

OPINION OF ADVOCATE GENERAL
LA PERGOLA

delivered on 14 October 1999 *

1. By an action commenced on 3 May 1996 the Kingdom of the Netherlands challenged the decision of the Commission of the European Communities, communicated in its letter of 26 February 1996 to the Prime Minister of the Netherlands Antilles, refusing to include the Netherlands Antilles in the list of third countries drawn up pursuant to Article 23 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 products¹ (hereinafter 'Directive 92/46' or 'the Directive').

2. Directive 92/46 lays down the health rules applicable to dairy products produced within the Community (see Chapter II of the Directive) and provides that the conditions applicable to imports from third countries of the products covered by the Directive must be at least equivalent to those laid down in Chapter II for Community production (see Chapter III of the Directive and, in particular, Article 22). In the interests of uniform application of the conditions laid down with regard to imports from third countries, in order to be imported into the Community, milk and milk-based products must satisfy certain requirements including the condition that they come from a country on the list of

third countries drawn up pursuant to Article 23(3)(a) of Directive 92/46 and in accordance with the procedure laid down in Article 31 of that directive. That list was established by 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.²

3. The Netherlands Antilles are a third country within the meaning of Directive 92/46.³ They do not, however, appear on the list referred to in Article 23 of the Directive and, consequently, dairy products from that country cannot be exported to the Community.

4. Following a series of discussions and exchanges of letters between the Netherlands, the Netherlands Antilles and the Commission in 1995 concerning the Netherlands Antilles' request to be included in the list, the Commission carried out an on-the-spot veterinary inspection on 29 November 1995 designed to establish whether the Community health rules for

* Original language: Italian.

1 — OJ 1992 L 268, p. 1.

2 — OJ 1994 L 36, p. 5.

3 — See the first point of the operative part of the judgment in Case C-106/97 *DADI and Douane-Agenten v Rijksdienst voor de Keuring van Vee* [1999] ECR I-5983.

the local production of dairy products were being observed. By the decision challenged before the Court in the present action the Commission informed the Prime Minister of the Netherlands Antilles that 'it [was] not appropriate, at that stage, to decide on the inclusion of the Dutch Antilles unless additional appropriate guarantees could be provided by the authorities' concerning compliance with the health rules laid down in Chapter II of Directive 92/46.

5. The Netherlands Government takes issue with the Commission's exclusion of the Netherlands Antilles from the list which it drew up pursuant to Article 23(3)(a) of Directive 92/46, arguing that the Commission based its refusal on irrelevant facts and infringed a number of laws.⁴

6. Some time after the Netherlands Government commenced the present action, the Court of Justice gave its decision in *DADI and Douane-Agenten*,⁵ a preliminary reference case concerning, *inter alia*, the validity of Decision 94/70. The Court held Decision 94/70 to be invalid inasmuch as the list of third countries drafted by the Commission had not been drawn up in accordance with

the method prescribed by Directive 92/46. Given that Decision 94/70 is invalid, I take the view that the present action, which seeks annulment of the Commission's decision to omit the Netherlands Antilles from the list annexed to Decision 94/70, is devoid of purpose and that there is therefore no need for the Court to give a ruling.

7. It should also be observed that Decision 94/70, which was in force at the time of the facts set out in point 4 of this Opinion, and which was held, in *DADI and Douane-Agenten*, to be invalid, was revoked and replaced by Commission Decision 95/340/EC of 27 July 1995 drawing up a provisional list of third countries from which Member States authorise imports of milk and milk-based products and revoking Decision 94/70/EC.⁶ Decision 95/340 came into force on 2 February 1996, following the series of exchanges between the Netherlands, the Netherlands Antilles and the Commission and the inspection carried out by the Commission, all of which took place in 1995. The decision's entry into force nevertheless preceded the letter to the Prime Minister at issue in the present action and thus also the action subsequently brought by the Netherlands. In my view, however, the existence of Decision 95/340 does not alter the conclusion reached in the preceding paragraph. Indeed, Decision 95/340 in no way differs from Decision 94/70 in so far as concerns the aspects which led to that decision being ruled

4 — In particular, the Netherlands Government claims that the Commission gave insufficient reasons for the contested decision, failed to comply with the procedure laid down in Article 31 of Directive 92/46, contravened the principle that a party has the right to be heard and the principle that measures must be meticulously prepared, infringed Article 2(2) of the Agreement on the Application of Sanitary and Phytosanitary Measures adopted in the context of the Uruguay Round of Multilateral Trade Negotiations (1986-1994) (OJ 1994 L 336, p. 40), contravened the principle of proportionality and, lastly, infringed Article 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).

5 — Cited in footnote 3.

6 — OJ 1995 L 200, p. 38.

invalid. On adopting Decision 95/340 the Commission did not in fact draw up a new list of third countries — the only extant list remains the one compiled in the manner which the Court of Justice held, in *DADI*

and *Douane-Agenten*, to be contrary to the Community rules — but merely reclassified milk-based products (second recital) for reasons of clarity and convenience (third recital).

Conclusion

8. In light of the foregoing considerations, I propose that the Court should declare that there is no need to rule on the action brought by the Netherlands against the Commission seeking annulment of the decision communicated to the Prime Minister of the Netherlands Antilles by letter of 26 February 1996.