product but on the hot wort, regardless of wastage incurred in subsequent stages of production and packaging, and in which, since it is technically impossible to verify *a posteriori* the actual wastage from hot wort, 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, while exported beer gives rise to a refund of excise duty calculated at a flat rate, may be considered compatible with the first paragraph of Article 95 and Article 96 of the Treaty only if it is established that the system has been so arranged as to exclude any possibility of imported beer being taxed more heavily than domestic beer or of refunds arising on the export of beer exceeding excise duty levied on the product before export.

Accordingly, a Member State which, in implementing such a system for the taxation of beer, for the purposes of the levying of excise duty on imports of beer and the refund of duty on exports, applies a rate of wastage incurred between the wort and the finished product which exceeds that of certain domestic breweries, is failing to fulfil its obligations under Articles 95 and 96 of the EEC Treaty.

REPORT FOR THE HEARING
in Case C-152/89 *

I — Facts and procedure

Under rules common to the Belgo-Luxembourg Economic Union, in both Luxembourg and Belgium the excise duty on beer is levied not on the finished product but on the hot wort, regardless of the wastage incurred in the subsequent stages of production and packaging.

The tax basis for determination of the duty to be levied on the finished product both on exports and on imports under that system is calculated in respect of the hot wort from which the beer is produced and account must be taken of the wastage incurred as the wort is converted into beer.

For exports, the notional conversion of the exported product into hot wort, for the purpose of determining the duty to be levied, is effected by application of the multiplier of 10/9, corresponding to a wastage rate of 10% of hot wort. This system leads to an increase in the refund of export duty of 11.11%.

For imports, the duty is calculated on the basis of the quantities actually imported,

* Language of the case: French.

expressed in terms of hectolitre/degrees. For the calculation of wastage, the quantity of wort arrived at by the conversion calculation is increased by 5%, which results in a wastage rate of 4.7619% of hot wort.

Considering that the wastage percentages adopted by Luxembourg exceeded the real level of wastage in Luxembourg, and thus went beyond the bounds of Articles 95 and 96 of the Treaty, the Commission wrote to the national authorities on 12 December 1983 calling on them to submit their observations within one month in accordance with the procedure under the first paragraph of Article 169 of the EEC Treaty.

In its letter of formal notice, the Commission stated that, according to the information in its possession, wastage in a modern brewery might be as low as 2% and that there was no reason to conclude that the wastage incurred in Luxembourg breweries was any greater. According to the Commission, under the Luxembourg system of taxing beer the export refund was higher than the amount of the tax actually levied on the finished product and the burden of taxation on imports was higher than that levied on similar national products.

In its reply, Luxembourg explained its system for taxing beer and denied that the rates of adjustment applied at its borders exceeded the limits imposed by Articles 95 and 96 of the Treaty.

The Commission then asked two independent experts, Dr Dalgliesh and Professor Narziss, to carry out a study and on the basis of their report it issued a reasoned opinion on 2 February 1987, accepting rates of wastage for Luxembourg at the lower ends of the ranges of 3.8% to 5.1% for exported beers and of 2.7% to 4% for beer delivered within Luxembourg.

By 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 the wastage incurred in the course of producing beer to less than 10%, whereas foreign breweries were better equipped and incurred wastage of only 4.7619%.

Considering that explanation to be insufficient, the Commission brought the present action under the second paragraph of Article 169 of the Treaty.

The application was received at the Court Registry on 27 April 1989.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *Commission* claims that the Court should:

Declare that by refunding excise duty on exports of beer and adjusting such duty on imports by applying a rate for wastage incurred between the wort and the finished product which exceeds the average rate

found in the Luxembourg brewing industry and in any event exceeds that of certain Luxembourg breweries Luxembourg has failed to fulfil its obligations under the EEC Treaty, in particular Articles 95 and 96 thereof;

Order the Grand Duchy of Luxembourg to pay the costs.

The *Grand Duchy of Luxembourg* contends that the Court should:

Dismiss the application as inadmissible and in the alternative as unfounded;

Order the Commission to pay the costs.

III — Submissions and arguments of the parties

(A) — *Admissibility*

The *Commission* states that from the outset it had expressed a preference for a legislative solution to the harmonization of the basis for duty on beer and that for that reason it had brought before the Court not the principle of the levying of duty on wort but rather the manipulation of the system applying to imports and exports.

As regards the admissibility of the application, the Commission states that the reasoned opinion was concerned with the lower end of the wastage range, and therefore with the most efficient breweries, that being the reason for the reference in the application to the wastage rate of 'certain Luxembourg breweries'. In its view the Luxembourg Government apprehended the issues very well, as is evident from its negative reply to the reasoned opinion, and it cannot therefore allege contradictions between that opinion and the application.

The *Luxembourg Government* points out in the first place that the Commission challenges neither the system whereby the semi-finished product is taxed nor the principle of increasing the wort equivalent at the frontier, but only the level of the increases which are based on a rate of wastage that it considers excessive.

The defendant further submits that the application is inadmissible in so far as it refers subsidiarily to the fact that the rates adopted exceed the wastage rates of 'certain Luxembourg breweries' whereas the reasoned opinion criticized Luxembourg simply — as regards the refund of excise duty on exports — for exceeding the 'average [rate of wastage] in the Luxembourg brewing industry' and — as regards the adjustment of duty on imports — for exceeding the ceiling of wastage recorded on average in Luxembourg and in the countries exporting to Luxembourg.

The Luxembourg Government contends, finally, that there is an inconsistency between the operative part and the statement of the grounds of the reasoned opinion which it is alleged not to have complied with — in the former, Luxembourg is required not to exceed the average rate in Luxembourg and in the countries exporting to Luxembourg whereas in the most important part of the statement of grounds it is merely called upon not to exceed the rate of wastage incurred in the Luxembourg production process. That contradiction, together with the imprecise

nature of the operative part itself, made it impossible for Luxembourg to comply with the reasoned opinion and the action against it for failure to fulfil its obligations is therefore inadmissible.

(B) — *The substance*

The *Commission* claims that Luxembourg applies to imports and exports a system different from that which is applied to domestic production and that that system contravenes Articles 95 and 96 of the Treaty.

With respect to imports, the Commission states that a Luxembourg brewer operating rationally has the benefit of a differential duty whereas the imported product is always taxed as if the average wastage incurred in Luxembourg had actually been incurred in each Luxembourg brewery.

In the Commission's view, Luxembourg must prove that the level of 5% adopted for the adjustment for wastage on imports is never achieved in its most efficient breweries and that the wastage incurred in the Member State of origin can in no case exceed that rate. The Commission refers to the judgment in Case 127/75 *Bobie Getränke* [1976] ECR 1079, according to which the first paragraph of Article 95 of the Treaty is infringed where a national product is subject, 'even if only in certain cases', to a lower rate of taxation than the imported product.

With respect to exports, the Commission considers that a Luxembourg brewer, operating rationally, who reduces his wastage below the flat-rate average will obtain a refund of duty in respect of quantities of wort which were not required for production of the exported beer, in breach of Article 96 of the Treaty.

The Commission observes in that connection that Luxembourg has altogether failed to show that the average of 10% wastage is justified, whereas, according to the judgment in Case 45/64 *Commission* v *Italy* [1965] ECR 857, a Member State which operates a flat-rate system for the repayment of internal taxes is under an obligation to prove that that system always remains within the mandatory limits of Article 96 of the Treaty. The Commission does not deny that it bears the burden of proof in actions for failure by a Member State to fulfil its obligations. But it considers itself entitled to require Luxembourg to prove that there are factors which aggravate wastage at its half dozen production sites, such proof being available to the industry and to the Luxembourg authorities.

According to the Commission, it is apparent from the experts' report commissioned by it that the maximum authorized wastage rate must be around 4.95% and consequently, since over-compensation is not permitted in any circumstances, the burden falls on Luxembourg to prove that that figure is not achieved by its most efficient breweries.

Finally, the Commission points out that Article 97 of the Treaty, which allows average rates to be applied where a turnover tax is calculated on a multi-stage system, constitutes an exception and does not extend to the taxation of beer.

The *Luxembourg Government* states that, with respect to imports, the burden of proof falls on the Commission in an action for the failure by a Member State to fulfil its obligations and that the Commission has adduced no proof that the adjustment of the duty on beer leads to excessive taxation. The wastage rate for wort of 4.7619% is, in its opinion, lower than the rate accepted by one of the Commission experts not only for export beers but also for beers delivered domestically, whereas the ranges mentioned in the reasoned opinion relate to cold wort and cannot therefore serve as a point of reference.

Moreover, in its opinion the only limit to the increasing of the wort equivalent of imported beers is the actual wastage rates incurred in foreign brewing, since discrimination would arise if imported beers were subjected to a wastage rate which was appropriate not to them but to domestic brewing. The Luxembourg Government criticizes the Commission in that respect for requiring it to prove that the wastage rate in Luxembourg breweries is lower.

As far as exports are concerned, the Luxembourg Government contends that the Commission has not proved that the 10% wastage rate for hot wort is excessive. It points out that the Commission compared that wastage rate with rates calculated on the basis of cold wort instead of hot wort and for beers delivered domestically instead of exported beers. Furthermore the Commission, which in 1982 believed that a wastage rate of 2% was correct, gradually became aware that brewing is much more complex and much further removed from the ideal, its own expert having noted that in the case of low-fermentation beers exported in bottles, like Luxembourg export beer, a much higher wastage rate was normal.

The Luxembourg Government emphasizes in that connection that the tables produced by the Commission expert only give averages calculated on the basis of data from German breweries, followed by some Austrian breweries and, later, British breweries. Moreover, in its view the Commission's expert himself found that in the case of breweries like those in Luxembourg and for beers like those exported by the Luxembourg breweries wastage rates of 10.25% of hot wort are normal, so that the Commission cannot rely on any presumption that wastage falls short of 10%.

G. C. Rodríguez Iglesias
Judge-Rapporteur