JUDGMENT OF THE COURT

21 September 1999 *

In Case C-106/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the College van Beroep voor het Bedrijfsleven, Netherlands, for a preliminary ruling in the proceedings pending before that court between

Dutch Antillian Dairy Industry Inc.,

Verenigde Douane-Agenten BV

and

Rijksdienst voor de keuring van Vee en Vlees

intervener:

Nederlandse Antillen

on the interpretation and validity of Chapter III of Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products (OJ 1992 L 268, p. 1), and in particular Article 23 thereof, and on the validity of Commission Decision 94/70/EC of 31 January 1994 drawing up a provisional list

* Language of the case: Dutch.

of third countries from which Member States authorise imports of raw milk, heat treated milk and milk-based products (OJ 1994 L 36, p. 5),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn (Presidents of Chambers), J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón (Rapporteur) and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Dutch Antillian Dairy Industry Inc., by W. Knibbeler, of the Amsterdam Bar,

— Nederlandse Antillen, by R.S.J. Martha, plenipotentiary minister to the permanent representation of the Netherlands, acting as Agent,

— the French Government, by K. Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in the same directorate, acting as Agents,

— the Netherlands Government, by A. Bos, Legal Adviser to the Ministry of Foreign Affairs, acting as Agent,

— the Council of the European Union, by J. Carbery, J. Huber and G. Houttuin, of its Legal Service, acting as Agents,

— the Commission of the European Communities, by P.J. Kuijper and T. van Rijn, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Nederlandse Antillen, represented by M. Slotboom, of the Rotterdam Bar, of the French Government, represented by A. de Bourgoing, of the Netherlands Government, represented by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, of the Council, represented by J. Carbery, J. Huber and G. Houttuin, and of the Commission, represented by P.J. Kuijper and T. van Rijn, at the hearing on 16 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 15 September 1998,

gives the following

Judgment

1 By order of 15 January 1997, received at the Court on 13 March 1997, the College van Beroep voor het Bedrijfsleven referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation and validity of Chapter III of Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat treated-milk and milk-based products (OJ 1992 L 268, p. 1) and in particular Article 23 thereof, and on the validity of Commission Decision 94/70/EC of 31 January 1994 drawing up a provisional list of third countries from which Member States authorise imports of raw milk, heat treated milk and milk-based products (OJ 1994 L 36, p. 5).

2 Those questions were raised in proceedings between, on the one hand, Dutch Antillian Dairy Industry (hereinafter 'DADI') and Verenigde Douane-Agenten BV (hereinafter 'Douane-Agenten') and, on the other hand, the Rijksdienst voor de keuring van Vee en Vlees (National Inspection Service for Animals and Animal Products, Voorburg, hereinafter the 'Service'), relating to the latter's refusal to authorise the importation into the Netherlands of a consignment of butter from the Netherlands Antilles, one of the overseas countries and territories (hereinafter the 'OCTs').

3 It appears from the file that DADI, a company based in Curaçao, Netherlands Antilles, whose object is the manufacture and export of butter, sent a consignment of butter with a net weight of 25 850 kilos from the Netherlands Antilles to the Netherlands.

4 Douane-Agenten, a company based in Rotterdam, presented the consignment for inspection to the Service which, on 31 January 1995, refused authorisation for its importation and sent Douane-Agenten a certificate relating to veterinary

inspections of products imported into the Community from third countries. The reason given on the certificate for the refusal was as follows: 'Curaçao not authorised under Decision 94/70/EC'.

5 On 8 February 1995 DADI and Douane-Agenten submitted a complaint against that decision. That complaint was rejected by a second decision of the Service of 21 June 1995 upholding the initial refusal of 31 January 1995.

6 In those circumstances, DADI and Douane-Agenten brought an action on 10 July 1995 before the College van Beroep voor het Bedreijfsleven seeking, first, annulment of the Service's decision of 21 June 1995 and, secondly, compensation for the loss they claimed to have suffered.

7 By their appeal, which was supported by the Government of the Netherlands Antilles, intervening in the proceedings, DADI and Douane-Agenten challenged the legality of the Service's decision rejecting the complaint. In that connection, they put forward a number of pleas in law and arguments relating to the inapplicability of Directive 92/46, which constitutes the legal basis for Decision 94/70, and to the validity of that directive in the light of Article 132(1) of the EC Treaty (now Article 183(1) EC), and of Articles 102 and 103 of Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1) (hereinafter the 'OCT Decision'). They furthermore challenged the validity of both Directive 92/46 and Decision 94/70. So far as the directive in particular is concerned, they challenged its validity in the light of the principle of proportionality and Articles 2, 4 and 5 of the Agreement on the Application of Sanitary and Phyto-sanitary measures which constitute Annex 1 A to the Agreement instituting the World Trade Organisation (OJ 1994 L 336, p. 40).

8 The Service, for its part, contested those arguments and contended, in reliance on Article 227 of the EC Treaty (now, after amendment, Article 299 EC), that the Netherlands Antilles have the status of a third country in relation to the

Community as they are not a party to the Treaty and Community law is not fully applicable there. In the submission of the Service, the OCTs have a special status which finds expression in the context of association arrangements.

9 In the light of the arguments and pleas in law advanced, and on the basis that the consignment of butter imported into the Community fulfils the conditions enabling it to be treated as butter originating in the Netherlands Antilles, the College van Beroep voor het Bedrijfsleven was uncertain as to the interpretation and validity of Directive 92/46 and the validity of Decision 94/70 and so decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1 (a) Must the provisions of Chapter III of Directive 92/46/EEC, seen in particular in the light of Article 227, together with Articles 131 to 136, of the EC Treaty be interpreted as setting the result to be achieved — within the meaning of the third paragraph of Article 189 of the EC Treaty — by national implementing provisions which are applicable to imports into the EC of butter originating in the overseas countries and territories listed in Annex IV to the EC Treaty, including the Netherlands Antilles?

If Question 1(a) is answered in the affirmative:

1 (b) Are the provisions of Chapter III of the aforementioned directive, having regard in particular to Article 132(1) of the EC Treaty and Articles 102 and 103 of Council Decision 91/482/EC of 25 July 1991 on the

association of the overseas countries and territories with the European Economic Community valid in so far they relate to the imports referred to in Question 1(a)?

If Questions 1(a) and 1(b) are answered in the affirmative:

2. Must Article 23 of the aforementioned directive be interpreted as meaning that the national provisions adopted to implement that article may only be applied to the imports referred to in Question 1(a)

(a) after the rules relating to intra-Community trade in the goods concerned, to which, under Article 22 of that directive, the third-country rules must be at least equivalent, have fully entered into force and

(b) after a legally valid decision has been taken with regard to the inclusion of the country concerned on the first list mentioned in Article 23(3) and with regard to the list of approved establishments in that country?

3. Is Commission Decision 94/70/EC of 31 January 1994 valid?'

Applicable law

The Treaty

10 Article 227(3), which defines the territorial scope of the Treaty, provides that '[t]he special arrangements for association set out in Part Four of this Treaty shall apply to the overseas countries and territories listed in Annex IV to this Treaty.'

11 Part Four of the EC Treaty, entitled 'Association of the Overseas Countries and Territories' comprises, *inter alia,* Articles 131 (now, after amendment, Article 182 EC), 132 (now Article 183 EC), 133 (now, after amendment, Article 184 EC), 134 and 135 (now Articles 185 EC and 186 EC) and 136 (now, after amendment, Article 187 EC).

12 The first paragraph of Article 131 of the Treaty provides: 'The Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, Denmark, France, Italy, the Netherlands and the United Kingdom. These countries and territories.... are listed in Annex IV to this Treaty.'

13 The Netherlands Antilles were included on the list referred to in Article 131 of the Treaty by Agreement 64/533/EEC of 13 November 1962 amending the Treaty establishing the European Economic Community to make the special association relationship set out in Part IV of the Treaty applicable to the Netherlands Antilles (JO 1964 150, p. 2414).

14 The purpose of association is described in the second paragraph of Article 131 of the Treaty as being 'to promote the economic and social development of the

countries and territories and to establish close economic relations between them and the Community as a whole'.

15 Article 132 of the Treaty sets out the objectives ascribed to association and lays down certain basic rules. It comprises two categories of provisions, the first of which concerns trade relations, and the second investments to promote development of the OCTs.

16 As regards trade relations, Article 132(1) of the Treaty provides that 'Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to this Treaty.'

17 Article 136 of the Treaty provides that, for an initial period of five years after the entry into force of the Treaty, the details of and procedure for the association of the OCTs with the Community are to be determined by an implementing convention annexed to the Treaty and that, thereafter, the Council, acting unanimously, shall lay down provisions.

18 Thus the Council has on several occasions adopted specific rules under the second paragraph of Article 136 of the Treaty to give concrete expression to the special arrangements for association between the Community and the OCTs and to enable the objectives of association to be attained. Finally, it adopted the OCT Decision, which constitutes the sixth decision of this type.

The OCT Decision

19 Title One in Part Three of the OCT Decision, entitled 'The instruments of EEC-OCT co-operation', relates to trade co-operation, and Chapter One of Title One, particularly Articles 101 to 103, governs general trade arrangements.

20 Article 101(1) states that products originating in the OCT are to be imported into the Community free of customs duties and charges having equivalent effect. Article 102 provides that the Community is not to apply to imports of products originating in the OCTs any quantitative restrictions or measures having equivalent effect.

21 Article 103 provides:

'1. Article 102 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality or public policy, the protection of health and life of humans, animals and plants...

2. Such prohibitions or restrictions shall in no case constitute a means of arbitrary discrimination or a disguised restriction of trade generally.

...'

Directive 92/46

22 Directive 92/46, which is based on Article 43 of the EC Treaty (now, after amendment, Article 37 EC), comprises, on the one hand, rules governing Community production used for the manufacture, *inter alia*, of milk-based products which are placed on the Community market (Chapter II) and, on the other hand, provisions to guarantee that, in order to be placed on the Community market, imports of such products from third countries satisfy the same health-protection requirements (Chapter III).

23 To that end, Article 22 of the directive, which appears in Chapter III, provides: 'The conditions applicable to imports from third countries of raw milk, heat-treated milk and milk-based products covered by this Directive must be at least equivalent to those laid down in Chapter II for Community production.'

24 As regards the import of milk products from third countries referred to in Article 22 of Directive 92/46, Article 23 of that directive provides:

'1. For the purposes of uniform application of Article 22, the provisions of the following paragraphs shall apply.

2. In order to be imported into the Community, milk or milk-based products must:

(a) come from a third country on the list to be drawn up in accordance with paragraph 3 (a);

(b) be accompanied by a health certificate corresponding to a specimen to be drawn up in accordance with the procedure laid down in Article 31, signed by the competent authority of the exporting country and certifying that the milk or milk-based products meet the requirements of Chapter II or any additional conditions or offer the equivalent guarantees referred to in paragraph 3 and come from establishments offering the guarantees provided for in Annex B.

3. The following shall be established in accordance with the procedure laid down in Article 31:

(a) a provisional list of third countries or parts of third countries able to provide Member States and the Commission with guarantees equivalent to those provided for in Chapter II and a list of the establishments for which they are able to give these guarantees.

This provisional list shall be compiled from the lists of establishments approved and inspected by the competent authorities, once the Commission has checked that these establishments comply with the principles and general rules laid down in this Directive;

...

4. Experts from the Commission and the Member States shall carry out on-the-spot inspections to verify whether the guarantees given by the third country regarding the conditions of production and placing on the market can be considered equivalent to those applied in the Community.

...

5. Pending the organisation of the inspections referred to in paragraph 4, national rules applicable to inspection in third countries shall continue to apply, subject to notification, through the Standing Veterinary Committee, of any failure to comply with hygiene rules found during these inspections.

...'

25 The provisional list referred to in Article 23(3)(a) of Directive 92/46 was established by Decision 94/70, which was applicable at the material time, and entered into force on 1 July 1994. It is common ground that the Netherlands Antilles do not appear on that list.

National law

26 Article 23 of Directive 92/46 was implemented in the Netherlands by Article 16 of the Warenwetregeling zuivelbereiding (Commodities rules concerning the preparation of dairy products; *Staatscourant* 1994, No 243). The rules, which are based on Article 4(2)(c) of the Warenwetbesluit Zuivel (decision concerning dairy products taken pursuant to the Commodities Law) and Article 19(1) of the Landbouwwet (Agriculture Law) entered into force on 1 January 1995.

27 Decision 94/70 was transposed by the reference in Article 16 of the Warenwetregeling zuivelbereiding to the list drawn up pursuant to Article 23 of Directive 92/46.

The first question

28 The first question comprises two parts.

29 By the first part of the question, the national court is essentially asking whether the provisions of Chapter III of Directive 92/46, which lay down health rules for imports of milk-based products from third countries, must be interpreted as applying to the placing on the Community market of such products originating in OCTs such as the Netherlands Antilles.

30 According to the fourth recital in the preamble to Directive 92/46, the aim of that directive is to lay down, in particular for milk-based products, health rules to ensure a high level of protection of public health.

31 With a view to attaining that objective, the directive is applied both to Community production, for which, in Chapter II, it lays down specific and detailed health rules (Articles 3 to 21), and to imports into the Community of products from third countries, for which, in Chapter III, while laying down different rules, it requires, in addition, compliance with health requirements at least equivalent to those prescribed in Chapter II for Community products (Articles 22 to 26).

32 That requirement of equivalence means that the health protection which Directive 92/46 aims to achieve cannot vary according to whether or not products are of Community origin. As is clear from the eighth recital in the preamble to the directive, the products to which the directive applies must afford the same degree of protection in the matter of human health, whether they originate in the Community or are imported.

33 It is also clear from the general scheme of Directive 92/46, and from the nature of the public-health objectives it pursues, that the provisions it lays down are intended to apply to all products covered by it which are produced or placed on the market in the Community.

34 Furthermore, it is common ground that the health rules set out in Chapter II of Directive 92/46 for products from the Member States do not apply to products from the OCTs.

35 It follows from the foregoing that the provisions of Chapter III of Directive 92/46 cover all milk-based products on the Community market, including those originating in an OCT, and that the term 'imports from third countries' must be understood as referring to any introduction of such products into the Community.

36 However, DADI, the Government of the Netherlands Antilles and the French Government submit that the fact that Articles 131 to 136 of the Treaty and the OCT Decision establish arrangements favourable to the OCTs precludes Chapter III of Directive 92/46, which lays down rules for imports into the Community from third countries, from applying to trade between the OCTs and the Community. Since the OCTs cannot, therefore, come within the regime established by the directive for third countries, they must be treated in the same way as the Member States.

37 As to that argument, import of goods into the Community may take place, not only from third countries in the fullest sense of the term, but also from countries associated with the Community. The fact that a product is brought into the territory of the Community from an OCT which benefits from special arrangements for association with the Community under Articles 227(3) and 131 to 136 of the Treaty and the OCT Decision cannot alter the characterisation of that operation as an act of importation.

38 Trade between the OCTs and the Community does not necessarily benefit from a regime identical to that governing trade between Member States since, although association of the OCTs with the Community is governed by a special regime, the relationship remains one of association, which, as the Court held in its judgment in *Road Air* (C-310/95 [1997] ECR I-2229, paragraph 40), is to be achieved by a dynamic and progressive process. The fact that there is such a process, which is in no way automatic, means that there is a fundamental difference between the regime governing trade between the OCTs and the Community and the regime established by the Treaty in respect of trade between the Member States. The latter is trade transacted within the framework of the internal market, as distinct from trade between OCTs and the Community, which is governed by the imports regime.

39 In support of their submission that Chapter III of Directive 92/46 is not applicable to milk-based products originating in the OCTs, DADI, the Government of the Netherlands Antilles and the French Government put forward, secondly, two further arguments founded respectively on the legal basis of that directive and the *acquis* of association.

40 First, as regards the legal basis of Directive 92/46, DADI and the Government of the Netherlands Antilles, supported by the French Government, argue that Directive 92/46, based exclusively on Article 43 of the Treaty, which appears in Part Three, cannot apply to imports from OCTs because, by reason of the special arrangements for association laid down in Article 227(3) of the Treaty, it was not also expressly declared to apply to trade with OCTs on the basis of Articles 131

to 136 of the Treaty, which appear in Part Four. In support of that argument, they refer to the judgment in *Leplat* (Case C-260/90 [1992] ECR I-643, paragraph 10), in which the Court held that, in the absence of express reference, the general provisions of the Treaty do not apply to OCTs.

41 In that connection, the Court has consistently held that Article 43 of the Treaty is the proper legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the attainment of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty (now Article 33 EC). Consequently, even where that legislation is directed both to objectives of agricultural policy and to other objectives pursued on the basis of other Treaty provisions, the existence of those provisions cannot be relied on as a ground for restricting the field of application of Article 43 of the Treaty (see the judgments in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraphs 14 and 16; Case C-131/87 *Commission* v *Council* [1989] ECR 3743, paragraphs 10 and 11; and Case C-280/93 *Germany* v *Council* [1994] ECR 1-4973, paragraph 54).

42 As regards the argument derived from the judgment in *Leplat*, cited above, it should be noted that Directive 92/46 does not require the OCTs to comply with the same health rules as those laid down for Community products; it merely requires, by laying down other specific rules, that products imported into the Community afford the same level of protection as that afforded by products of Community origin. It follows that the directive does not extend the application of the health rules laid down for the Member States to the OCTs.

43 Consequently, in order for it to govern imports from the OCTs into the Community it is not necessary for Directive 92/46 to provide expressly, on the basis of Part Four of the Treaty, that it applies to the OCTs.

44 Secondly, the Government of the Netherlands Antilles argues that the requirements imposed on the Council by the second paragraph of Article 136 of the

Treaty to take account of experience acquired and of successive decisions relating to the OCTs, and by Article 132(1), which provides that Member States are to apply to their trade with the OCTs the same treatment as they accord each other pursuant to the Treaty, constitute an *acquis* of association, with the result that those provisions preclude the institutions from assimilating the regime applicable to the OCTs to the regime which applies to third countries and in this way from going back on the experience acquired.

45 In that connection, it is not necessary to come to any conclusion as to the extent of the Council's obligations with regard to experience acquired through association. It is sufficient to observe that compliance with such obligations cannot, on any view, constitute a valid ground for holding that the trade regime between the OCTs and the Community is automatically the same as that established by the Treaty for trade between Member States. As has been held at paragraph 38 of this judgment, that regime cannot in every case be identical to that enjoyed by the Member States as between themselves.

46 It follows from the foregoing that the provisions of Chapter III of Directive 92/46, which lays down health rules for imports of milk-based products from third countries, must be interpreted as applying to the placing on the Community market of such products from OCTs such as the Netherlands Antilles.

47 By the second part of the first question, the national court is essentially asking whether the requirements of Chapter III of Directive 92/46, and in particular Article 23, are valid having regard to Article 132(1) of the Treaty and Articles 102 and 103 of the OCT Decision, to the extent that they apply to imports of milk-based products from OCTs such as the Netherlands Antilles.

48 DADI and the Government of the Netherlands Antilles challenge the validity of Chapter III of the directive, and in particular of Article 23, on the ground that, although it has not been proved that there is any risk to public health, their

application to imports of milk-based products from OCTs amounts to a prohibition on such imports and arbitrary discrimination against the OCTs or a disguised restriction of trade contrary to Article 132(1) of the Treaty and Article 102 of the OCT Decision. Chapter III of Directive 92/46 is therefore invalid, with the result that Chapter II of that directive applies to such imports.

49 DADI and the Government of the Netherlands Antilles also argue that application to imports from OCTs of conditions other than those contained in Chapter II of Directive 92/46, in this case those in Chapter III and, in particular, Article 23, goes beyond what is necessary in order to protect public health and is therefore contrary to the principle of proportionality which ensues from Article 103(2) of the OCT Decision.

50 It is to be noted that, having regard to Article 132(1) of the Treaty and Article 102 of the OCT Decision, to the extent that they apply to the OCTs, the requirements of Article 23 of Directive 92/46 entail restrictions on imports into the Community.

51 However, neither Article 132(1) of the Treaty, which impliedly refers to Article 36 of the EC Treaty (now, after amendment, Article 30 EC), nor Article 102 of the OCT Decision, which must be read in conjunction with Article 103(1) of that decision, precludes prohibitions or restrictions on imports which are justified on grounds relating to the protection of public health.

52 In order to establish whether a provision of Community law is justified on grounds relating to the protection of public health, it is important to ascertain whether the means it employs are appropriate for realising the objective pursued and do not go beyond what is necessary in order to attain it.

53 In that regard, the proportionality of the health requirements and of the system established by Chapter II of Directive 92/46 for trade within the internal market has not been contested. That system guarantees to the Member State of destination that the competent authority for inspection and supervision of establishments and products in the Member State of origin has in fact carried out its duties under the directive.

54 Having regard to the objective of Chapter III of Directive 92/46, which, as the eighth recital in the preamble to the directive indicates, is to require of products imported into the Community guarantees as to the protection of public health equivalent to those afforded by products of Community origin, the means employed by that chapter, and in particular Article 23 — namely registration on a list of countries which export to the Community and compliance with the requirement to produce a health certificate signed by the competent authority in the country of export attesting that the milk-based products satisfy the requirements of Chapter II of the Directive — are appropriate for the purpose of attaining that objective.

55 Nor does the requirement that products imported into the Community afford guarantees as to the protection of public health equivalent to those afforded by products of Community origin go beyond the limits imposed by observance of the principle of proportionality. It cannot be accepted, in the absence of any controls, that the regulatory and health situation in a third country, including that in an OCT which exports to the Community, is such that the competent authority is able to supply guarantees for the purposes of the protection of public health equivalent to those provided by the competent authority of a Member State.

56 The reply to the second part of the first question must therefore be that examination of the requirements contained in Chapter III of Directive 92/46, and in particular in Article 23, has not disclosed any factors affecting the validity of that directive in the light of Article 132(1) of the Treaty or of Articles 102 and 103 of the OCT Decision.

57 DADI submits furthermore that Chapter III of the directive is contrary to Articles 2, 4 and 5 of the Agreement on the Application of Sanitary and Phyto-

sanitary Measures which constitutes Annex 1 A to the Agreement establishing the World Trade Organisation.

58 In that connection, suffice it to observe that, although that issue was raised before it, the national court did not refer any question relating to the validity of Chapter III of the directive in the light of the abovementioned provisions of the Agreement on the Application of Sanitary and Phyto-sanitary Measures. There is accordingly no need to examine the validity of the chapter in the light of that agreement.

The second and third questions

59 By its second and third questions, which it is appropriate to consider together, the national court is asking, in essence, on the one hand, whether Article 23 of Directive 92/46 must be interpreted as applying to imports from OCTs, even where the regime laid down in that directive for trade between the Member States has not in fact been introduced beforehand and the lists of exporting countries and approved establishments have not been drawn up in accordance with the method prescribed in that provision, and, on the other hand, whether Decision 94/70 is valid.

60 As regards, first of all, the prior introduction of the regime prescribed in Chapter II of Directive 92/46, DADI and the Government of the Netherlands Antilles state that Council Directive 92/47/EEC of 16 June 1992 on the conditions for granting temporary and limited derogations from specific Community health rules on the production and placing on the market of milk and milk-based products (OJ 1992 L 268, p. 33), which was adopted on the same day as Directive 92/46, provided for a period of derogation as regards compliance by Community establishments with the requirements of Directive 92/46, with the result that those establishments were exempted from applying the regime laid down in Chapter II until 1 January 1998. It follows that, until that regime has actually been introduced in relations between Member States, Article 23 of Directive 92/46 does not apply to imports from the OCTs either.

61 On this issue, it must first be observed that, although Directive 92/47 institutes a system of temporary and limited derogations as regards compliance by certain Community establishments with the specific rules laid down by Directive 92/46, it none the less requires, as is clear from the fourth recital in its preamble, that that regime should be without prejudice to the requirement that all operations connected with production and placing on the market conform to the hygiene rules laid down by Directive 92/46.

62 It must also be borne in mind that the difference, noted at paragraph 31 of this judgment, between Chapter III of Directive 92/46, which contains the rules applicable to imports into the Community, and Chapter II, containing those applicable to intra-Community trade, means that the scope of application of each chapter is defined by the trade to which that chapter is directed. It follows that, having regard to the objective of the directive, the application of Chapter III, and in particular Article 23, cannot be conditional upon the regime applicable to trade between Member States, which is laid down in Chapter II, having first been introduced.

63 Consequently, although, as has been observed at paragraph 54 of this judgment, the objective of Chapter III of Directive 92/46 is to guarantee that milk-based products imported into the Community satisfy public-health requirements at least equivalent to those laid down in Chapter II for Community products, it does not follow either from Directive 92/47 or from Article 23 of Directive 92/46 that application of the regime for imports into the Community is conditional on prior introduction of the regime applicable to trade between Member States.

64 Secondly, DADI and the Government of the Netherlands Antilles contend that Article 23 of Directive 92/46 is not applicable to imports from OCTs unless the measures which are a prerequisite for its application have first been adopted in accordance with the method indicated in that provision. They put forward two series of arguments. First, the documents prescribed in Article 23 of the directive, in particular the list of third countries, the list of approved establishments and the specimen health certificate which must accompany the products, have not been drawn up, nor have the Community experts performed the other necessary tasks

such as prior inspection of the third-country establishments. Second, although Decision 94/70 contains a list of third countries, that list was not validly drawn up because, contrary to the requirements of Article 23(3)(a) of the directive, it was not compiled from lists of establishments approved and inspected by the competent authorities but from a list relating to other products, namely that laid down in Council Decision 79/542/EEC of 21 December 1976 drawing up a list of third countries from which the Member States authorise imports of bovine animals, swine and fresh meat (OJ 1979 L 146, p. 15). It follows that, so long as those measures have not been taken and validly adopted, the application of Article 23 of the directive must be suspended.

65 It must be pointed out that Article 23(2) of Directive 92/46 provides that countries which export milk products must be registered on the provisional list referred to in Article 23(3)(a) and that the imported products must be accompanied by a health certificate corresponding to a specimen drawn up and signed by the competent authority of the exporting country, failing which there shall be a total ban on imports into the Community. The second subparagraph of Article 23(3)(a) furthermore lays down the method by which the list of third-country exporters is to be drawn up and states that the list must be compiled on the basis of the lists of establishments approved and inspected by the competent authorities.

66 Admittedly, a provisional list of third countries was established in Decision 94/70 but it was not compiled on the basis of the lists of establishments producing milk or milk-based products approved and inspected by the competent authorities. As DADI and the Government of the Netherlands Antilles observe, it is clear from the wording of Decision 94/70, and in particular the third recital in the preamble thereto, that the list was drawn up on the basis of the list which appears in the annex to Decision 79/542, in other words on the basis of a list drawn up for other products.

67 In justification of its chosen method, the Commission contends that the list of third-country exporters compiled on the basis of the list of establishments approved and inspected by the competent authorities is of secondary interest only and merely constitutes an additional means of control, the essential means of

control being the guarantees afforded by the legislative regime and the system of supervision by the authorities of the exporting third country. According to the Commission, recourse to the list of third countries which appears in the annex to Decision 79/542 made it possible to ensure that those countries offered such guarantees, including those relating to the health requirements in regard to milk and milk-based products.

68 As to those arguments, the second subparagraph of Article 23(3)(a) of Directive 92/46 does not provide that the list of third countries may be drawn up otherwise than on the basis of the establishments approved and inspected by the competent authorities. It follows that the Commission cannot adopt a method which differs from that indicated by the directive.

69 Second, that interpretation finds support in Article 23(4) of Directive 92/46 which requires that experts from the Commission and the Member States carry out spot checks to verify whether the guarantees afforded by the third country are equivalent to those required for Community products.

70 Finally, whilst it is true that the list of third countries which appears in the annex to Decision 79/542 is capable of offering guarantees as regards bovine animals, swine and fresh meat, recourse to that list cannot ensure that public health is protected in regard to other products such as milk and milk-based products, for which Article 23(4) of the directive requires on-the-spot inspections to be carried out at the third-country establishments. It is common ground that the list of third countries which appears in the annex to Decision 79/542 was not drawn up on the basis of inspections carried out at establishments producing milk or milk-based products.

71 It must therefore be concluded that, having regard to the fact that the Commission failed to comply with the method prescribed by Directive 92/46 for drawing up the list of third countries mentioned in Article 23(3)(a) thereof, Decision 94/70 was not validly adopted.

72 The Commission maintains, furthermore, that it found it necessary to have recourse to Decision 79/542 because of the length of the inspections and the complexity of the verifications which it had to undertake in order to ensure, as required by the second subparagraph of Article 23(3)(a) of Directive 92/46, that those establishments complied with the principles and general rules set out in that directive. In that connection, it contends that it was not physically possible, prior to the entry into force of Directive 92/46, to organise inspections in all the countries concerned and that it therefore became necessary to have recourse to the list annexed to Decision 79/542 in order to set up swiftly a transitional system which, albeit incomplete, none the less enabled the public-health objective pursued by the directive to be fully attained.

73 The finding that Decision 94/70 is invalid is not affected by the practical difficulties allegedly encountered by the Commission by reason of the length of the inspection procedures and the complexity of the checks to be carried out (see Joined Cases C-38/90 and C-151/90 *Lomas and Others* [1992] ECR I-1781, paragraph 21). Practical difficulties of that kind cannot exempt the Commission from applying binding provisions of Community law.

74 It was not necessary to have recourse to the list which appears in the annex to Decision 79/542 in order to establish a transitional system designed to attain the objective pursued by Directive 92/46, namely the protection of public health, since the directive itself instituted such a transitional system.

75 In accordance with the 15th recital in the preamble and in order to allow for the time necessary to set up a Community inspection system, Article 23(5) of Directive 92/46 provides for national rules on controls to be maintained for a transitional period as regards third countries. Furthermore, while Article 25(1) of the directive requires, as one of the conditions for the importation of milk products into the Community, that the certificate issued by the competent authorities of the exporting country accompanying such products be drawn up in accordance with the procedure laid down in Article 31 of the directive, Article 25(2) provides: 'Pending the establishment of detailed rules for the application of this Article, the national rules applicable to imports from third

countries for which such requirements have not been adopted at Community level shall continue to apply, provided they are not more favourable than those laid down in Chapter II'.

76 It is clear from those provisions that, even though they do not expressly refer to the drawing up of the list of third countries, they none the less confirm the intention of the Community legislature that, so long as there are no Community measures for the checking of imports of milk products, such checks are to be carried out by the Member States under the provisions of domestic law applicable to inspections, provided that they are compatible with the objective of the protection of public health as laid down for Community products in Chapter II of Directive 92/46.

77 It therefore follows that the answer to the second and third questions must be that Article 23 of Directive 92/46 must be construed as applying to imports from OCTs even where the regime laid down in that directive for trade between Member States has not in fact yet been introduced and where the lists of exporting countries and approved establishments have not been drawn up in accordance with the method indicated in that provision. Since such lists have not been validly drawn up in accordance with the method indicated in that provision, Decision 94/70 is invalid.

Costs

78 The costs incurred by the French and Netherlands Governments and by the Council and the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT,

in answer to the questions referred to it by the College van Beroep voor het Bedrijfsleven by order of 15 January 1997, hereby rules:

1. The provisions of Chapter III of Council Directive 92/46/EEC of 16 June 1992 laying down the health rules for the production and placing on the market of raw milk, heat-treated milk and milk-based products, which lays down health rules for imports of milk-based products from third countries, must be interpreted as applying to the placing on the Community market of such products from overseas countries and territories such as the Netherlands Antilles.

2. Examination of the requirements contained in Chapter III of Directive 92/46, and in particular in Article 23, has not disclosed any factors affecting the validity of that directive in the light of Article 132(1) of the EC Treaty (now Article 183(1) EC) or of Articles 102 and 103 of Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community.

3. Article 23 of Directive 92/46 must be construed as applying to imports from overseas countries and territories even where the regime laid down in that directive for trade between the Member States has not in fact yet been introduced and where the lists of exporting countries and approved establishments have not been drawn up in accordance with the method

indicated in that provision. Since such lists have not been validly drawn up in accordance with the method indicated in that provision, Commission Decision 94/70/EC of 31 January 1994 drawing up a provisional list of third countries from which Member States authorise imports of raw milk, heat treated milk and milk-based products is invalid.

Rodríguez Iglesias	Kapteyn	Moitinho de Almeida
Gulmann	Murray	Edward
Ragnemalm	Sevón	Wathelet

Delivered in open court in Luxembourg on 21 September 1999.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President