JUDGMENT OF THE COURT
4 March 1986 *

In Case 106/84

Commission of the European Communities, represented by its Legal Adviser, Johannes Føns Buhl, acting as Agent, with an address for service in Luxembourg at the office of Georges Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

and

Kingdom of Denmark, represented by Laurids Mikaelsen, legal Adviser at the Ministry of Foreign Affairs, with an address for service in Luxembourg at the Danish Embassy,

defendant,

APPLICATION for a declaration that the Kingdom of Denmark has failed to fulfil its obligations under Article 95 of the EEC Treaty by imposing a higher rate of duty on wine made from grapes than on wine made from other fruit,

THE COURT

composed of: T. Koopmans, President of Chamber, acting as President, U. Everling, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, O. Due, Y. Galmot, C. Kakouris and F. Schockweiler, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 3 December 1985,

gives the following

* Language of the Case: Danish.

JUDGMENT

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

Decision

1 By application lodged at the Court Registry on 16 April 1984, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by taxing wine made from grapes at a higher rate than wine made from other fruit, the Kingdom of Denmark has failed to fulfil its obligations under Article 95 of the EEC Treaty.

2 It is clear from the documents before the Court that under the relevant Danish legislation, namely Law No 98 of 17 March 1971 charging duty on wine and fruit wine, as most recently amended by Law No 149 of 11 April 1984, wine made from grapes and wine made from other fruit are taxed differently. As far as wine made from grapes is concerned, the rate of duty per litre is fixed at DKR 10.725 for table wine and at DKR 19.93 for wine of the liqueur type, the alcoholic strength of which is higher than that of table wine but does not exceed 23% by volume; wine of a higher alcoholic strength is taxed under the law charging duty on spirits. In the case of fruit wine, the rate of duty per litre is DKR 6.92 for wine of the table-wine type of an alcoholic strength not exceeding 14% by volume and DKR 11.02 for other products, that is to say wine of the liqueur type of an alcoholic strength of between 14% and 20% by volume; wine of a higher alcoholic strength is taxed as spirits.

3 The Danish tax legislation does not define fruit wine. According to a circular issued by the Directorate-General for Customs, fruit wine is a product obtained by the fermentation of fruit juice or honey and contains at least one litre of fermented alcohol per 100 litres; the alcohol content of the end product may be increased by the addition of neutral distilled alcohol, that is to say excluding flavoured alcohol, such as cognac, rum or whisky. It became apparent in the proceedings that the alcoholic strength achieved by natural fermentation varies, in practice, between 6% and 8% by volume.

4 The Commission relies on the case-law of the Court in support of its principal argument that wine made from grapes and wine made from other fruit constitute similar products for the purposes of the first paragraph of Article 95 of the Treaty since they have similar characteristics, meet the same needs, are manufactured from similar raw materials and by the same process of fermentation, are of the same alcoholic strength and are consumed in the same quantities. In the alternative, the Commission contends that there is at the very least a competitive relationship between the two products for the purposes of the second paragraph of Article 95 and that the Danish tax system has a discriminatory and protective effect in favour of fruit wine, which is a typical national product, to the detriment of wine made from grapes, which is exclusively an imported product.

5 The Danish Government denies infringing Article 95 in any respect.

6 In the first place, it denies that wine made from grapes and wine made from other fruit are similar products, on the ground that the two products are classified under different headings of the Common Customs Tariff, are manufactured by different processes and have different characteristics. Fruit wine is fermented naturally to give an alcoholic strength of only 6% to 8% by volume and its alcohol content is increased by the addition of ethyl alcohol. Unlike wine made from grapes, wine made from other fruit displays the same characteristics every year. In contrast to wine made from grapes, wine made from other fruit is not covered by a common organization of the market.

7 The Danish Government concedes that there may be a competitive relationship, for the purposes of the second paragraph of Article 95, between those two products. However, it denies that the differential taxation may have a protective effect, since that effect should be assessed in relation to the incidence of tax on the selling price, which in this case is practically the same for both products.

8 The Danish Government considers that if there is a protective effect it is in any event justified on legitimate social and economic grounds which permit Denmark to apply a favourable tax system for the benefit of certain categories of fruit growers who would otherwise be unable to find a market for their produce.

9 Since the Commission has based its action primarily on the first paragraph of Article 95, it is necessary to consider in the first place whether the conditions for the application of that provision are fulfilled.

10 As the Court recalled in its judgments of 27 February 1980 in Case 168/68 (*Commission* v *French Republic* [1980] ECR 347), in Case 169/78 (*Commission* v *Italian Republic* [1980] ECR 385) and in Case 171/78 (*Commission* v *Kingdom of Denmark* [1980] ECR 447), the aim of Article 95 as a whole is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other Member States and to guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products. With regard to the concept of similar products, the first paragraph of Article 95 prohibits more specifically any tax provision whose effect is to impose, by whatever mechanism, higher taxation on imported goods than on domestic products.

11 It is clear from the documents before the Court that wine made from grapes and consumed in Denmark is exclusively an imported product. With regard to fruit wine, wine of the liqueur type is almost entirely a domestically-produced product and wine of the table-wine type, whilst approximately one third of the volume thereof is imported from other Member States, is a typical domestically-produced alcoholic beverage which has traditionally represented an essential outlet for Danish fruit growers.

12 In order to determine whether products are similar within the terms of the prohibition laid down in the first paragraph of Article 95 it is necessary to consider, as the Court stated in its judgment of 17 February 1976 in Case 45/75 (*REWE* v *Hauptzollamt Landau* [1976] ECR 181), whether they have similar characteristics and meet the same needs from the point of view of consumers. The Court endorsed a broad interpretation of the concept of similarity in its judgments of 27 February 1980 in Case 168/78 (*Commission* v *France* [1980] ECR 347) and 15 July 1982 in Case 216/81 (*Cogis* v *Amministrazione delle Finanze dello Stato* [1982] ECR 2701) and assessed the similarity of the products not according to whether they were strictly identical, but according to whether their use was similar and comparable. Consequently, in order to determine whether products are similar it is necessary first to consider certain objective characteristics of both categories of beverages, such as their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content, and secondly to consider whether or not both categories of beverages are capable of meeting the same need from the point of view of consumers.

13 In order to make that assessment, it is necessary to consider separately the two types of beverage to which the Danish tax legislation on wine applies, namely table wine and liqueur wine.

14 With regard to wine of the table-wine type, it should be noted in the first place that wine made from grapes and wine made from other fruit are manufactured from the same kind of basic product, namely agricultural produce, and by the same process, namely natural fermentation. Their organoleptic properties, in particular their taste and their alcohol content, are similar. The fact that the final alcohol content in fruit wine is achieved by the addition of ethyl alcohol must be regarded as irrelevant, since the alcohol content of wine made from grapes may also be increased, particularly in order to improve wine with a low natural alcohol content.

15 Moreover, in view of their similar characteristics the two categories of beverages can meet the same needs from the point of view of consumers inasmuch as they can be consumed in the same way, namely to quench thirst, as refreshments and at meal times. The fact that the two categories of beverages meet the same needs cannot be called in question by the fact that fruit wine has always been less popular with consumers than wine made from grapes. The question whether they meet the same needs must be assessed on the basis not of existing consumer habits but of the prospective development of those habits and, essentially, on the basis of objective characteristics which ensure that a product is capable of meeting the same needs as another product from the point of view of certain categories of consumers.

16 With regard to wine of the liqueur type, the methods of manufacturing wine from grapes and from other fruit may be regarded as identical, since the end product is invariably obtained by the addition of ethyl alcohol following initial fermentation for some length of time and, in some cases, by the addition of other substances, such as juice or honey. Accordingly, in view of their comparable characteristics and similar properties, the two categories of products meet the same needs from the point of view of consumers, since they are consumed as apéritifs by some and as dessert wine by others. Fruit wine of the liqueur-wine type and grape wine of the liqueur-wine type must consequently be regarded as similar products for the purposes of the first paragraph of Article 95 of the EEC Treaty.

17 The similarity between the two types of wine concerned cannot be denied, as the Danish Government maintains, on the ground that wine made from grapes and wine made from other fruit are classified under different tariff headings. As the Court held in its judgment of 27 February 1980 in Case 169/78, the customs classification of alcoholic beverages, which was designed to meet the requirements of external trade, cannot provide conclusive evidence with regard to the appraisal of the criterion of similarity laid down in the first paragraph of Article 95 of the Treaty.

18 Similarly, the fact that wine made from grapes is not covered by a common organization of the market cannot be considered relevant to the question whether products are similar, since the absence of such an organization cannot justify discriminatory taxation which favours the use, for the manufacture of products which are in other respects similar, of certain categories of agricultural produce to the detriment of other categories of produce originating largely in other Member States.

19 Since it is thus established that the products in question are similar products for the purposes of the first paragraph of Article 95, it is necessary to consider the discriminatory nature of the taxation concerned, which, as the Court pointed out in its judgments of 27 February 1980, derives exclusively from the difference in the tax burden borne by the two categories of products, whether it is the result of the rate of tax, the mode of assessment or other detailed implementing rules. In this case, it is indisputable that wine made from grapes bears a higher fiscal burden than the same quantity of wine made from other fruit.

20 With regard to the argument submitted by the Kingdom of Denmark to the effect that differential taxation may be justified by socio-economic considerations, it must be remembered, as the Court has consistently held (see, most recently, the judgment of 15 March 1983 in Case 319/81 *Commission* v *Italy* [1983] ECR 601), that at its present stage of development Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products, even products which are similar within the meaning of the first paragraph of Article 95, on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products.

21 However, such differential taxation is incompatible with Community law if the products most heavily taxed are, as in this case, by their very nature, imported products.

22 It follows from the foregoing considerations that, by taxing wine made from grapes at a higher rate than wine made from other fruit, the Kingdom of Denmark has failed to fulfil its obligations under the first paragraph of Article 95 of the EEC Treaty.

Costs

23 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the Kingdom of Denmark has been unsuccessful in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by taxing wine made from grapes at a higher rate than wine made from other fruit, the Kingdom of Denmark has failed to fulfil its obligations under the first paragraph of Article 95 of the EEC Treaty.

(2) Orders the Kingdom of Denmark to pay the costs.

Koopmans Everling Bahlmann Joliet

Bosco Due Galmot Kakouris Schockweiler

Delivered in open court in Luxembourg on 4 March 1986.

P. Heim
Registrar

T. Koopmans
President of Chamber acting as President