JUDGMENT OF THE COURT
12 February 1987 *

In Case 181/85

French Republic, represented by Gilbert Guillaume, acting as Agent, assisted by Alain Sortais and Ronny Abraham, acting as Deputy Agents, with an address for service in Luxembourg at the French Embassy, 9, boulevard Prince-Henri,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Jean-Claude Séché, 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,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by Susan J. Hay, acting as Agent, assisted by Derrick A. Wyatt, of the Bar of England and Wales, with an address for service in Luxembourg at the British Embassy, 28 boulevard Royal,

intervener,

APPLICATION for a declaration that Commission Regulation No 644/85 of 12 March 1985 (Official Journal 1985, L 73, p. 15) amending Regulation No 2541/84 (Official Journal 1984, L 238, p. 16) fixing a countervailing charge on imports into the other Member States of ethyl alcohol of agricultural origin produced in France, adopted pursuant to Article 46 of the Treaty, is void,

* Language of the Case: French.

THE COURT

composed of: Lord Mackenzie Stuart, President, Y. Galmot and C. Kakouris (Presidents of Chambers), G. Bosco, T. Koopmans, U. Everling, R. Joliet, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: Sir Gordon Slynn
Registrar: D. Louterman, Administrator

having regard to the Report for the Hearing and further to the hearing on 6 November 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 16 December 1986,

gives the following

Judgment

1 By an application lodged at the Court Registry on 4 June 1985, the French Republic brought an action under the first paragraph of Article 173 of the EEC Treaty requesting the Court to declare void Commission Regulation No 644/85 of 12 March 1985 (Official Journal 1985, L 73, p. 15) amending Regulation No 2541/84 of 4 September 1984 (Official Journal 1984, L 238, p. 16) fixing a countervailing charge on imports into the other Member States of ethyl alcohol of agricultural origin produced in France.

2 Reference is made to the Report for the Hearing for a summary of the relevant provisions of Community legislation 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.

3 The point at issue in these proceedings is whether the Commission correctly applied Article 46 of the EEC Treaty, according to which a countervailing charge

may be fixed by the Commission and applied by the Member States to imports of a product subject to a national market organization or to internal rules having equivalent effect which affect the competitive position of similar production in another Member State.

4 It should be specified that by Regulation No 2541/84, which was adopted pursuant to Article 46 of the EEC Treaty and was not challenged by the French Government within the relevant time-limit, the Commission fixed the countervailing charge for the products in question at 0.04 ECU per % volume per hectolitre, and the contested Regulation No 644/85 raised the amount of that charge to 0.075 ECU per % volume per hectolitre.

5 In its first submission the French Government alleges that the Commission's decision to raise the original rate of the countervailing duty was based on an error of fact because it took the view that the rate fixed by Regulation No 2541/84 had not had any effect on French exports of non-denatured alcohol of agricultural origin despite the fact that the statistics showed a considerable fall in such exports for the period following September 1984.

6 With regard to that submission it should be stated in the first place that under Article 5 (1) of Regulation No 2541/84, which was not amended by Regulation No 644/85, Member States are to communicate monthly to the Commission, 'for the preceding month, indicating the quantities involved:

(a) the free-at-frontier prices observed for imported alcohol, broken down by:

(i) class of alcohol (synthetic or of agricultural origin, in the latter case separately for non-denatured and denatured alcohol),

(ii) exporting countries;

(b) the prices obtaining on their own market for domestically produced alcohol as delivered to the user, broken down by the different uses'.

7 Article 5 (2) requires the Commission, in particular on the basis of the information provided under Article 5 (1), to monitor continuously trade in the products covered by the regulation, and, in the event of significant changes in the factors used in fixing the countervailing charge, to adjust the charge accordingly.

8 In the light of those arrangements for data gathering, whose legality is not challenged by the French Government, the Commission was therefore required to assess the trend in trade in French ethyl alcohol on the basis of import statistics supplied by the other Member States and not France's export statistics, which the French Republic was not obliged to supply and indeed did not supply before the adoption of Regulation No 644/85.

9 Bearing in mind the nature of those arrangements, it should be ascertained whether the Commission correctly appraised the statistics supplied to it pursuant to Article 5 of Regulation No 2541/84 by the Member States importing non-denatured ethyl alcohol of agricultural origin produced in France.

10 On that point it must be observed that the statistics supplied by the importing Member States, from which it appears that during the period covered by Regulation No 2541/84 the volume of imports into those States had not 'followed a downward trend', show that the Commission could justifiably come to the view that the original rate of the countervailing charge was not sufficient to curb the rise in exports to other Member States of non-denatured ethyl alcohol of agricultural origin produced in France.

11 The first submission put forward by the Government of the French Republic must therefore be rejected.

12 In its second submission, the French Government argues that the adoption, for the purposes of calculating the charge, of a French export price determined by reference to the 'lowest free-at-frontier price at which representative quantities of non-denatured alcohol from France are sold on the markets of the other Member States', as provided for in the fourth recital in the preamble to Regulation No 2541/84, is arbitrary because in practice several grades of alcohol with different characteristics and different prices are sold on the alcohol market.

13 The Commission stated in answer to that submission that it would have been impossible, in comparing French prices with those prevailing in the importing Member States, to distinguish between different grades or end uses of alcohol, in view of the fact that the Member States were not in a position to produce figures enabling such a comparison to be made. Moreover, it takes the view that even if there were different markets according to each grade of alcohol in the Member States they would still not be directly comparable because in some Member States prices depend on end use and in others they depend on the quality of the product itself.

14 In order to decide on the merits of that submission it must be determined whether the Commission exceeded the bounds of its discretion or made an error in law in adopting a method for calculating the charge based on a single export price, where there were different prices for different grades of alcohol.

15 It is therefore necessary to examine whether the method adopted by the Commission was capable of securing the objectives sought by Article 46 of the Treaty. In view of the considerations set out by the parties, it must be held that the method of referring to the lowest free-at-frontier price was suited to the attainment of those objectives because it avoided the need to set up a highly complex system of data gathering and calculation which would have delayed the adoption of the measures provided for in that article.

16 The French Government further complains that the Commission did not take account of exports which were exceptional either because of the very high price at which they were made or because of their exceptionally high quality which was reflected in the price.

17 With regard to that point it is sufficient to note that the lowest free-at-frontier price used by the Commission relates to representative quantities of non-denatured ethyl alcohol of agricultural origin and that the French Government has not shown that this was not the case. Its second submission must therefore also be rejected.

18 In its third submission, the French Government argues that the fourth recital in the preamble to Regulation No 2541/84 proceeds on a false assumption in providing for a comparison between, on the one hand, the export price, and, on the other, 'an equilibrium price which may be considered the normal price for domestically produced non-denatured alcohol on the markets of the Community when competition is not distorted', since market prices for alcohol vary from one Member State to another.

19 The Commission correctly points out that the method it adopted, that of determining a single equilibrium price, enabled the objectives pursued by Article 46 to be achieved while avoiding the need to determine an equilibrium price for each Member State, which would in turn have necessitated adjustments in the form of surcharges and rebates for trade in French alcohol between Member States other than France, and is proportionate to those objectives since the theoretical equilibrium price was set at a prudently low level within the range of possibilities.

20 It follows from this that the third submission must also be rejected.

21 In its fourth submission the French Government argues that reference to the trend in the price of cane molasses for the purpose of calculating the equilibrium price

defined in the fourth recital of the preamble to Regulation No 2541/84 is incorrect because the price for cane molasses does not influence production prices for Community alcohol, which is mainly produced from beet molasses.

22 As the Commission correctly notes, the price for beet molasses and the price for sugar-cane molasses tend to rise and fall together, as is shown by statistics for the period from December 1984 to May 1986 which were produced in the course of the procedure and which the French Government was not able seriously to challenge at the hearing. Reference to the price of imported cane molasses in the calculation of the equilibrium price for alcohol must therefore be regarded as permissible even if cane molasses is used only to a limited extent in alcohol production.

23 In view of the foregoing considerations it must be concluded that the Commission was entitled to use the price of cane molasses in calculating the equilibrium price and that the submission relating to that point must therefore be rejected.

24 In its fifth submission, the French Government argues that Article 1 (1) (b) of Regulation No 2541/84, as amended by Regulation No 644/85, which provides that the charge is to be levied unless the alcohol has been denatured 'in accordance with the relevant provisions in France', does not comply with Article 46 of the Treaty because it makes the charge applicable even if the alcohol is intended for denaturing in another Member State or if it was denatured in France in accordance with the provisions applicable in another Member State.

25 It must be pointed out that an exemption from the charge in favour of alcohol of agricultural origin denatured in another Member State after importation from France might have encouraged deflections of trade in the case of alcohol intended to be used after it had been denatured and would have reduced the effects of the countervailing charge in regard to such alcohol.

26 Furthermore, it was not possible to provide for an exemption in respect of French alcohol denatured in France in accordance with the provisions applicable in other Member States, since the legislation to be taken into account in determining whether or not alcohol has been denatured cannot be other than that of the exporting country, and the French legislation applicable in this instance does not provide for methods of denaturing other than those laid down by itself.

27 Consequently, the fifth submission must also be rejected.

28 In its sixth submission the French Government challenges the legality of the provision under which the charge is to be applied to all French exports of non-denatured alcohol of agricultural origin including those which are effected at a price higher than the equilibrium price and hence do not disturb the markets of importing Member States.

29 There can be no doubt that national alcohol production in the importing Member States is affected by French exports even in the case of dearer and better-quality alcohol, which is placed at an advantage by the national organization of the market in France. As the Commission correctly pointed out, the French market organization for alcohol encourages the export of non-quota alcohol ('alcools liberés') which is sold direct by private undertakings, since it is subject to a tax ('soulte') when sold in France.

30 The sixth submission put forward by the French Government must therefore be rejected.

31 In the light of what has been said, and without it being necessary to give a decision on the objection of inadmissibility raised by the Commission, the application must be dismissed in its entirety.

Costs

32 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the French Republic has failed in its submissions, it must be ordered to pay the costs, including those of the intervener, the United Kingdom, which requested costs in its pleadings.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the applicant to pay the costs, including those of the intervener.

Mackenzie Stuart Galmot Kakouris Bosco

Koopmans Everling Joliet Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 12 February 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President