

JUDGMENT OF THE COURT (Second Chamber)
20 October 2005 *

In Case C-111/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 March 2003,

Commission of the European Communities, represented by L. Ström van Lier and A. Bordes, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Sweden, represented by A. Kruse, acting as Agent,

defendant,

* Language of the case: Swedish.

supported by

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent, with an address for service in Luxembourg,

intervener,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2005,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities requests the Court to declare that, by maintaining a system of compulsory prior notification and

health checks for imports of certain food products of animal origin from other Member States, the Kingdom of Sweden has failed to fulfil its obligations under Article 5 of Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13).

Legal context

Relevant provisions of Community law

- 2 With a view to the completion of the internal market Directive 89/662 aims to regulate veterinary checks in intra-Community trade of products of animal origin.

- 3 Under Article 1 of that directive, veterinary checks to be carried out on products of animal origin covered by that directive, which are intended for trade between Member States are (subject to the provisions of Article 6 on products from third countries) no longer to be carried out at frontiers within the Community, but are to take place in accordance with the provisions of Directive 89/662.

- 4 Article 2 of Directive 89/662 specifies that the term 'veterinary check' within the meaning of the directive means any physical check and/or administrative formality which applies to the products covered by the directive and which is intended for the safeguarding, direct or otherwise, of public or animal health.

- 5 Chapter I of that directive, entitled 'Checks at origin', is made up of Articles 3 and 4 which regulate veterinary checks in the Member State of dispatch.
- 6 Under the first of those two provisions, the Member State of dispatch is to ensure that the only products intended for intra-Community trade are those which have been obtained, checked, marked and labelled in accordance with Community rules for the destination in question and which are accompanied to the final consignee by the certificates required by the Community veterinary rules. The establishments of origin are to carry out constant self-supervision to check whether the products concerned satisfy those requirements. Without prejudice to the monitoring duties assigned to the official veterinarian under Community legislation, the competent authority of the State of dispatch is required to carry out regular checks of every undertaking which produces, stores or processes the products in question in order to ensure that they comply with Community requirements and to take the appropriate measures, which may include withdrawing approval if those requirements are not met.
- 7 In accordance with Article 4 of Directive 89/662, the Member State of dispatch is to take the necessary measures to ensure that the veterinary requirements are complied with at all stages of the production, storage, transport and marketing of the goods covered and penalise any infringement of the Community rules in that context. In particular, that State is to ensure, first, that the products obtained in accordance with the veterinary harmonisation directives, listed in Annex A to Directive 89/662, are checked in the same way, from a veterinary point of view, whether they are intended for intra-Community trade or for the national market and, second, that those products which are not subject to Community harmonisation, but which are listed in Annex B to that same directive, are not dispatched to the territory of another Member State, if they cannot be marketed on its own territory for reasons justified by Article 36 of the EC Treaty (now, after amendment, Article 30 EC).

8 Chapter II of Directive 89/662, entitled 'Checks on arrival at the destination', is made up of Articles 5 to 8.

9 Article 5 states:

'1. Member States of destination shall implement the following measures:

- (a) The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport;

...

3. Operators who have products delivered to them from another Member State or who completely divide up a batch of such products:

...

(c) must, if so requested by the competent authority, report the arrival of products from another Member State, to the extent necessary to carry out the checks referred to in paragraph 1;

...

4. The detailed rules for implementing this article shall be adopted in accordance with the procedure laid down in Article 18.

...

- 10 Articles 7 and 8 of Directive 89/662 lay down the measures to be taken and the procedure to be followed if, during a check carried out at the place of destination of a consignment, the competent authority establishes the existence of an epizootic disease, any new serious and contagious disease or other cause likely to constitute a serious hazard to animals or to human health. The detailed rules for implementing those two articles are to be adopted in accordance with the procedure laid down in Article 18 of the directive.

11 Articles 9, 17 and 18 are to be found in Chapter III of Directive 89/662, entitled 'Common provisions'.

12 In the event of an outbreak of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health, Article 9 of the directive states, in particular, that, pending the Community measures to be adopted, the Member State of destination may, on serious health grounds, take interim protective measures with regard to the establishment concerned or, in the case of an epizootic disease, with regard to the area of protection provided for in Community rules. Those measures are to be notified, without delay, to the other Member States and to the Commission. The latter is to review the situation in the Standing Veterinary Committee at the earliest opportunity and adopt the necessary measures; it is to monitor the situation and amend or repeal the decisions taken, depending on how the situation develops.

13 According to Article 17 of Directive 89/662, as corrected (OJ 1990 L 151, p. 40):

'1. Where the procedure laid down in this article is to be used, matters shall without delay be referred by the Chairman, either on his own initiative or at the request of a Member State, to the Standing Veterinary Committee (hereinafter called "the Committee") set up by Decision 68/361/EEC.

2. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within two days. The opinion shall be delivered by the majority laid down in Article

148(2) of the Treaty [now Article 205(2) EC] in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that article. The Chairman shall not vote.

3. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

4. If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken.

The Council shall act by a qualified majority.

If, on the expiry of a period of 15 days from the date of referral to the Council, the Council has not acted, the Commission shall adopt the proposed measures, save where the Council has decided against the said measures by a simple majority.'

14 Article 18 of that same directive is worded as follows:

'1. Where the procedure laid down in this article is to be used, matters shall without delay be referred by the Chairman, either on his own initiative or at the request of a Member State, to the Standing Veterinary Committee (hereinafter called "the Committee") set up by Decision 68/361/EEC.

2. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time-limit which the Chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that article. The Chairman shall not vote.

3. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

4. If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken.

The Council shall act by a qualified majority.

If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the Commission shall adopt the proposed measures and implement them immediately, save where the Council has decided against the said measures by a simple majority.'

The national legislation in dispute

¹⁵ Article 8 of the Decree of 15 December 1998 of the Swedish food administration (Livsmedelsverket) on veterinary checks of food products of animal origin in intra-Community trade (SLV FS 1998, No 39) provides that the importer or his agent

must, no later than 24 hours before the estimated time of arrival of certain products, give notice of them to the competent supervisory authority of the place where the first consignee of the goods is located.

16 The products in question are referred to in Annex 3 to that decree and are the following:

- milk and milk products which have not been heat treated (implying a positive reaction to the phosphatase test);

- hens' eggs intended for direct consumption (classes A and B);

- fresh meat from all types of animals (also including frozen meats);

- meat preparations (including, for example, products which have not been heat treated);

- minced meat;

- all other products likely to entail a health risk and in respect of which the national food administration has accordingly imposed a duty of prior notification upon registration.

- 17 It is common ground that all of the products cited fall within the field of application of Directive 89/662 either directly or, as regards minced meat and meat preparations, by reference made by Article 10 of Council Directive 94/65/EC of 14 December 1994 laying down the requirements for the production and placing on the market of minced meat and meat preparations (OJ 1994 L 368, p. 10).
- 18 The meaning of 'first consignee' as referred to in Article 8 of the Decree of 15 December 1998, cited above, is defined in Article 2 of the Decree as being the first person in Sweden who receives the products and processes them in a place which receives food products. When a batch of goods is divided during transport, each consignee of one of the parts of the batch is deemed to be the first consignee thereof.

Pre-litigation procedure

- 19 Following a complaint which it had received, the Commission, considering that the Swedish rules cited above are incompatible with the requirements of Article 5 of Directive 89/662, sent the Kingdom of Sweden a letter of formal notice, on 9 July 1999, requesting it to submit its observations within two months.
- 20 Unsatisfied with the explanations provided in that regard by the Swedish Government, the Commission sent a reasoned opinion to that Member State on 21 December 2001 requesting it to adopt, within two months of receipt, the measures necessary to comply with it.

- 21 After the Swedish Government had replied to that reasoned opinion by letter of 26 February 2002, in which it repeated its earlier arguments, the Commission decided to bring the present action.
- 22 By order of the President of the Court of 23 July 2003 the Republic of Finland was given leave to intervene in support of the form of order sought by the Kingdom of Sweden.

The action

- 23 The Commission complains that the Kingdom of Sweden has failed to fulfil its obligations under Article 5 of Directive 89/662 by introducing in 1998 and by maintaining in force a system which, as regards certain food products of animal origin from other Member States, provides, first, for compulsory prior notification by importers of the abovementioned products and, second, for health checks to be carried out on importation of those same products.

Subject-matter of the action

- 24 In its reply, the Commission pointed out that it was withdrawing its complaint in so far as it was based on the existence of health checks on imports of the products concerned.
- 25 In those circumstances, assessment is required solely of the merits of the Commission's complaint based on the existence of a system of compulsory prior notification for importers of the products referred to in the Swedish rules in dispute.

The substance

Arguments of the parties

- 26 In support of its action, the Commission points out that Article 5 of Directive 89/662 amounts to a derogation from the principle laid down in the directive that veterinary checks must be carried out in the Member State of origin.
- 27 As an exception to the main objective of that directive, which is to reduce checking formalities at the place of destination of the goods, Article 5 should be interpreted restrictively.
- 28 In addition, Article 5 refers only to veterinary 'spot-checks' carried out 'at the places of destination of goods' and Article 5(3) applies only to 'operators who have products delivered to them from another Member State or who completely divide up' such products.
- 29 Furthermore, Article 5(3)(c) states that the obligation to report the arrival of the products in question applies only 'to the extent necessary' to carry out the non-discriminatory spot-checks referred to in Article 5(1).
- 30 However, first, the national provision in dispute refers to 'importers' and should, therefore, be regarded as resulting in border checks prohibited by Directive 89/662.

- 31 Second, checks carried out at the place of introduction of the products onto Swedish territory are discriminatory, since they apply, by definition, only to imported goods.
- 32 The Commission adds that the position of the Swedish Government is contrary to the purpose and effectiveness of Directive 89/662 in that the checks carried out in the Member State of dispatch are not recognised or regarded as reliable and the obligation to give notice refers systematically to all importers of the products concerned.
- 33 In relation to that government's argument that it has found serious failures to fulfil obligations on the part of certain Member States of dispatch in terms of the checks relating to the presence of salmonella in foodstuffs of animal origin and that, therefore, mere spot-checks at the place of final destination of those products are not sufficient to protect public health effectively, the Commission contends that checks on the presence of salmonella in food are governed by specific rules and that, in any event, a Member State cannot justify its failure to perform its obligations under Community law by relying on the fact that other Member States have also failed to fulfil their obligations.
- 34 Furthermore, Directive 89/662 itself allows each Member State to take the appropriate measures in the event that Community rules are found to be infringed when samples are taken. In particular, Article 8(1) of that directive lays down the procedure to that effect. In addition, Article 9(1) would permit the adoption of interim protective measures if risks for human health were established.
- 35 Supported by the Finnish Government, the Swedish Government disputes the Commission's arguments.

36 First of all, the requirement of prior notification of certain products, set out in Article 8 of the Decree of 15 December 1998, cited above, is dictated by the desire for effective organisation of the spot-checks expressly laid down in Directive 89/662 in the Member State of destination, by ensuring the availability of products for the purpose of checks and by enabling the competent authorities to plan monitoring. A check at the final destination would not be easy to carry out since the products at issue are difficult to situate and reach the consumer very quickly.

37 Next, such an obligation does not in any way mean that the competent national authority has the power to check every batch which enters Swedish territory.

38 In addition, the rules challenged by the Commission do not necessarily refer to the importer, but the operator who is the first person to take delivery of the food products and to process them in a place designed to receive them (for example, in connection with a processing industry or a wholesale business, a freezing plant or a food warehouse).

39 Furthermore, the aim of those rules is to give the competent national authority the opportunity to carry out checks where there are reasons to suspect that the Community legislation has not been complied with at an earlier stage. In particular, as a result of the finding of serious failures to comply with the requirements imposed on Member States of dispatch as regards the presence of salmonella in foodstuffs of animal origin, spot-checks at the place of final destination are not sufficient to protect public health. The Member States have not all reached the same level of protection in that area and contaminations in Sweden are almost exclusively caused by 'foreign' products.

- 40 Moreover, the national measure referred to in the Commission's application has not resulted in any obstacle to trade since imports of meat from other Member States have been on the increase since 1997.
- 41 Finally, the Swedish rules in dispute are consistent with Article 5(3)(c) of Directive 89/662 which leaves Member States the power to implement a notification procedure for products from another Member State and reserves to those Member States a certain discretion in that regard. More particularly, the directive does not give a definition of the place of destination referred to in Article 5(1)(a). Nor did the Community legislature specify the time at which notification is to take place or the frequency of such notification. Equally, the directive does not define what is to be understood by 'operators'.

Findings of the Court

- 42 For the purpose of assessing the merits of the Commission's action, as defined in paragraph 25 of this judgment, it should first be pointed out that, as can be seen from its title and the first recital in its preamble, Directive 89/662 is one of the measures intended to complete the internal market.
- 43 In order to guarantee the free movement of agricultural products which, according to the second recital in the preamble to that directive, is 'a fundamental feature of the common organisation of markets', the directive aims to dismantle 'veterinary barriers to the development of intra-Community trade in products' of animal origin.

44 Having regard to the ultimate aim of Directive 89/662, which is, according to the fourth recital in the preamble thereto, to ensure for that purpose that veterinary checks are carried out only at the place of dispatch of the products in question, the directive provides, as is apparent from the fifth recital in the preamble, that 'the emphasis should be placed on the checks to be carried out at the place of dispatch' of the goods 'and in organising those that could be carried out at the place of destination', and such a solution entails, according to the sixth recital in the preamble, the suspension of veterinary checks at the Community's internal frontiers and implies increased confidence in the veterinary checks carried out by the Member State of dispatch.

45 Article 1 of Directive 89/662 thus provides that the veterinary checks of products of animal origin referred to in the directive may no longer be carried out at frontiers. Furthermore, that directive makes a fundamental distinction between checks at origin and checks on arrival at the destination by stating, in the seventh recital in its preamble, that, in the Member State of destination, veterinary checks can, in principle, be carried out only in the form of spot-checks at the place of destination of the goods.

46 On this view, after giving a broad definition of the concept of 'veterinary checks' which covers any physical check and/or administrative formality which applies to the products in question and which is intended for the protection, direct or otherwise, of public or animal health, the directive gives detailed rules, in Articles 3 and 4, on checks at origin.

47 As regards checks on arrival at the destination, Article 5 of the directive states that the competent national authority may check by means of veterinary checks that the requirements of Article 3 have been complied with, on the express condition that the checks are carried out at the places of destination of goods, are restricted to spot-checks and are non-discriminatory. Where the competent authority of the Member State of transit or of destination has information leading it to suspect an infringement, checks may admittedly also be carried out during the transport of goods in its territory, to the exclusion however of any check at the frontier. Article 5 (4) states that the detailed rules for implementing the article are to be adopted in accordance with the Community procedure laid down in Article 18 of Directive 89/662.

- 48 Furthermore, Articles 7 and 8 of the directive lay down the procedure to be followed by the Member State of destination in the case where, during a check carried out at the place of destination of a consignment or during transport, it appears that a product of animal origin is likely seriously to undermine the objective of protection of public health. In particular, those provisions require the competent authorities of the Member State of destination to make contact, without delay, with those of the Member State of dispatch. Where appropriate, the Commission may be led to adopt the appropriate measures to bring about a concerted approach of the Member States, which must be confirmed or reviewed in accordance with the Community procedure laid down in Article 17 of Directive 89/662. The detailed rules for implementing Articles 7 and 8 are to be adopted in accordance with the procedure laid down in Article 18 of the directive.
- 49 Finally, in accordance with Article 9 of the directive, the possibly divergent interim protective measures taken in an emergency by a Member State in the event of serious hazard are to be replaced with a Community system of protection for which that article lays down the framework and the detailed rules for its implementation which are also to be adopted in accordance with the procedure in Article 18.
- 50 It is clear from the factors noted in paragraphs 42 to 49 of the present judgment that the Swedish rules in dispute must be considered to be incompatible with the requirements of Directive 89/662.
- 51 The harmonised system of veterinary checks set up by that directive, which is based on full inspection of the goods in the Member State of dispatch, is intended to replace, in principle, inspection in the Member State of destination and must allow for the free movement of the goods concerned in conditions similar to those of an internal market. In that regard, considerations related to the need to protect public health cannot justify additional specific constraints imposed unilaterally by a Member State when the frontier is crossed, such as the duty of prior notification imposed on importers of products of animal origin from other Member States by the Swedish rules in dispute.

- 52 Since that directive aims to regulate, in detail, veterinary checks to be carried out at the place of dispatch of the goods, in order to restrict as far as possible checks which could be carried out at the place of destination and, a fortiori, to abolish checks at internal frontiers of the Community in order gradually to complete the internal market, that directive must be understood as having circumscribed, in a clear and precise manner, the power of the Member States when implementing health checks likely still to be carried out at the place of destination.
- 53 In that context, Article 5 of Directive 89/662 does not, contrary to the assertions of the Swedish Government, authorise national rules such as those contested by the Commission in the context of the present proceedings.
- 54 Thus, generally, Article 5 must, as an exception to the essential purpose of Directive 89/662 to reduce checks and formalities at the place of destination of products of animal origin, be interpreted strictly.
- 55 More particularly, that provision refers, as is evident from its very wording, only to 'non-discriminatory veterinary spot-checks' carried out 'at the places of destination of goods', intended to 'check ... that the requirements of Article 3 have been complied with'.
- 56 In addition, Article 5(3) applies only to 'operators who have products delivered to them from another Member State or who completely divide up a batch of such products' and under Article 5(3)(c) those operators 'must, if so requested by the competent authority, report the arrival of products from another Member State, to the extent necessary to carry out the checks' as defined in the previous paragraph of this judgment.

- 57 By contrast, the national rules contested by the Commission, first of all, expressly refer to 'importers', a notion which does not cover that in the first sentence of Article 5(3) of Directive 89/662 and which not only implies that only products from abroad, to the exclusion of those originating in Sweden, are subject to the formality at issue, but is also such as to lead to checks on crossing the frontier, which is prohibited by that directive. In any event, the wording of the contested Swedish rules does not guarantee in any way that checks are carried out at the very place of destination of the goods, as required by Article 5 of Directive 89/662, and the Swedish Government has moreover indicated practical difficulties allegedly inherent in a check at the place of final destination.
- 58 Next, the duty of prior notification introduced by those rules is of a general nature and cannot prevent its leading to checks which go beyond a simple spot-check permitted by Article 5.
- 59 Finally, those rules do not comply with the strict conditions laid down in Article 5(3) (c) of Directive 89/662 which clearly show that the duty to report the arrival of products from another Member State must not be systematic, but is to depend on a specific request to that effect by the competent authority, made solely where that measure is essential correctly to carry out the checks referred to in Article 5(1).
- 60 In those circumstances, the Swedish rules contested by the Commission cannot be regarded as consistent with the requirements of Article 5 of Directive 89/662.

61 It must be added that those rules are such as to involve a serious risk of a double check, carried out, moreover, at the very moment that the product enters national territory, which thus indicates a clear lack of confidence in the adequacy of the checks already carried out at the place of departure.

62 In particular, the explanations provided by the Swedish Government as regards the reason for the existence of the national provision challenged by the Commission, namely to guarantee the effectiveness of health checks to prevent food products infected with salmonella from entering Sweden, contradict the spirit of Directive 89/662 which is to promote the free movement of agricultural products by placing the emphasis on the checks which have been carried out in the Member State of origin.

63 That objective of the directive could not be realised and its effectiveness achieved if the Member States were free to go beyond the requirements contained therein, so that maintaining or adopting national measures other than those expressly provided for must be regarded as incompatible with the purpose of that directive.

64 Moreover, first, Directive 89/662 itself contains, in Articles 7, 8 and 9, provisions allowing the Member State of destination to take measures in the event of a serious risk, in particular, to public health, but which are coupled with procedural guarantees to circumscribe them at Community level, or which are merely of a temporary nature pending adoption of common measures.

65 Second, as pointed out by the Advocate General in points 14, 77 and 78 of his Opinion, the Kingdom of Sweden, just like the Republic of Finland indeed, obtained, in connection with their accession to the European Union, additional guarantees concerning salmonella checks on delivery of certain products of animal origin to be sent to them.

- 66 In any event, it is settled case-law that a Member State cannot rely on a possible infringement of Community law by another Member State in order to justify its own default. Therefore, a Member State may not under any circumstances unilaterally adopt, on its own authority, corrective or defensive measures designed to obviate any such failure, but is bound to act within the context of the procedures and legal remedies laid down to that effect by the Treaty (see, to that effect, inter alia, Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 9; Case 325/82 *Commission v Germany* [1984] ECR 777, paragraph 11; Case C-146/89 *Commission v United Kingdom* [1991] ECR I-3533, paragraph 47; and Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 20).
- 67 Moreover, the Swedish Government's argument that imports of meat from other Member States have not been affected by the application of the national measure in dispute must be rejected in the light of the Court's case-law, according to which failure to comply with an obligation imposed by a rule of Community law is itself sufficient to constitute a breach, and the fact that such a failure had no adverse effects is irrelevant (see Case C-233/00 *Commission v France* [2003] ECR I-6625, paragraph 62).
- 68 In the light of all the foregoing considerations, the Commission's application must be considered well founded.
- 69 Consequently, it must be held that, by maintaining a system of compulsory prior notification for imports of certain food products of animal origin from other Member States, the Kingdom of Sweden has failed to fulfil its obligations under Article 5 of Directive 89/662.

Costs

- 70 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Sweden has been unsuccessful, the latter must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of those Rules, the Republic of Finland, as intervener, is to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by maintaining a system of compulsory prior notification for imports of certain food products of animal origin from other Member States, the Kingdom of Sweden has failed to fulfil its obligations under Article 5 of Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market;**

2. **Orders the Kingdom of Sweden to pay the costs;**

3. **Orders the Republic of Finland to bear its own costs.**

[Signatures]