JUDGMENT OF THE COURT
9 July 1987 *

In Case 356/85

Commission of the European Communities, represented by its Principal Legal Adviser Henri Étienne, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a Member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

supported by

French Republic, represented by Gilbert Guillaume, acting as Agent, with an address for service in Luxembourg at the French Embassy, 9 boulevard Prince-Henri,

intervener,

v

Kingdom of Belgium, represented by the Minister for External Affairs, (Agent: Robert Hoebaer, Director at the Ministry of Foreign Affairs, External Trade and Cooperation with Developing Countries, assisted by Jacques Delbeke, Adviser at the Ministry of Finance), with an address for service in Luxembourg at the Belgian Embassy, 4 rue des Girondins,

defendant,

APPLICATION for a declaration that, by applying a higher rate of value-added tax to wine of fresh grapes, an imported product, than to beer, a domestic product, the Kingdom of Belgium has failed to fulfil its obligations under Article 95 of the EEC Treaty,

* Language of the Case: French.

THE COURT,

composed of: Lord Mackenzie Stuart, President, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, O. Due, U. Everling, K. Bahlmann, R. Joliet and J. C. Moitinho de Almeida, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 17 December 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 26 February 1987,

gives the following:

Judgment

1 By an application lodged at the Court Registry on 19 November 1985, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that by applying a higher rate of value-added tax to wine of fresh grapes, an imported product, than to beer, a domestic product, the Kingdom of Belgium has failed to fulfil its obligations under Article 95 of the EEC Treaty.

2 By order of 29 April 1986, the French Republic was granted leave to intervene in support of the Commission's conclusions.

3 It appears from the documents before the Court that under the Belgian legislation in force since 1 January 1983, the supply of certain beverages intended for domestic consumption, and in particular wine of fresh grapes, is subject to a rate of VAT of 25%. By contrast, the rate of VAT applicable to supplies of beer intended for domestic consumption is 19%. Since the Kingdom of Belgium does not produce wine but does produce a substantial quantity of beer, it would appear that a greater tax burden is borne by the product for which internal demand is met

almost entirely by imports, whereas the product of which substantial quantities are produced in Belgium bears a lesser tax burden.

4 Reference is made to the Report for the Hearing for details of the Belgian legislation at issue, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

5 Since the Commission's application is based on the view that wine and beer are competing products of the kind referred to in the second paragraph of Article 95 of the Treaty, which concerns internal taxes of a protectionist nature, the scope of that provision must first be considered.

6 It has been consistently held by the Court that the purpose of Article 95, as a whole, is to ensure the free movement of goods between the Member States under normal conditions of competition, by eliminating all forms of protection which might result from the application of discriminatory internal taxation against products from other Member States, and to guarantee absolute neutrality of internal taxation as regards competition between domestic and imported products.

7 Against that background, the second paragraph of Article 95 is more specifically intended to prevent any form of indirect fiscal protectionism affecting imported products which, although not similar, within the meaning of the first paragraph of Article 95, to domestic products, are nevertheless in a competitive relationship with some of them, even if only partially, indirectly or potentially.

8 The parties disagree as to the application of those criteria to the Belgian legislation at issue. Their difference of opinion concerns the extent of the competitive relationship between wine and beer and the question whether or not the tax provisions at issue are protective in nature.

The competitive relationship between wine and beer

9 As far as the competitive relationship between wine and beer is concerned, the Commission maintains that all wines of fresh grapes must be regarded as competing with beer for the purposes of the second paragraph of Article 95 of the Treaty. On the other hand, the Belgian Government contends that, in view of the wide range of qualities and prices of wines, only light cheap wines are in a competitive relationship with beer.

10 In its judgments of 27 February 1980 and 12 July 1983 (Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417 and [1983] ECR 2265), the Court held that wine and beer were, to a certain extent, capable of meeting identical needs, so that it had to be acknowledged that there was a degree of substitution for one another. The Court made it clear in those judgments that in view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties, and that that is accordingly the appropriate basis for making fiscal comparisons.

11 Those considerations are also applicable in this case, since nothing in the documents before the Court indicates any feature specific to the Belgian market which might justify a different approach. Consequently, only commonly consumed wines, which in general are cheap wines, have enough characteristics in common with beer to constitute an alternative choice for consumers and may therefore be regarded as being in competition with beer for the purposes of the second paragraph of Article 95 of the Treaty.

The protective nature of the tax system

12 With regard to the question whether or not the tax system at issue is protective in nature, the Commission and the French Government take the view that once a competitive relationship is established between two products any difference in the rates of tax applied to the same basis of assessment, in this case the value, is contrary to the second paragraph of Article 95 of the Treaty, and it is not necessary also to take into account the impact of that difference of rates on the retail price and hence on consumer preference.

13 According to the Belgian Government, on the other hand, if the second paragraph of Article 95 is to apply it is also necessary, by contrast with the position under the first paragraph, for a further condition to be satisfied, namely that the discrepancy in the tax burden must be liable to have a protective effect favouring domestic products. It is therefore necessary to consider the possible economic effects of the tax in question.

14 In its judgment of 27 February 1980 (Case 168/78 *Commission* v *France* [1980] ECR 347) the Court held that whilst the criterion indicated in the first paragraph of Article 95 consists in the comparison of tax burdens whether in terms of the rate, the mode of assessment or other detailed rules for their application, in view of the difficulty of making sufficiently precise comparisons between the products in question the second paragraph of that article is based upon a more general criterion, namely the protective nature of the system of internal taxation.

15 It follows that any assessment of the compatibility of a given tax with the second paragraph of Article 95 must take account of the impact of that tax on the competitive relationship between the products concerned. The essential question is therefore whether or not the tax is of such a kind as to have the effect, on the market in question, of reducing potential consumption of imported products to the advantage of competing domestic products.

16 Consequently, in considering to what extent a protective effect actually exists, the difference between the respective selling prices of beer and wine competing with beer cannot be disregarded. The Belgian Government has stated that the price of a litre of beer, including tax, is on average BFR 29.75, whereas the corresponding price of a litre of ordinary wine is around BFR 125, four times the price of beer, giving a difference in price per litre of BFR 95.25. In the Belgian Government's view it follows that even if a single rate were applied to both products, the price difference between the two would continue to be substantial; the reduction in that difference would be so insignificant that it could not influence consumer preference.

17 In response to that argument the Commission drew attention to the fact that in two Belgian establishments named by it the wine most commonly consumed is sold

at BFR 61 per litre, including tax. The Belgian Government did not challenge that figure but stated that, according to the information given to it by one of those establishments, the sale of wines priced at less than BFR 80, which include wines sold in five-litre plastic containers and cooking wines, account for only about 15.6% of total wine sales. According to the Belgian Government, it is more appropriate to compare such wines with table beer which is sold for as little as BFR 17 per litre.

18 In view of those observations, it must be concluded that the Commission has not shown that the difference between the respective prices for comparable qualities of beer and wine is so small that the difference of 6% between the VAT rates applied to the two products is capable of influencing consumer behaviour. The Commission has thus not shown that that difference gives rise to any protective effect favouring beer intended for domestic consumption.

19 Nor do the statistics produced by the Commission comparing trends in beer and wine consumption indicate the existence of any protective effect. The Commission stated that beer consumption in Belgium reached a peak in 1973 and has been on the decline since then. By contrast, wine consumption has tripled during the last 20 years; however, from 1980 onwards, the growth in wine consumption slowed down and it levelled off in 1982 and 1983.

20 Whilst those figures show the general trends in the consumption of the products in question, they do not show with any certainty that there is any causal connection between the patterns of consumption described and the introduction in 1977 of a higher rate of VAT for wine. Consequently, the Commission cannot successfully rely upon them to support its view that the progressive increase in wine consumption was slowed down and finally brought to a halt precisely because of the introducion of a higher rate of VAT for wine. Moreover, that view does not appear to be borne out by the fact, pointed out by the Belgian Government and not contested by the Commission, that between 1978 and 1983 the rate of VAT applicable to beer was increased on three occasions without there being in the medium term any restrictive effect on the consumption of beer to the advantage of wine.

21 It follows that the Commission has not established that the tax system in question actually has a protective effect. Accordingly, the application must be dismissed.

Costs

22 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission of the European Communities and the French Republic, which intervened in its support, have failed in their submissions, they must be ordered jointly and severally to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the Commission of the European Communities and the French Republic jointly and severally to pay the costs.

Mackenzie Stuart O'Higgins Schockweiler Bosco

Due Everling Bahlmann Joliet Moitinho de Almeida

Delivered in open court in Luxembourg on 9 July 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President