Case 253/83

Sektkellerei C. A. Kupferberg & Cie KG a. A.
v
Hauptzollamt Mainz

(reference for a preliminary ruling
from the Finanzgericht Rheinland-Pfalz)

'Tax system with regard to spirits'

Summary

Fiscal legislation — Internal taxation — National spirits monopoly — De facto *reduction in selling price — Compatibility with the EEC Treaty and the Agreements between the EEC and Spain and between the EEC and the Portuguese Republic — Conditions*
(EEC Treaty, Art. 37 and Art. 95; Agreement between the EEC and Spain of 29 June 1970, Art. 3; Agreement between the EEC and the Portuguese Republic of 22 July 1972, Art. 21)

Articles 95 and 37 of the EEC Treaty, Article 21 of the Agreement between the EEC and the Portuguese Republic and Article 3 of the Agreement between the EEC and Spain must be interpreted as not precluding the *de facto* reduction made in the selling price of spirit sold by the Federal Monopoly Administration in a given period provided that the rate of taxation actually applied to imported products during that period did not exceed the rate of taxation actually levied on corresponding domestic products.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 27 November 1984 *

Mr President,
Members of the Court,

The request for a preliminary ruling which falls for my consideration is a further link in the chain of cases dealing with the interpretation of Articles 37 and 95 of the EEC Treaty with regard to the German Branntweinmonopolgesetz [Law on the Monopoly in Spirits].

* Translated from the German.

1. The facts can be summarized as follows:

From 1 to 17 March 1976 Sektkellerei C.A. Kupferberg & Cie. KG a. A., whose registered office is in Mainz, the plaintiff and respondent in the main proceedings (hereinafter referred to as 'the plaintiff'), removed from its bonded warehouse several kinds of whisky from Great Britain, geneva and liqueur from the Netherlands, armagnac and pruneaux from France, sherry from Spain and port from Portugal, which it declared for the payment of duty. The defendant, the Hauptzollamt [Principal Customs Office], Mainz, the defendant and appellant in the main proceedings, assessed the monopoly equalization duty payable thereon at a uniform rate of DM 1 500 per hectolitre of spirit.

In its action brought before the Finanzgericht Rheinland-Pfalz [Finance Court, Rhineland-Palatinate] on the basis of Paragraph 152 of the Law on the Monopoly in Spirits, Kupferberg seeks the application of monopoly equalization duty at a rate of DM 1 430 per hectolitre of spirit. Its contention is that the rate should be calculated on the basis of the selling price actually applied in the period in question, namely DM 1 683 per hectolitre of spirit, less the basic price for spirits in force at that time, namely DM 253 per hectolitre of spirit. The plaintiff assesses the total amount in dispute at DM 29 033.07.

The selling price of DM 1 683 per hectolitre of spirit was arrived at because, following the Court's judgments in *Manghera*, [1] *Rewe-Zentrale* [2] and *Miritz*, [3] the Federal Monopoly Administration (Bundesmonopolverwaltung) cut the normal selling price (regelmässiger Verkaufspreis) of DM 1 833 per hectolitre of spirit by DM 150 per hectolitre of spirit in order to remain competitive with imported alcoholic beverages. However, neither the reduced selling price of DM 1 683 per hectolitre of spirit nor the normal selling price of DM 1 833 per hectolitre of spirit was used to calculate the spirits surcharge (Branntweinaufschlag) levied on spirits not sold to the Federal Monopoly Administration or the monopoly equalization duty (Monopolausgleich) on imported spirits. Instead, by decision of the Federal Minister for Finance (circular No III A 2 — V 7030 — 32/76 of 23 March 1976) both the spirits surcharge and the normal monopoly equalization duty were fixed at the same level as the tax on spirits, that is to say at DM 1 500 per hectolitre of spirit, as from 23 February 1976. That unusual state of affairs ended — less than four weeks later — on 18 March 1976 when the amendment to the Law on the Monopoly in Spirits, which has already been the subject of a judgment of the Court in the case of *Hansen GmbH*, [4] entered into force and the tax on spirits was raised.

By judgment of 13 February 1978 the court making the reference found in favour of the plaintiff. On appeal on a point of law by the Hauptzollamt, the Bundesfinanzhof [Federal Finance Court], by a decision of 5 August 1980, quashed the judgment and remitted the matter to the Finanzgericht for a fresh ruling. The Bundesfinanzhof held, *inter alia*, that the selling price of DM 1 683 per hectolitre of spirit which was actually applied on 23 February 1976 was not the normal selling price for spirits to be used to determine the amount of the normal monopoly equalization duty within the meaning of Paragraph 152 of the Law on the Monopoly in Spirits. The normal selling

1 — Judgment of 3 February 1976 in Case 59/75, *Pubblico Ministero* v *Flavia Manghera and Others*, [1976] ECR 91.

2 — Judgment of 17 February 1976 in Case 45/75, *Rewe-Zentrale des Lebensmittel-Großhandels GmbH* v *Hauptzollamt Landau/Pfalz*, [1976] ECR 181.

3 — Judgment of 17 February 1976 in Case 91/75, *Hauptzollamt Göttingen and Bundesfinanzminister* v *Wolfgang Miritz GmbH & Co.*, [1976] ECR 217.

4 — Judgment of 13 March 1979 in Case 91/78, *Hansen GmbH & Co.* v *Hauptzollamt Flensburg*, [1979] ECR 935 (the second Hansen case).

price for spirits continued to be DM 1 833 per hectolitre of spirit, with the result that the aforementioned calculation method yielded a normal monopoly equalization duty of DM 1 580 per hectolitre of spirit. It found that the levying of equalization duty of DM 1 500 per hectolitre of spirit was proper under national law. In addition, the Bundesfinanzhof considered that Articles 9, 12, 13 and 37 of the EEC Treaty had not been infringed and that, in view of the extensive case-law of the Court of Justice, it was not necessary to apply to the Court for a preliminary ruling. Nevertheless, it considered that it was possible that Article 95 of the EEC Treaty together with Article 3 of the Agreement between the EEC and Spain and the first paragraph of Article 21 of the Agreement between the EEC and the Portuguese Republic had been infringed in so far as the Finanzgericht might find that comparable domestic spirits not subject to the requirement to be sold to the Federal Monopoly Administration had received concessionary treatment under Paragraphs 79 (2) and 79a of the Law on the Monopoly in Spirits.

When the case came before it again, the Finanzgericht took the view that the Bundesfinanzhof had not ruled on the question whether reducing the selling price for spirits by DM 150 by *de facto* administrative action while at the same time retaining the former selling price for the purpose of calculating the monopoly equalization duty on imported spirits was compatible with Articles 37 and 95 of the EEC Treaty and with the corresponding provisions of the Agreements with Spain and Portugal. Accordingly by order of 6 October 1983 the Third Senate of the Finanzgericht stayed the proceedings and, referring to the Court's judgment in *Pabst & Richarz*[5] which had since been delivered submitted the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Should Articles 37 and 95 of the EEC Treaty, together with Article 3 of the Agreement of 29 June 1970 between the European Economic Community and Spain and the first paragraph of Article 21 of the Agreement of 22 July 1972 between the European Economic Community and the Portuguese Republic, be interpreted to mean that an importer of spirits from other Member States and from Spain and Portugal may invoke the aforesaid provisions before a national court, on the ground that the Federal Monopoly Administration for Spirits (Bundesmonopolverwaltung für Branntwein) lowered its selling price for spirits between 23 February and 17 March 1976 by DM 150 per hectolitre of spirit, namely from DM 1 833 to DM 1 683 per hectolitre of spirit, whereas it retained the selling price of DM 1 833 per hectolitre of spirit during the same period for the purpose of calculating the monopoly equalization duty (Monopolausgleich) on imported spirits?'

2. My views on that question are as follows:

I consider it appropriate to deal first with the question of the taxation of the products originating in other Member States of the Community from the point of view of Articles 95 and 37 of the EEC Treaty and then with that of the taxation of the products imported from Spain and Portugal from the point of view of the prohibition of discrimination embodied in the Agreements between the EEC and those two countries.

2.1. *Consideration from the point of view of the EEC Treaty*

2.1.1. The plaintiff considers that the imported spirits suffered discrimination with respect to similar or competing domestic products in the period in question, namely from 23 February to 17 March 1976. It maintains that, *vis-à-vis* imported spirits, the fixing of the selling price for spirits performs a characteristic function of a monopoly and that therefore Article 37 of the EEC Treaty is applicable. Since that

5 — Judgment of 29 April 1982 in *Pabst & Richarz KG* v *Hauptzollamt Oldenburg*, [1982] ECR 1331.

price, in turn, performed a function with regard to the calculation of duty, in so far as it determined the amount of the import duties, there was also an infringement of Article 95.

(a) However, as far as Article 95 is concerned, the plaintiff overlooks the fact that during the period in question, contrary to the arrangements set out in the Law on the Monopoly in Spirits, the import duties on spirits and the tax on domestic alcohol which was not subject to the requirement to be sold to the Federal Monopoly Administration were no longer calculated on the basis of the normal selling price for spirits. Instead, and in contrast with the legal situation which still obtained under the legislation at the time, the arrangements introduced by decision of the Finance Minister were characterized by the fact that they severed the link between the taxation of imported spirits and of domestic spirits not subject to the requirement to be sold to the Federal Monopoly Administration and the price at which the Federal Monopoly Administration sold its spirits. As a result, the tax on the consumption of spirits was fixed at a *uniform* rate of DM 1 500 per hectolitre of spirit irrespective of whether it was the *tax on spirits, the spirits surcharge or the monopoly equalization duty.* Since, as a result, the tax on products imported from other Member States was neither directly nor indirectly higher than the tax levied on similar or competing domestic products, the criteria set out in Article 95 of the EEC Treaty were, as the defendant Hauptzollamt and the Commission correctly maintain, essentially satisfied.

(b) Nor can any different conclusion be reached as far as Article 37 of the EEC Treaty is concerned. In so far as that provision can be construed as prohibiting discrimination in the field of taxation, that prohibition — as is clear, in particular, from the first *Hansen* judgment [6] — is in substance the same as the prohibition set out in Article 95 of the EEC Treaty and hence does not call for any special consideration.

However, it is questionable whether the fact that the selling price was lowered while the basic price was retained can have any relevance for the purposes of Article 37. According to the Bundesfinanzhof, in so far as Article 37 prohibits discrimination other than tax discrimination in the context of a monopoly, is has no bearing on the present case, which is concerned solely with the level of taxation.

However, the question whether that is in fact the case can, in the final analysis, be left unanswered. The one determinant factor is that the price was decreased with the aim of making domestic spirits competitive with imported products. It is therefore a question, as the Commission also acknowledges, not of a measure peculiar to the State monopoly but of a measure dictated by *competitive forces.*

It is clear, however, from the second *Hansen* case, [4] that such action gives rise to no objection from the point of view of Article 37. In that case the Court held that it was permissible to bring down, with the aid of State funds, the price of a product such as spirit to a level enabling it to be sold. The only restriction was that the monopoly's spirits might not be sold at *abnormally low prices* in relation to imported products. Yet it appears to be uncontested by the parties that the normal selling price of DM 183 net of tax charged by the Federal Monopoly

4 — Judgment of 13 March 1979 in Case 91/78, *Hansen GmbH & Co.* v *Hauptzollamt Flensburg,* [1979] ECR 935 (the second Hansen case).

6 — Judgment of 10 October 1978 in Case 148/77, *H. Hansen jun. & O.C. Balle GmbH & Co.* v *Hauptzollamt Flensburg,* [1978] ECR 1787 (the first Hansen Case).

Administration during the period in question was a *fair market price* compared with the prices of imported spirits. Accordingly in the present case Article 37, too, can provide no basis for objecting to the adjustment of the selling price and for requiring a reduction in import duty.

2.1.2. Apart from those general considerations, the plaintiff contends that the taxation of imported spirit-based products which is at issue in this case is discriminatory in four specific respects which I will now briefly re-examine.

(a) The plaintiff considers Articles 95 and 37, and in particular the stand-still obligation laid down in Article 37 (2), to have been infringed simply by virtue of the fact that the charge to import duty was not calculated in accordance with the provisions of the Law on the Monopoly in Spirits: had those provisions been applied the charge to duty would have been lower.

As against that view it is necessary to level the objection, as the Commission does, that when tax burdens are compared in the context of Articles 95 and 37 of the EEC Treaty the only question of importance, according to the established case-law of the Court, is whether — and this is for the court making the reference to examine — the imported products and corresponding domestic products were *actually and generally* subjected to taxes of the same magnitude. On the other hand, it is not for the Court to deal with the question — already examined by the Bundesfinanzhof — whether the Federal Finance Minister's decision which resulted in the severing of the link between the tax and the selling price and hence in uniform taxation is or is not compatible with the Law on the Monopoly on Spirits. In particular, according to the established case-law of the Court, it may not be inferred from the prohibition of discrimination under Community law that products imported from other Member States should receive more favourable tax treatment than domestic products.

Furthermore, I am quite unable to understand to what degree the reduction in the price of monopoly spirits is supposed to be incompatible with the stand-still obligation in Article 37 (2) of the EEC Treaty or to what extent it is possible to discern in that action a measure equivalent in effect to a quantitative restriction within the meaning of Article 30 of the EEC Treaty. On the contrary, the restriction on imports caused by the monopoly was, as we know, directly eliminated as a result of decisions of the Court. The price was therefore reduced in order to make monopoly spirits competitive with freely imported spirits produced by other Member States.

(b) The second specific instance of discrimination on which the plaintiff relies involves comparison of the tax burden on imported spirits with that on similar domestic spirits, such as fruit brandies, which are *not subject to the requirement to be sold to the Federal Monopoly Administration.* Here too, the plaintiff, referring to the term 'impose' used in Article 95 (1), argues that account must be taken not only of the actual taxation levied on domestic products but also of that taxation which is 'legally permissible'.

As I have already indicated, however, what matters as regards the comparison of the tax burden on imported spirits and that on spirits not subject to the requirement to be sold to the Federal Monopoly Administration is once again the rates of tax that were actually applied during the period in question. As a result of the severance, in this case too, of the link between the spirits surcharge and the Federal Monopoly Administration's selling prices, however, the uniform rate of DM 1 500 was fixed. It is therefore not possible to find that there was any discrimination.

(c) The third specific instance of discrimination on which the plaintiff relies raises the question whether imported spirit-based

products suffer discrimination in comparison with domestic spirits which are *subject to the requirement to be sold to the Federal Monopoly Administration,* such as spirit sold by the Federal Monopoly Administration and used to manufacture liqueurs. The plaintiff acknowledges that during the period in question imported spirits were subject to exactly the same level of direct taxation as the spirit marketed by the Federal Monopoly Administration. Yet when the Federal Monopoly Administration sold such spirits at the original normal selling price for spirits of DM 1 833 per hectolitre of spirit it received tax at the rate of DM 1 500 per hectolitre of spirit as well as the price of the product, namely DM 333 per hectolitre of spirit. When the normal selling price was lowered to DM 1 683 per hectolitre of spirit while the acquisition price for spirits (Branntweinübernahmepreis) remained the same, the Federal Monopoly Administration failed to levy the tax on spirits to the extent of DM 150 per hectolitre of spirit.

Yet, as the Government of the Federal Republic of Germany expressly stated in answer to a question put by the Court, during the period in question the Federal Monopoly Administration collected the tax on spirits *without deduction* and paid it over to the Federal Treasury. In the light of that statement, the accuracy of which I can see no reason to doubt, it is not possible, in this case either, to find that there was any discrimination.

Whether, as the plaintiff considers, the Federal Monopoly Administration was not entitled under national law to incur losses by such means in the period in question is also not for the Court of Justice to determine.

All that matters is that it cannot be inferred from the fact that such a loss was incurred that the Federal Monopoly Administration did not transfer the taxes to the Treasury in full.

(d) The specific instance of discrimination put forward by the plaintiff involves a comparison between imported spirits and the *taxation levied on German grain spirits.* There are two different marketing possibilities for the latter. If more than the amount permitted under the distillation rights granted is produced, the excess must also be sold to the Federal Monopoly Administration. In so far as grain spirit produced within the amount permitted under the distillation rights is concerned, either it can be sold to the Deutsche Kornbranntwein-Verwertungsstelle — a sales organization subject to private law provided for in the Law on the Monopoly in Spirits — at the guaranteed acquisition price or the distiller can market his potable grain spirit himself. The Kornbranntwein-Verwertungsstelle carried out, in respect of the spirit which it sold, the same price reduction as the Federal Monopoly Administration. Since potable spirits marketed directly by the producer were also affected by the operation of the market, the Federal Government made a direct payment of DM 150 per hectolitre of spirit to distillers who marketed their spirits directly as compensation for the decrease in the selling price for spirits. The plaintiff considers that that payment should be regarded in the context of the prohibition of discrimination laid down by Community law, as substantial tax relief for domestic grain spirit and not as an aid.

(aa) With regard to the fact that *the Kornbranntwein-Verwertungsstelle reduced the selling price* while, at the same time, retaining the acquisition price, the plaintiff considers that the judgment in the second Hansen case, [4] holding that a corresponding measure taken by the Federal Monopoly Administration for Spirits was compatible with Community law, is not relevant as regards the action of an organization constituted under private law.

4 — Judgment of 13 March 1979 in Case 91/78, *Hansen GmbH & Co.* v *Hauptzollamt Flensburg,* [1979] ECR 935 (the second Hansen case).

That argument meets with the objection, however, that the form of organization of the Kornbranntwein-Verwertungsstelle cannot in itself justify a different assessment under Community law. Instead, the decisive factor must surely be that the Kornbranntwein-Verwertungsstelle, a body for which provision is made in the Law on the Monopoly in Spirits, has tasks conferred on it, under State supervision, which correspond to those of the Federal Monopoly Administration. In that regard, the action taken by the Kornbranntwein-Verwertungsstelle may be judged differently than the corresponding behaviour of the Federal Monopoly Administration, which was the subject of a detailed appraisal by the Court in the second Hansen case. [4] In that case the Court decided that Article 37 of the EEC Treaty constitutes in relation to Articles 92 and 93 of that Treaty a *lex specialis* in the sense that State measures, inherent in the exercise by a State monopoly of a commercial character of its exclusive right must, even where they are linked to the grant of an aid to producers subject to the monopoly, be considered in the light of the requirements of Article 37.

However, as emerges from that decision, the linking of aid arrangements to the activities of a State monopoly in such a way that producers are guaranteed an acquisition price which is not a fair market price could at most be relevant from the point of view of Article 37 where a (causal) connection exists between the amount of the aid which is granted to the producers in the form of a guaranteed acquisition price and the selling price. The Court found that there was no such connection in that case because of the intervention of the monopoly. Consequently, it must also be assumed that a decline in the earnings of the Kornbranntwein-Verwertungsstelle or any loss, or, ultimately, the offsetting of such loss by the State cannot be the subject of criticism from the point of view of Article 37 or Article 92 *et seq.*

(bb) In contrast, *payments made directly to the distillers marketing their own products,* without the interposition of the monopoly or the Kornbranntwein-Verwertungsstelle, must be seen in a different light. In the Commission's view, the said payments constituted a lawful *aid* and were indeed notified as such. The plaintiff considers that the payments were not aid but an indirect reduction in the tax on spirits, which according to the 'sovrapprezzo' [surcharge] cases (Case 105/76, [7] and Case 73/79, [8]) is not lawful. In the 'sovrapprezzo' cases the Court of Justice held that an internal tax which, formally, placed an identical burden on domestic and imported products but which was used exclusively or principally to finance aids for the sole benefit of domestic products infringed the prohibition of discrimination in taxation contained in Article 95 of the EEC Treaty. However, as the Commission also points out, the judgments in those cases are not relevant to this case for several reasons. First, monopoly equalization duty is a *general* tax levied on importation which, as a tax on consumption, is paid to the Federal Treasury, that is to say into the federal budget, and not into a special support fund for distillers of grain spirit. Secondly, unlike the 'sovrapprezzo', monopoly equalization

4 — Judgment of 13 March 1979 in Case 91/78, *Hansen GmbH & Co.* v *Hauptzollamt Flensburg,* [1979] ECR 935 (the second Hansen case).

7 — Judgment of 25 May 1977 in Case 105/76, *Interzuccheri SpA* v *Società Rezzano e Cavassa,* [1977] ECR 1029.

8 — Judgment of 21 May 1980 in Case 73/79, *Commission of the European Communities* v *Italian Republic,* [1980] ECR 1533.

duty is not intended 'exclusively or principally' to support domestic production and hence to confer upon it an indirect tax advantage. In the present case the aid did not have the aim of creating a tax advantage over imported products for products of distillers of cereal spirits marketing their own products. It was merely intended to put that category of producers in a position to sell their products at fair market prices. If that had not been done, the only result would have been — as the Commission correctly observes — that the distillers of grain spirit would have decided for the more favourable option of selling their spirit to the Kornbranntwein-Verwertungsstelle at the guaranteed acquisition price, rather than attempting to sell it themselves.

Consequently, it only remains to be stated that none of the matters put forward by the plaintiff are open to criticism from the point of view of Articles 95 and 37 of the EEC Treaty.

2.2. *Consideration of the provisions of the Agreements with Spain and the Portuguese Republic*

2.2.1. Both the Agreement with Spain and the Agreement with the Portuguese Republic contain provisions similar to Article 95 of the EEC Treaty concerning the tax treatment of imported products. However, the Agreements in question contain no provision comparable with Article 37 of the EEC Treaty, so that there is no need to examine them in that regard.

Article 3 of the Agreement with Spain reads as follows:

'Any internal fiscal measure or practice giving rise, directly or indirectly, to discrimination between the products of one Contracting Party and like products of the other Contracting Party shall be prohibited.'

The first paragraph of Article 21 of the Agreement with the Portuguese Republic, which has already been interpreted by the Court in *Hauptzollamt Mainz* v *C. A. Kupferberg (Case 104/81* [9]), provides as follows:

'The Contracting Parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting Party.'

2.2.2. The judgment in Case 104/81[9] has already established that Article 21 of the Agreement with the Portuguese Republic covers port wine from Portugal.

As the Commission has, in my view, demonstrated, it must also be accepted that Spanish sherry falls within the scope of Article 3 of the Agreement with Spain.

2.2.3. In Case 104/81 [9] the Court of Justice further held that Article 21 of the Agreement with the Portuguese Republic is *directly applicable* and that traders may rely upon that article before courts in the Community. In view of the wording of Article 3 of the Agreement with Spain and the structure and objectives of that Agreement, that article, as the Commission cogently argues, may not be treated any differently.

2.2.4. In the light of the judgment in Case 104/81 [9] it may also be assumed that the

9 — Judgment of 26 October 1982 in Case 104/81, *Hauptzollamt Mainz* v *C.A. Kupferberg & Cie. KG a. A.*, [1982] ECR 3641.

two provisions have the same aim as Article 95 but a more limited scope given the narrower objectives of the Agreements as compared with the EEC Treaty. Arguing from the greater to the lesser, it can therefore be held that if no objection can be taken under Article 95 to the action of the Federal Monopoly Administration there can *a fortiori* have been no infringement of the two provisions of the Agreements.

2.2.5. As a subsidiary point, it should also be mentioned in conclusion that it is implicit in the judgment in Case 104/81 [9] that traders may rely upon the prohibition of discrimination set out in those two provisions only if there are on the domestic market products which are similar as regards both the method of their manufacture and their characteristics which have in fact benefited from a reduction.

3. I therefore suggest that the question put to the Court should be answered as follows:

Articles 37 and 95 of the EEC Treaty, Article 3 of the Agreement with Spain and Article 21 of the Agreement with the Portuguese Republic must be interpreted as meaning that a comparison of the taxes that were actually and generally applied to imported products, on the one hand, and corresponding domestic products, on the other, is an important factor in considering the question whether a tax levied on imported spirit-based products is compatible with the said articles.

In particular, there are no grounds in the aforementioned articles to justify criticism of the fact that during the period in question, from 23 February 1976 to 17 March 1976, the Federal Monopoly Administration levied a uniform tax on consumption of DM 1 500 per hectolitre of spirit on imported and similar domestic spirits contrary to the method of calculation stipulated in the Law on the Monopoly in Spirits.

9 — Judgment of 26 October 1982 in Case 104/81, *Hauptzollamt Mainz* v *C.A. Kupferberg & Cie. KG a. A.*, [1982] ECR 3641.