JUDGMENT OF THE COURT (Second Chamber)
27 March 1985 *

In Case 73/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen [Higher Administrative Court for North Rhine-Westphalia] for a preliminary ruling in the action pending before that court between

Denkavit Futtermittel GmbH, a company incorporated under German law whose registered office is at Warendorf (Federal Republic of Germany),

and

Land Nordrhein-Westfalen [The *Land* of North Rhine-Westphalia], represented by the Minister for Food, Agriculture and Forestry,

on the interpretation of Articles 3 and 9 of Council Directive 79/373 of 2 April 1979 on the marketing of compound feeding-stuffs for animals and of Article 30 of the EEC Treaty,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: M. Darmon
Registrar: P. Heim

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gives the following

* Language of the Case: German.

** after considering the observations submitted on behalf of
the plaintiff by Mr D. Ehle,
the defendant by Dr A. Ebert, in the written proceedings, and by Mr N. Fischer, Regierungsdirektor, in the oral proceedings,
the Danish Government by Mr L. Mikaelsen, assisted by Mr Gregers Larsen, in the oral proceedings,
the Commission of the European Communities by Mr P. Karpenstein, acting as Agent,
after hearing the Opinion of the Advocate General delivered at the sitting on 14 February 1985,

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order dated 16 February 1984, which was received at the Court on 15 March 1984, which was received at the Court on 15 March 1984, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen [Higher Administrative Court for North Rhine-Westphalia] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 30 and 36 of the EEC Treaty and Articles 3 and 9 of Council Directive 79/373 of 2 April 1979 on the marketing of compound feeding-stuffs for animals (Official Journal 1979, L 86, p. 30), with regard to health inspections on imports of compound feeding-stuffs for animals.

The background to the dispute

2 The plaintiff in the main proceedings, Denkavit Futtermittel GmbH [hereinafter referred to as 'Denkavit'], a company incorporated under German law whose registered office is at Warendorf, regularly imports milk-based feeding-stuffs for animals from its Netherlands subsidiary, Denkavit Nederland BV. The checks to which those products were subjected upon importation, under the Viehseuchengesetz [Law on infectious diseases of cattle], were the subject of the Court's judgment of 8 November 1979 (Case 251/78 *Denkavit Futtermittel GmbH* v *Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen* [1979] ECR 3369) given as a result of a request for a preliminary ruling from the Verwaltungsgericht [Administrative Court] Münster. In that judgment the Court considered the scope of the relevant Community directives and concluded that at the time of the events which gave rise to that case, that is to say before the entry into force of Directive 79/373, the circumstances which might have prevented Member States from having recourse to the provisions of Article 36 of the EEC Treaty, in the interests of the protection of public health, were not present, as far as concerned measures against pathogenic organisms in compound animal feeding-stuffs.

3 As a result of that ruling and the subsequent judgment of the Verwaltungsgericht Münster of 2 April 1980 the Minister for Food, Agriculture and Forestry of North-Rhine Westphalia granted Denkavit on 19 August 1980 a less restrictive import licence based on Paragraphs 5 and 9 of the *Verordnung über die Einfuhr und Durchfuhr von Futtermitteln tierischer Herkunft und von Knochenmaterial* [Regulation on the importation and transit of feeding-stuffs of animal origin and

of bone material] of 15 August 1978 (Bundesgesetzblatt I, p. 1375). Paragraphs 5 and 9 have since been replaced by Paragraphs 3 and 8 of the new version of that regulation of 19 July 1983 (Bundesgesetzblatt I, p. 999). The licence relates to an unlimited quantity of milk-based animal feeding-stuffs and is subject to the obligation to produce in respect of each importation the original licence or a certified copy thereof together with a certificate, valid for one year, issued by the veterinary surgeon responsible for the place of production, to the effect that the feeding-stuffs consist, as regards products of animal origin, solely of powdered milk products and animal fats, that the milk products were manufactured exclusively from pasteurized milk, that the fats were heated to a temperature of at least 85° centigrade and that the whole process of manufacture was an integrated operation. In view of the risk of epizootic diseases the licence could be revoked at any time without liability.

4 On 5 February 1981, Denkavit brought an action before the Verwaltungsgericht Düsseldorf for a declaration that it was entitled to import compound animal feeding-stuffs without a licence or certificate. It placed reliance on Directive 79/373, in particular Article 3 thereof, whose provisions, in its view, precluded Member States from purporting to justify health inspections by reference to Article 36 of the EEC Treaty.

5 By a judgment dated 29 January 1982, the Verwaltungsgericht Düsseldorf dismissed the action after a detailed analysis of the relevant provisions of Community law. It held that the Community directives which had been adopted at that stage did not deal with the question of health protection and therefore did not have the effect of precluding Member States from having recourse to Article 36.

6 Denkavit appealed to the Oberverwaltungsgericht für das Land Nordrhein-Westfalen, which, after considering the arguments put forward in support of and against Denkavit's contention, decided to refer the following question to the Court:

Is Council Directive 79/373/EEC of 2 April 1979 on the marketing of compound feeding-stuffs, in particular Articles 3 and 9 thereof, in conjunction with Article 30 of the EEC Treaty, to be interpreted as meaning that Member States are not allowed to subject, in reliance on Article 36 of the EEC Treaty, the importation of compound feeding-stuffs within the meaning of Article 2 (b) of Directive 79/373/EEC from other Member States to the production of an import licence issued by the veterinary authorities or of a certificate issued by the veterinary authorities of the exporting State?

The substance of the action

7 In essence, Denkavit contends that Directive 79/373 contains an exhaustive statement of the relevant law, so that compound feeding-stuffs marketed in accordance with the requirements of the directive should be able to circulate freely within the Community without the Member States' being able to lay down requirements with regard to the protection of health other than those provided for in the directive. Whereas Article 1 (2) of Directive 74/63 of 17 December 1973 concerning undesirable substances and products in feeding-stuffs (Official Journal 1974, L 38, p. 31), as amended by Directive 80/502 of 6 May 1980 (Official Journal 1980, L 124, p. 17), expressly excludes the provisions to be adopted by the Community with regard to micro-organisms in feeding-stuffs, Directive 79/373 on the marketing of compounding feeding-stuffs contains no such exclusion. According to Denkavit, Member States are therefore no longer entitled to require health checks, since Article 9 of the directive provides that Member States cannot subject compound feeding-stuffs to marketing restrictions other than those provided for by the directive. It follows that the responsibility for checking that the compound feeding-stuffs are wholesome, unadulterated and of merchantable quality and that they do not represent a danger to animal or human health, as is required by Article 3 of the directive, falls on the Member State in whose territory the compound feeding-stuffs are manufactured. According to a series of cases decided by the Court, in particular its judgments of 15 December 1976 (Case 35/76 *Simmenthal* v *Italian Ministry for Finance* [1976] ECR 1871), of 25 January 1977 (Case 46/76 *Bauhuis* v *The Netherlands State* [1977] ECR 5) and of 8 November 1979 (*Denkavit Futtermittel*, cited above) the Member States must, in the context of trading conditions which are similar to those found in a domestic market, rely on the checks carried out by the State from which the feeding-stuffs are exported. On those grounds Denkavit considers that the importing State cannot carry out health checks other than by way of sampling; if the presence of pathogenic micro-organisms is discovered the importing State may only take the administrative and legal steps which are provided for under national law in relation to the domestic marketing of contaminated compound feeding-stuffs.

8 According to Land Nordrhein-Westfalen, Directive 79/373 cannot be said, either on the basis of its wording or of its relationship to other provisions of Community law, to concern health checks on compound feeding-stuffs. Similarly Directive 74/63, concerning undesirable substances, contains no rules with regard to the presence of pathogenic organisms. In its judgment of 8 November 1979, the Court itself emphasized that in connection with the harmonization of national legislation on public health the Council had undertaken 'gradual and methodical action';

however, since that time no further progress has been made in harmonizing the rules in that area.

9 In its observations, the Danish Government draws attention to the serious risks entailed by the presence of pathogenic organisms. It notes that the manner in which those risks are dealt with is determined by the veterinary policy pursued by the different Member States and that such policy has special characteristics in States, such as Denmark, which have succeeded in preserving their territory free from certain epizootic diseases; the preservation of that state of affairs is of great importance for the sake of exports to non-member countries which are also free of such diseases. The Danish Government considers that until detailed rules governing health problems in the sector in question are adopted by the Community, each Member State retains responsibility for adopting protective measures in accordance with Article 36 of the Treaty. It draws attention to the fact that, for the aforementioned reasons, the Danish rules are stricter than those applicable in the Federal Republic of Germany since they require each individual consignment of imported feeding-stuffs to be accompanied by a health certificate. In its judgment of 8 February 1983 (Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203), the Court, after noting the need for cooperation betwen the health authorities of the Member States, recognized the right of the importing State to ensure, by an appropriate procedure, the effectiveness of the checks carried out by the State where the products originated.

10 After examining all the directives concerned with animal feeding-stuffs, the Commission states that the directives seek to achieve comprehensive harmonization but only with regard to the matters covered by them. It recognizes that, within the field in question, the process of harmonization has not yet extended to questions of the protection of health. As long as the necessary measures for ensuring protection of health have not been laid down by the Community and as long as there are no Community procedures to verify the application of such measures, Member States are free, within the limits defined in Article 36 of the Treaty, to take appropriate measures to ensure protection againt pathogenic micro-organisms.

11 In the light of these arguments it must be recognized, as was stated by the Commission, that Directive 79/373 on the marketing of compound feeding-stuffs, considered in conjunction with Directive 70/524 of 23 November 1970 concerning additives in feeding-stuffs (Official Journal, English Special Edition 1970 III, p. 840) and Directive 74/63 concerning undesirable substances in feeding-stuffs, is in fact intended to deal comprehensively with the marketing of compound animal

feeding-stuffs in the Community. However, it does not seem necessary, in the context of this case, to determine whether that objective has been fully attained by the aforesaid directives as they now stand. In so far as that is the case, Article 9 of Directive 79/373 provides that 'Member States shall ensure that compound feeding-stuffs are not subject, for reasons concerning the provisions included in this Directive, to marketing restrictions other than those provided for by this Directive'; a similar provision is to be found in Article 14 of Directive 70/524 and in Article 7 of Directive 74/63. It follows that the free movement of feeding-stuffs within the Community must not be impeded for reasons connected with their composition and packaging, if they comply with the rules laid down in the aforesaid directives.

12 However, it must at the same time be noted that the directives in question, in particular Directive 79/373, do not purport to lay down rules with regard to health inspections on compound feeding-stuffs. Contrary to Denkavit's contention, it is not possible to deduce such an effect from Article 3 of Directive 79/373, which provides that:

'Member States shall prescribe that compound feeding-stuffs may be marketed only if they are wholesome, unadulterated and of merchantable quality. They shall also prescribe that compound feeding-stuffs may not represent a danger to animal or human health and may not be presented or marketed in a manner liable to mislead.'

In fact, that provision merely imposes on Member States a general obligation to adopt all appropriate measures, whether legislative, administrative or judicial, to enforce compliance with certain rules relating to quality, to ensure that health inspections are carried out on feeding-stuffs and to guarantee fair trading, regardless of the origin of the applicable rules, that is to say, regardless of whether they are of a purely national nature or are provisions which have been harmonized under Community law.

13 As long as the rules relating to health protection in the sector in question have not been harmonized, it is for the Member States to carry out the necessary inspections in accordance with Article 36 of the Treaty. In principle therefore such inspections cannot be regarded as restrictions on intra-Community trade within the meaning of Article 30.

14 As is clear from a series of cases decided by the Court and in particular from the aforementioned judgments of 15 December 1976 (Case 35/76 *Simmenthal* v *Italian Minister for Finance*), 25 January 1977 (Case 46/76 *Bauhuis* v *The Netherlands State*), 8 November 1979 (Case 251/78 *Denkavit* v *Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen*) and 8 February 1983 (Case 124/81 *Commission* v *United Kingdom*), health inspections carried out by Member States in accordance with Article 36 are, however, only justified provided that the measures adopted are in reasonable proportion to the aim pursued and that the protection of health cannot be achieved as effectively by measures which restrict intra-Community trade to a lesser extent. In the same context the Court has also emphasized repeatedly that the free movement of goods is served by the carrying out of health inspections in the country of production and that the health authorities of the Member States concerned should cooperate in order to avoid the repetition, in the importing country, of checks which have already been carried out in the country of production.

15 In that respect it may be stated that measures of the type applied by the Land Nordrhein-Westfalen following the Court's judgment of 8 November 1979 comply fully with the aforementioned requirements, inasmuch as they provide for the granting of an import licence for an indefinite period and in respect of an unlimited quantity of feeding-stuffs, provided they are covered by a health certificate issued by the veterinary surgeon responsible for the place of production and valid for a long period. The other conditions and reservations to which the licence is subject are also in reasonable proportion to the exigencies of health protection.

16 The reply to the question referred to the Court must therefore be that Council Directive 79/373 of 2 April 1979 on the marketing of compound feeding-stuffs for animals, in particular Articles 3 and 9 thereof, in conjunction with Article 30 of the EEC Treaty, must be interpreted as meaning that Member States are not prohibited from subjecting, in reliance on Article 36 of the EEC Treaty, the importation from other Member States of compound feeding-stuffs for animals, within the meaning of Article 2 (b) of Directive 79/373, to the production of a certificate issued by the veterinary authorities of the exporting State or an import licence issued by the veterinary authorities of the importing State, provided that such a licence is issued on terms that are in reasonable proportion to the requirements referred to in Article 36.

Costs

17 The costs incurred by the Government of the Kingdom of Denmark and by the Commission, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 (Second Chamber),

in answer to the question submitted to it by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen, by an order of 16 February 1984, hereby rules:

Council Directive 79/373 of 2 April 1979 on the marketing of compound feeding-stuffs for animals, in particular Articles 3 and 9 thereof, in conjunction with Article 30 of the EEC Treaty, must be interpreted as meaning that Member States are not prohibited from subjecting, in reliance on Article 36 of the EEC Treaty, the importation from other Member States of compound feeding-stuffs for animals, within the meaning of Article 2 (b) of Directive 79/373, to the production of a certificate issued by the veterinary authorities of the exporting State or an import licence issued by the veterinary authorities of the importing State, provided that such a licence is issued on terms that are in reasonable proportion to the requirements referred to in Article 36.

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 27 March 1985.

P. Heim
Registrar

O. Due
President of the Second Chamber