect of restricting imports because it is incompatible with legal certainty and involves importers in

considerable expense. It must therefore be regarded as an infringement of the provisions referred to at the outset and, contrary to the Italian Government's view, it is not necessary for there to be an *intention* to restrict imports.

With regard to that complaint there are no problems concerning evidence. In the first place reference may be made to the documents annexed to the application (Annex II) from which it is clear that samples were taken on 7 September 1983, that they were sent for analysis on 12 September 1983 and that after the results of the analysis had been sent to the customs authorities (24 September 1983) a decision was taken by the relevant veterinary officer at the beginning of the following month. In the second place reference may also be made to a document submitted together with the reply (according to which a sample was taken on 29 September 1982, on 15 October 1982 it was announced that the relevant veterinary officer had to consult the authorities in Rome before he could release the goods and clearance took place on 30 October 1982). Last but not least reference may be made to a table produced by the Italian Government concerning 16 such checks according to which samples were taken between 3 and 16 June 1982 and the corresponding decisions were taken only between 23 and 25 June 1982.

When the Italian Government states in relation to that table that the cases referred to therein were special cases (in which, owing to the absence of precise threshold values the veterinary officer at the frontier was unable to come to a decision himself but was required under the notice dated 31 October 1975 to refer the matter for decision to the Ministry of Health in Rome), that can hardly amount to justification. Even if the failure to provide details regarding such maximum permitted values in good time is not to be regarded in itself as a fault, it is nevertheless certainly the case that a shorter procedure for arriving at a decision is imperative in order not to impede imports. Furthermore it has been shown that the situation which is the subject of complaint continued to exist in the autumn of 1982 and even in the following year, that is to say at a time when there had been ample opportunity to reduce the time taken to arrive at a decision by laying down the necessary detailed values.

In that respect it is necessary to agree with the Commission and to recognize that Article 30 of the EEC Treaty and Article 22 of Regulation No 804/68 have been infringed. Moreover the fact that, as stated by the Italian Government, agreements between the German and Italian authorities (with regard to the criteria to be applied, methods of analysis and the procedure for carrying out checks) have satisfactorily resolved the problems so that imports will no longer be impeded in the aforesaid manner, cannot prevent such a finding. Details of this solution have not yet been made known, even to the Commission, and during the oral procedure it was stated merely that the agreements would be formalized before the end of April 1985.

5. Finally, the Commission has alleged an infringement of Community law inasmuch as when admission of imports of curds was refused the importers concerned received a *written* decision only after a very long delay or not at all. In that respect it referred, in its letter initiating the procedure, to the case in which Molkereizentrale Süd, Nuremberg, was orally refused permission to import in *November 1979* and received written confirmation only *in June 1980* and to another

case in which imports sent by Milchwerk Jäger were refused admission in June 1982 and by January 1983 written confirmation had still not been received.

In that respect it may confidently be stated that if imports are refused admission, that is to say if the important right to circulate goods freely is denied, it is imperative that the person concerned be informed immediately and in writing and that the reasons for the decision be stated. Even if that is not expressly provided for in Community law it is nevertheless clear that it is one of the general principles of administrative law in relation to the adoption of administrative measures which impose a burden. It must also be acknowledged that breach of that principle, that is to say failure to state in an authoritative manner the essential grounds for refusal to admit the imports, in order to enable the person concerned to decide whether it is appropriate to seek legal redress or to adopt other measures (for example, to improve the manufacturing process so as to satisfy the requirements laid down in Italy but not generally applicable), leads to legal uncertainty — which restricts imports — or to an increase in the price of imported products (because foreign manufacturers, in ignorance of the precise Italian health requirements, may possibly make excessive efforts to improve their products).

However, whether it may rightly be said of the defendant that in the case of a refusal to admit imports, there was a repeated *failure* on its part to provide *any written* decision at all seems doubtful in view of the defendant's vigorous denials. In that respect its reference to its notifications to other Member States and the Commission (which, in fact, took place only months later) is not necessarily conclusive since it is not possible to conclude from such notifications, as has been asserted by the Commission, that the importers concerned were also informed. However, the Italian Government is correct when it states that, in that connection, the Commission is under a duty to provide the necessary proof, which can hardly be regarded as furnished by the two cases referred to in the document commencing the procedure, which are rather imprecise (and therefore incapable of verification). In addition it emerges from other documents produced to the Court that records regarding the taking of samples also contained statements of the reasons for which the admission of imports had been refused. In that respect the written notification required in the interests of free circulation is presumably satisfied if, as the Italian Government asserted, the records are sent to the undertaking concerned (compare, for example, the record of 7 September 1983 and the letter sent by Molkereizentrale Süd on 17 November 1983). Accordingly there seems to be no justification for declaring that the Treaty has been infringed on account of the *absence* of decisions of refusal provided with a written statement of reasons.

However, it is scarcely possible to avoid regarding the Commission's complaint as justified to the extent to which it relates to such notification's being *made in good time.* In that respect there is no reason to doubt the correctness of the criticisms made by the Commission in its letter dated 7 March 1983. Moreover, reference may be made to the findings made in relation to the foregoing complaint. In addition, it is my view that the reference to practical difficulties in connection with the fact that some loads remain at the frontier until the completion of the investigations and that others are sent on to their destination or even returned to the place of dispatch, cannot be relied upon as justification in this

respect. Such factors certainly do not prevent notification to the persons concerned, in a shorter time than has been revealed in the cases referred to in these proceedings, of a decision to refuse admission to imports.

6. Finally it may therefore be stated that the objections raised by the Commission appear to be justified in so far as, on the importation of curds into Italy and after the carrying out of random checks, the decision whether or not to admit the imports has repeatedly been taken after unacceptable delay and in the case of refusals decisions provided with a written statement of the reasons have not been immediately supplied. In that respect it must be stated that the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 22 of Regulation No 804/68.

7. My opinion with regard to the costs of the action is as follows: the Commission withdrew its first complaint — that checks had been carried out systematically — after the Italian Republic had given a detailed rebuttal thereof in its defence. However, during the preliminary procedure under Article 169 the defendant failed to reply to the Commission's allegations regarding that matter. Accordingly it gave the Commission cause to institute proceedings and must bear the costs to that extent.

The Commission has failed to prove that lorries carrying curds were detained at the frontier by the Italian authorities. In addition it has not succeeded in proving that the Italian authorities failed to provide the importers concerned with any written confirmation whatsoever of their decisions.

Nevertheless, the Commission has been able to prove that decisions regarding the admission or rejection of consignments of curds and written confirmation of such decisions are excessively delayed.

In those circumstances it seems to me appropriate to order each party to bear its own costs (Article 69 (3) of the Rules of Procedure).