JUDGMENT OF THE COURT (Fourth Chamber)

2 April 2009 *

In Case C-83/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Thüringer Finanzgericht (Germany), made by decision of 28 November 2007, received at the Court on 25 February 2008, in the proceedings

Glückauf Brauerei GmbH

v

Hauptzollamt Erfurt,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, R. Silva de Lapuerta, E. Juhász and G. Arestis (Rapporteur), Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 18 December 2008,

after considering the observations submitted on behalf of:

— Glückauf Brauerei GmbH, by H. Deiters, Rechtsanwalt, and by J. Werner, Steuerberater and Wirtschaftsprüfer,

— the Greek Government, by O. Patsopoulou, S. Alexandriou and I. Pouli, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes and C. Guerra Santos, acting as Agents,

— the Commission of the European Communities, by W. Mölls, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(2) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21).

2 The reference has been made in the course of proceedings between Glückauf Brauerei GmbH ('Glückauf'), a company incorporated under German law, and the Hauptzollamt Erfurt (Principal Customs Office, Erfurt) ('the Hauptzollamt') relating to the refusal of the Hauptzollamt to apply, in respect of Glückauf, the reduced rate of excise duty to beer.

Legal context

Community legislation

3 The third recital in the preamble to Directive 92/83 states that '… it is important to the proper functioning of the internal market to determine common definitions for all the products concerned'.

4 The seventh recital in the preamble to that directive states that, in the case of beer produced in small independent breweries and ethyl alcohol produced in small distilleries, common solutions are required permitting Member States to apply reduced rates of duty to those products.

5 According to the 17th recital in the preamble to that directive, in the cases where Member States are permitted to apply reduced rates, such reduced rates should not cause distortion of competition within the internal market.

6 Article 4 of Directive 92/83 provides:

'1. Member States may apply reduced rates of duty, which may be differentiated in accordance with the annual production of the breweries concerned, to beer brewed by independent small breweries within the following limits:

— the reduced rates shall not be applied to undertakings producing more than 200 000 hl of beer per year,

— the reduced rates, which may fall below the minimum rate, shall not be set more than 50% below the standard national rate of excise duty.

2. For the purposes of the reduced rates the term "independent small brewery" shall mean a brewery which is legally and economically independent of any other brewery, which uses premises situated physically apart from those of any other brewery and does not operate under licence. However, where two or more small breweries cooperate, and

their combined annual production does not exceed 200 000 hl, those breweries may be treated as a single independent small brewery.

3. Member States shall ensure that any reduced rates they may introduce apply equally to beer delivered into their territory from independent small breweries situated in other Member States. In particular they shall ensure that no individual delivery from another Member State ever bears more duty than its exact national equivalent.'

National legislation

7 Article 4 of Directive 92/83 was transposed into German law by Paragraph 2 of the Law on beer duty (Biersteuergesetz) of 21 December 1992 (BGBl. 1992 I, p. 2150, 'the BierStG'), as follows:

'…

2. By way of exception to subparagraph 1, the rate of duty for beer produced in the brewing process by independent breweries with a total annual production not exceeding 200 000 hl of beer shall be reduced evenly in increments of 1 000 to 1 000 hl.

…

3. A brewery which is legally and economically independent of any other brewery, which uses premises situated physically apart from other breweries and does not brew beer under licence is to be regarded as independent....

4. Interdependent breweries, the combined annual production of which does not exceed 200 000 hl, may be considered as a single brewery for the application of a reduced rate of duty.

…'

The dispute in the main proceedings and the question referred for a preliminary ruling

8 Glückauf operates a brewery in the form of a private limited company. It is apparent from the observations submitted to the Court that its annual beer production does not exceed 200 000 hl.

9 During 2005, the share capital of Glückauf was held by, inter alia, Menz Beratungs- und Beteiligungs GmbH ('Menz'), a company incorporated under Austrian law, which held 3%, and Innstadt Brauerei AG ('Innstadt'), a company incorporated under German law, as principal shareholder, which held 48%. Those two companies together thus held 51% of the share capital of Glückauf.

10 In addition, the share capital of Innstadt was held by, inter alia, Ottakringer Brauerei AG ('Ottakringer'), a company incorporated under Austrian law, which held 49%, and

Menz, which held 30.7%. Mr Menz was both chairman of the board of directors of Ottakringer and managing shareholder of Menz.

11 Furthermore, Ottakringer's parent company and majority shareholder was Getränke Holding AG, a company incorporated under Austrian law. Approximately 81% of the share capital of Getränke Holding AG was held by the Wenckheim family (65% approximately) and the Menz family (16% approximately). Under Ottakringer's articles of association, where voting by the two board members, namely Mrs Wenckheim and Mr Menz, was equal, the chairman of the board of directors, namely Mr Menz, had the casting vote.

12 According to the order for reference, Innstadt was included as an associated company in the consolidated accounts of Ottakringer in accordance with both the International Financial Reporting Standards (IFRS) and the Austrian Commercial Code, and Innstadt was shown as holding 48% of Glückauf's share capital.

13 It is common ground that, in the course of the period at issue in the main proceedings, Innstadt and Ottakringer — the combined annual beer production of which exceeded 200 000 hl — did not cooperate with Glückauf on the market. There were no price agreements, leasing agreements or profit transfer agreements between those breweries. Likewise, they were undeniably present in separate regional markets, with different customers and different ranges of beverages. The undertakings did not engage in any joint advertising campaigns.

14 The Hauptzollamt, initially, classified Glückauf as a brewery which was independent of Innstadt and Ottakringer and applied in respect of it, in accordance with Paragraph 2(2) of the BierStG, a reduced rate of duty to beer. However, after having learned that since 2001 Menz held 3% of the share capital of Glückauf, the Hauptzollamt took the view

that the latter company was economically dependent on Ottakringer and claimed from it, by an amended assessment, the difference between the amount due under the reduced rate of duty and that due under the normal rate of duty.

15 Following an unsuccessful challenge to that assessment, Glückauf brought an action against the amended assessment before the Thüringer Finanzgericht (Finance Court of Thuringia). It claimed that the criterion of economic independence ought to be interpreted in the light of the objective pursued by Directive 92/83, and of the conduct of the relevant companies on the market. The existence of economic dependence could not be asserted, in the present case, unless the companies which were linked by a joint shareholding of a third party appeared and acted on the market as a single company.

16 The Thüringer Finanzgericht is unsure whether the Hauptzollamt's refusal to apply the reduced rate of duty referred to in Paragraph 2(3) of the BierStG is consistent with Article 4 of Directive 92/83. According to that court, none of Glückauf's shareholders directly holds a majority of that company's voting rights or is able, pursuant to contractual stipulations, to exert a dominant influence over the company. The presumed dependence, relied on by the Hauptzollamt, exists only through the shareholding of a third party such that, in the present case, the criterion of economic independence alone is at issue.

17 The referring court asks whether that criterion is respected where there are personal ties, which do not involve holding shares directly, which enable a third party to influence the taking of decisions within a brewery. In that regard, it states that an interpretation of the concept of independence which is restricted solely to an analysis of the conduct of the breweries in the market may not be sufficient. Since, according to the referring court, links of dependency between different breweries may result not only from economic structures but also from legal structures, the combined effect of the criteria of legal independence and economic independence need to be assessed.

18 In those circumstances, the Thüringer Finanzgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the criteria of legal and economic independence referred to in Article 4(1) of [Directive 92/83] … for applying the reduced rates of duty to be understood, in view of the recitals to the Directive, as meaning that economic dependence between otherwise legally independent breweries is to presumed only where the breweries concerned cannot act as competitors in the market uninfluenced by each other, or is the mere de facto possibility of influence on the business activity of the breweries sufficient for the criterion of independence to be met no longer?'

The question referred for a preliminary ruling

19 By its question, the referring court asks, in essence, whether, for the purposes of applying the reduced rate of duty to beer, the condition laid down in Article 4(2) of Directive 92/83, that a brewery must be legally and economically independent of any other brewery, is to be interpreted as meaning that the criterion of economic independence, between legally independent breweries, concerns solely the conduct of those breweries in the market, or whether that criterion is no longer satisfied where an individual has the possibility of exercising de facto influence over the business activities of those breweries.

20 In order to reply to the question referred, it is necessary to examine what is meant by a brewery that is 'legally and economically independent of any other brewery' within the meaning of Article 4(2) of Directive 92/83.

21 The first point to be noted here, as is clear both from the third recital in the preamble and from the title of Directive 92/83, is that, in order to ensure the proper functioning of the internal market, the directive seeks to establish common definitions for all the products concerned, adopted as part of a policy designed to harmonise the structures of excise duty on alcohol and alcoholic beverages. In order to ensure that that directive is applied in a uniform fashion, the terms in it must be interpreted independently on the basis of the wording of the provisions in question and the purpose of the directive (see, by analogy, Case C-389/02 *Deutsche See-Bestattungs-Genossenschaft* [2004] ECR I-3537, paragraph 19, and Case C-495/04 *Smits-Koolhoven* [2006] ECR I-3129, paragraph 17).

22 In accordance with Article 4(1) of Directive 92/83, the Member States may apply reduced rates of duty to beer brewed by independent small breweries producing not more than 200 000 hl of beer per year, provided that those reduced rates are not more than 50% below the standard national rate of excise duty.

23 Article 4(2) states that an independent brewery is a brewery which is legally and economically independent of any other brewery, which uses premises situated physically apart from those of any other brewery and does not operate under licence. That provision also states that where two or more small breweries cooperate, and their combined annual production does not exceed 200 000 hl, those breweries may be treated as a single independent small brewery.

24 It thus follows from the wording of Article 4 of Directive 92/83 that a brewery which wishes to benefit from the reduced rate of duty on beer must meet two conditions, that

is to say, a quantitative condition relating to its maximum annual production of beer, and a qualitative condition concerning that brewery's independence from any other brewery.

25 In accordance with the 7th and 17th recitals in the preamble to Directive 92/83, that directive seeks, in the case of beer produced in small independent breweries, common solutions to permit Member States to apply reduced rates of duty to those products, while not allowing those reduced rates to lead to distortions of competition in the internal market.

26 It follows that Directive 92/83 seeks to prevent the benefits of such a reduction from being granted to breweries, the size and capacity of which could cause distortions in the internal market. In those circumstances, the criteria of legal and economic independence, laid down in Article 4(2) of that directive, seek to ensure that any form of economic or legal dependence between breweries results in exclusion from the tax advantage represented by the reduced rate of duty on beer.

27 That provision requires, as a consequence, in the light of the objective pursued by Directive 92/83, that small breweries — the annual beer production of which is less than 200 000 hl — should be genuinely autonomous from any other brewery both as regards their legal and economic structure, and as regards their production structure, where they use physically separate premises and do not operate under licence.

28 In that context, the concept of a 'brewery which is legally and economically independent of any other brewery', within the meaning of Article 4(2) of Directive 92/83, implies ascertaining whether, as between the breweries concerned, there is a relationship of legal dependency at the level of, in particular, management of the breweries or the holding of share capital or voting rights, or even a relationship of

economic dependence, such as to affect the capacity of those breweries to take business decisions independently.

29 It must be added that the purpose of the independence criterion is to ensure that the reduced rate of duty actually benefits those breweries the size of which represents a handicap, and not those which belong to a group. In those circumstances, in order to include, in the application of Article 4(2) of Directive 92/83, only breweries which are genuinely legally and economically independent, it is necessary to ensure that the condition of independence is not circumvented by purely formal means and, in particular, by legal arrangements between allegedly independent breweries which form, in reality, an economic group the production of which exceeds the limits prescribed in Article 4 of Directive 92/83 (see, by analogy, Case C-91/01 *Italy* v *Commission* [2004] ECR I-4355, paragraph 50).

30 In the main proceedings, the national court starts from the premiss that Glückauf is legally independent of any other brewery, in particular, Innstadt, Ottakringer and Menz. Its question seeks to ascertain whether the assessment of the criterion of economic independence rests solely on the actual market conduct of the relevant breweries or whether, by contrast, the fact that one and the same individual can influence the business activities of those breweries is sufficient to conclude that that economic criterion is not met.

31 In that regard, the concept of 'economic independence', within the meaning of Article 4(2) of Directive 92/83, refers, as is apparent from paragraph 28 of this judgment, and as the Commission has pointed out in its written observations, to the capacity of the brewery concerned to take business decisions independently.

32 In the main proceedings, the referring court states that Mr Menz, who is the holder of management positions in Ottakringer and Menz, is able to exercise influence over the business policy of Glückauf through Innstadt, Ottakringer and Menz. According to that

court, in view of the structure of the shares held in those different breweries and the voting rights system within Ottakringer, Mr Menz, although he does not have a direct shareholding in Glückauf, has, de facto, the opportunity to influence its business activities, and can establish convergence on matters of interest, and on decision-making, between Glückauf, Innstadt and Ottakringer.

33 A situation such as that at issue in the main proceedings, which is characterised by the existence, between different breweries, of structural links in terms of shareholding and voting rights, and which results in a situation where one individual, performing his duties as manager of a number of the breweries concerned, is able, independently of his actual conduct, to exercise influence over the taking of business decisions by those breweries, prevents them from being considered economically independent of each other within the meaning of Article 4(2) of Directive 92/83.

34 In that context, given that — according to the information supplied by the referring court — Innstadt and Ottakringer produce over 200 000 hl of beer per year, the grant to Glückauf of the reduced rate of duty on beer would infringe the condition relating to the quantity of beer produced annually which is laid down in Article 4(1) of Directive 92/83.

35 As regards the possible effects of the conduct of the breweries concerned in the market for the purposes of determining their economic independence, it should also be stated, first, that Article 4(2) of Directive 92/83 concerns the legal and economic structures of breweries without referring expressly to the conduct of those breweries in the market. Second, as the Commission points out, the presence of the breweries at issue in the main proceedings on distinct markets with separate ranges of products cannot allow for the finding that they are economically independent of one another. Such a circumstance may, on the contrary, result from the existence of a deliberate strategy decided at the group level, and designed to avoid or reduce internal competition between them.

36 In the light of the foregoing, the reply to the question referred is that Article 4(2) of Directive 92/83 must be interpreted as meaning that a situation characterised by the existence of structural links in terms of shareholdings and voting rights, and which results in a situation in which one individual, performing his duties as manager of a number of the breweries concerned, is able, independently of his actual conduct, to exercise influence over the taking of business decisions by those breweries, prevents them from being considered economically independent of each other.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 4(2) of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages must be interpreted as meaning that a situation characterised by the existence of structural links in terms of shareholdings and voting rights, and which results in a situation in which one individual, performing his duties as manager of a number of the breweries concerned, is able, independently of his actual conduct, to exercise influence over the taking of business decisions by those breweries, prevents them from being considered economically independent of each other.

[Signatures]