JUDGMENT OF THE COURT

26 June 1991 *

In Case C-152/89,

Commission of the European Communities, represented by Henri Étienne, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Grand Duchy of Luxembourg, represented by Alphonse Berns, Directeur des relations économiques internationales et de la coopération at the Ministry of Foreign Affairs, assisted by André Elvinger, of the Luxembourg Bar, with an address for service at the latter's Chambers, 15 Côte d'Eich,

defendant,

APPLICATION for a declaration that, by applying, for the purpose of the adjustment of excise duty on imports of beer and refunds of duty on exports, a rate of wastage incurred between the wort and the finished product which exceeds the average rate in the Luxembourg brewing industry and in any event exceeds that of certain Luxembourg breweries, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 95 and 96 of the EEC Treaty,

* Language of the case: French.

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins and G. C. Rodríguez Iglesias, Presidents of Chamber, Sir Gordon Slynn, R. Joliet, F. A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs,
Registrar: J.-G. Giraud,

after hearing the parties in their oral submissions at the hearing on 10 January 1991,

after hearing the Opinion of the Advocate General at the sitting on 28 February 1991,

gives the following

Judgment

1 By application lodged at the Court Registry on 27 April 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by applying, for the purposes of the adjustment of excise duty on imports of beer and refunds of duty on exports, a rate of wastage incurred between the wort and the finished product which exceeds the average rate in the Luxembourg brewing industry and in any event exceeds that of certain Luxembourg breweries, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 95 and 96 of the EEC Treaty.

2 Pursuant to the rules common to the Belgo-Luxembourg Economic Union, excise duty on beer is levied in Belgium and Luxembourg not on the finished product, but on the hot wort, regardless of wastage incurred in subsequent stages of production and packaging. Under such a system, the total tax burden borne by the finished product, beer, is dependent on the losses in the course of the transformation of wort into beer. The lower the losses, the less the tax burden.

3 In order to determine the amount of the excise duty attributed to the finished product when it is exported or imported, it is necessary to refer back to the basis of taxation, the hot wort from which the beer is produced, while taking account of losses in the course of the transformation of the wort into beer. Upon exportation, the exported product is notionally converted into hot wort on the basis of a wastage rate of 10% of the wort. Upon importation, the quantities of beer actually imported are increased by 5% in order to take account of the wastage incurred by the breweries of the Member State of origin, corresponding to a wastage rate of 4.7619% of the hot wort.

4 On 12 December 1983, pursuant to Article 169 of the EEC Treaty, the Commission addressed a letter of formal notice to the Luxembourg Government. According to that letter, the wastage percentages applied by Luxembourg in calculating the amount of excise duty to be paid on importation and to be refunded on exportation exceeded the actual level of wastage within the country and therefore constituted an infringement of Articles 95 and 96 of the EEC Treaty. The Commission pointed out that, according to the information in its possession, the wastage incurred by a modern brewery might be as low as 2% and there was no reason to think that wastage in Luxembourg breweries was any greater. According to the Commission, under the Luxembourg system for taxing beer, the refund on exportation was higher than the amount of the tax actually borne by the finished product and the burden of tax levied upon importation was higher than that applying to similar national products.

5 In its reply, Luxembourg explained its system for taxing beer and denied that the rates applied at its frontiers represented an infringement of Articles 95 and 96 of the Treaty. The Commission then commissioned a study by two independent experts, Dr Dalgliesh and Professor Narziss, and on the basis of their reports it sent a reasoned opinion on 2 February 1987 in which it accepted wastage rates for Luxembourg at the lower end of the ranges of 3.8 to 5.1% for exported beers and 2.7 to 4% for beers delivered inside the country.

6 By a letter of 16 October 1987, the Luxembourg Government replied that its brewing industry was poorly equipped and that it had not been possible to reduce wastage in the course of beer production below 10%, whereas foreign breweries were better equipped and had losses of only 4.7619%. The Commission was not satisfied by that explanation and it brought the present action.

7 Reference is made to the Report for the Hearing for a fuller account of the relevant legislation, the course of the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 The Luxembourg Government contests the admissibility of the proceedings inasmuch as the application refers in the alternative to the fact that the rates applied exceed the wastage rate of 'certain Luxembourg breweries', whereas in the reasoned opinion the complaint against Luxembourg was merely that it had applied a wastage rate for refunding excise duty on exportation which exceeded the rate existing 'on average in the Luxembourg brewing industry', and that it had adopted a rate for adjusting excise duty on importation exceeding the upper limit of the average losses found in Luxembourg and the countries exporting to Luxembourg.

9 In that connection, it must be pointed out that in the context of proceedings for failure to fulfil an obligation which the Commission may bring under Article 169 of the Treaty, the reasoned opinion defines the subject-matter of the proceedings and it cannot subsequently be extended. The possibility for the State concerned to present its observations is an essential guarantee envisaged by the Treaty, and is an essential procedural requirement for the proper conduct of the procedure for a finding that a Member State has failed to fulfil its obligations.

10 In this instance, the dispute between the parties in the pre-litigation procedure was essentially whether or not the loss rates applied by Luxembourg in taxing imported beers and giving refunds on exports were too high and also concerned the criteria to be used for assessing the compatibility of the system with Articles 95 and 96 of the Treaty.

11 In those circumstances, the fact that the reasoned opinion did not expressly state that the criterion to be used was the wastage rate of 'certain Luxembourg breweries' did not deprive the defendant of the possibility of presenting its observations on the relevance of that criterion and therefore cannot render the proceedings inadmissible.

12 The Luxembourg Government further argues that the operative part of the reasoned opinion and its statement of grounds are contradictory inasmuch as the operative part required Luxembourg not to exceed the average rate in Luxembourg and the countries exporting to Luxembourg, whereas the most important part of the statement of grounds called on it merely not to exceed the wastage rate occurring during the manufacturing process within Luxembourg. That contradiction and the imprecise nature of the operative part itself made it impossible for Luxembourg to comply with the reasoned opinion.

13 In that connection, it is sufficient to find that the defendant's reply to the reasoned opinion, in which it defends the compatibility with Articles 95 and 96 of the system challenged by the Commission, does not reveal any difficulties in grasping the scope of the reasoned opinion.

14 Moreover, the defendant could have asked for further details if it considered them necessary.

15 It follows from the foregoing that the action must be declared admissible.

The merits

(a) *Article 95*

16 The Commission claims that Luxembourg applies to imported beer a different system from that for the taxation of domestic beer. Whereas a Luxembourg brewer operating rationally has an advantage as regards the amount of excise duty, the duty on the imported product is always calculated on a flat-rate basis. The Commission considers that such a system would be compatible with Article 95 only if Luxembourg could prove that the level of losses from the hot wort applied on a flat-rate basis to imported beers, 4.7619%, was always incurred by Luxembourg breweries, even the most efficient ones.

17 The Luxembourg Government observes that in proceedings for failure to fulfil a Treaty obligation, the burden of proof lies on the Commission, which has, however, failed to prove that the adjustment of the excise duty on beer leads to over-taxation of imported beers. Furthermore, the increase in the wort equivalent of imported beers takes account of the greater efficiency of certain breweries established in other Member States and is subject only to the limit of the actual wastage rates occurring in manufacture abroad, given that there would be discrimination if the wastage rate applied to imported beers was not their own but that of the domestic product.

18 At the outset, it should be noted that the problem of the compatibility of the contested system of taxation with Article 95 arises from the fact that the assessment basis used for imported products is different from the one used for domestic products. Domestic beer is taxed on the basis of the quantity of hot wort used, without account being taken of the quantity lost during the transformation of the hot wort into beer, with the result that an efficient producer enjoys a tax advantage. On the other hand, imported beer is taxed on the basis of the quantity of the finished product, to which a flat-rate adjustment is applied to take account of the presumed quantity of hot wort used to produce the beer.

19 The arrangements for taxing domestically produced beer, based on the hot wort and not on the finished product, cannot be applied to imported beer, because it is technically impossible to verify *a posteriori* the losses of hot wort actually incurred during the beer-making process.

20 The Court has already held that the first paragraph of Article 95 is infringed where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria, which lead, if only in certain cases, to higher taxation being imposed on the imported product (Case 45/75 *REWE* v *Hauptzollamt Landau* [1976] ECR 181).

21 It follows that the system of taxation at issue can be considered to be compatible with the first paragraph of Article 95 only if it is proved to be so arranged as to exclude any possibility of imported beer being taxed more heavily than domestic beer.

22 In order to ascertain whether that condition is fulfilled, the tax burden imposed on imported beer on the basis of the losses of hot wort calculated on a flat-rate basis must be compared with the lowest tax burden actually borne by domestic beer, which can only be determined by reference to the wastage rate of the most efficient domestic brewery.

23 On the other hand, contrary to the arguments put forward by the defendant, the wastage rate in the country of origin of the imported beer is irrelevant in this respect, because it does not permit any meaningful comparison between the tax burden on that beer and the tax burden on domestic beer.

24 Applying the criteria set out above to the facts in the present case leads the Court to find that the Luxembourg system is not so arranged as to exclude any possibility of imported beer being taxed more heavily than domestic beer.

25 Taking into account the lack of transparency in the taxation system in issue, the onus is on the defendant to prove that the system in question does not engender any possibility of discriminatory effects.

26 The expert's reports produced by the Commission — one by Dr Dalgliesh and two by Professor Narziss — show that it is not possible to fix an absolute figure to take account of the rates of losses incurred in the manufacture of beer in different breweries and different countries. Dr Dalgliesh states that 'if administrative con-

venience demands a single value representative of good manufacturing practice in a reasonably well-equipped modern brewery, then 5% would be generous, and 4% would not be too low'. Professor Narziss's first report concludes that it is possible for an average brewery to attain a figure of 5% for ordinary beer, but that figure could be slightly reduced, although that would require a great deal of technical work.

27 In his second report, Professor Narziss indicates, for the various production stages, different rates between which breweries' losses fluctuate. Adding the averages of those figures for each production stage gives a figure for losses, for an average brewery, of 7.35% for beers delivered inside the country and 7.95% for beers for export. According to Professor Narziss, there may be divergences from those central rates of 1.5% either way. However, adding the lowest average figures for each production stage yields a figure of 4.25%.

28 It follows from those expert's reports that the wastage factor of 4.7619% applied on a flat-rate basis in taxing imported beers cannot be regarded as the lowest rate of wastage capable of being achieved by the most efficient Luxembourg breweries.

29 In those circumstances, in the absence of evidence to the contrary from the defendant, it must be considered as proved that certain Luxembourg breweries may achieve a wastage rate lower than 4.7619%.

30 It follows from the foregoing that, in so far as concerns the infringement of Article 95, the action is well founded.

(b) *Article 96*

31 With respect to exports, the Commission claims that a Luxembourg brewer who reduces wastage to a rate below the average of 10% calculated on a flat rate basis is refunded duty corresponding to proportions of wort not used for the manufacture of the beer exported, which is contrary to Article 96 of the Treaty. In that connection the Commission observes that far from proving that its most efficient units do not achieve a wastage factor of 10% or less, as was incumbent on it, Luxembourg has not even been able to prove that that figure represents the average wastage factor.

32 The defendant alleges that the Commission has not proved the 10% rate to be exaggerated. It considers that there is no factual evidence on which to base such a presumption.

33 According to Professor Narziss's second report, the average wastage rate for beers for export is 7.95%, with a margin of variation of 1.5%. By taking the highest figure, a wastage rate of 9.45% is arrived at.

34 That report shows that the 10% rate is not an absolute limit below which no Luxembourg brewery can ever reduce its wastage in respect of beers for export.

35 Since the defendant has not furnished any evidence to the contrary, it must be taken as proved that the refund on exportation is, in certain cases, higher than the tax burden actually borne by the beer exported.

36 As the Court held in Case 45/64 *Commission* v *Italy* [1965] ECR 857, when a Member State employs a flat-rate system for determining the amount of internal

taxation which can be repaid on exportation to another Member State, it is for that State to establish that such a system remains in all cases within the mandatory limits of Article 96.

37 It follows from the foregoing that the action is also well founded in so far as concerns the infringement of Article 96 of the Treaty.

38 It must therefore be held that by applying, for the purposes of the levying of excise duty on imports of beer and the refund of duty on exports, a rate of wastage incurred between the wort and the finished product which exceeds that of certain Luxembourg breweries, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 95 and 96 of the EEC Treaty.

Costs

39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Grand Duchy of Luxembourg has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by applying, for the purposes of the levying of excise duty on imports of beer and the refund of duty on exports, a rate of wastage incurred between the wort and the finished product which exceeds that of certain Luxembourg breweries, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 95 and 96 of the EEC Treaty;

(2) Orders the Grand Duchy of Luxembourg to pay the costs.

Due Mancini O'Higgins Rodríguez Iglesias

Slynn Joliet Schockweiler Grévisse Zuleeg

Delivered in open court in Luxembourg on 26 June 1991.

J.-G. Giraud
Registrar

O. Due
President