JUDGMENT OF THE COURT (sitting as a full Court)

5 October 2004 *

In Case C-475/01,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 6 December 2001,

Commission of the European Communities, represented by E. Traversa and M. Kondou Durande, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by K. Manji, acting as Agent,

intervener,

* Language of the case: Greek.

Hellenic Republic, represented by A. Samoni-Rantou and P. Milonopoulos, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (sitting as a full Court),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, C. Gulmann, J.-P. Puissochet and J.N. Cunha Rodrigues, Presidents of Chambers, R. Schintgen, F. Macken, N. Colneric and S. von Bahr (Rapporteur), Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 September 2003,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2004,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by maintaining in force in respect of ouzo an excise duty lower than that imposed on other alcoholic beverages, the Hellenic Republic has failed to fulfil its obligations under the first paragraph of Article 90 EC.

2 By order of the President of the Court of 25 July 2002 the United Kingdom of Great Britain and Northern Ireland was allowed to intervene in support of the form of order sought by the Commission. It did not lodge a written pleading and was not represented at the hearing of the case.

Legal background

Community legislation

3 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) lays down rules for determining the rate of excise duty for all products falling within its scope. Its scope is defined in Articles 19 and 20.

4 Article 19 of Directive 92/83 provides:

'1. Member States shall apply an excise duty to ethyl alcohol in accordance with this Directive.

2. Member States shall fix their rates in accordance with Directive 92/84/EEC.'

5 Article 20 of Directive 92/83 provides:

'For the purposes of this Directive the term "ethyl alcohol" covers:

— all products with an actual alcoholic strength by volume exceeding 1.2% volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN,

— products of CN codes 2204, 2205 and 2206 which have an actual alcoholic strength by volume exceeding 22% vol.,

— potable spirits containing products, whether in solution or not.'

6 The amount of the excise duty is determined in accordance with Articles 21 to 26 of Directive 92/83. Article 23 allows a reduced rate of excise duty to be applied in certain circumstances and in respect of certain types of product. That article states as follows:

'The following Member States may apply a reduced rate, which may fall below the minimum rate but not be set more than 50% below the standard national rate of duty on ethyl alcohol, to the following products:

...

2. the Hellenic Republic, in respect of those aniseed flavoured spirit drinks defined in Regulation (EEC) No 1576/89 which are colourless and have a sugar content of 50 grams or less per litre, and in which at least 20% of the alcoholic strength of the final product is composed of alcohol flavoured by distillation in traditional discontinuous copper stills with a capacity of 1 000 litres or less.'

National legislation

7 Law No 2127/93 is intended to transpose Directive 92/83 into the Greek legal system.

8 It fixes the basic rate of excise duty at approximately GRD 294 000 per 100 litres of pure alcohol.

9 Article 26 of the same law, however, provides for a reduction of 50% of that basic rate in respect of ouzo so that the amount of excise duty chargeable on that product is only approximately GRD 147 000 per 100 litres of pure alcohol.

Pre-litigation procedure

10 The Commission received a number of complaints that the Greek authorities were applying a reduced rate of excise duty to ouzo and a less favourable rate to other alcoholic beverages such as gin, vodka, whisky, rum, tequila and arak.

11 The Commission considered that this rate differential was incompatible with Article 90 EC and commenced the procedure for failure to fulfil obligations. After giving the Hellenic Republic formal notice to submit its observations, on 10 August 1999 the Commission delivered a reasoned opinion requesting that Member State to adopt the measures necessary to comply with the opinion within two months of its notification. Since the Greek authorities denied that they had infringed Community law as alleged, the Commission brought the present action.

The action

12 It should be noted as a preliminary point that the Commission has emphasised that its action is based exclusively on Article 90 EC and does not relate to Article 23 of

Directive 92/83. In those circumstances, the fact that the Commission did not bring an action for annulment of the latter provision has no bearing on the admissibility of the present action for failure to fulfil obligations.

13 The Commission submits essentially that secondary Community legislation must be interpreted and transposed into the legal orders of the Member States in a way which is compatible with the EC Treaty. In its view, that implies that the existence of a provision of secondary legislation authorising the Member States to impose a reduced rate of excise duty on a national product in no way dispenses them from their obligation to comply with the fundamental principles of that Treaty, including that set out in Article 90 EC. The Commission considers that the Hellenic Republic has infringed the first paragraph of Article 90 EC by applying a reduced rate of excise duty to ouzo alone. According to the Court's settled case-law, if a national system of taxation is to be compatible with Article 90 EC it must exclude any possibility of foreign products being taxed more heavily than similar domestic products.

14 The Hellenic Republic denies that its legislation is contrary to Community law. It states that by basing its action solely on Article 90 EC, the Commission failed to take account of the *lex specialis* applicable in the present case, namely Article 23 of Directive 92/83, which enables that Member State to apply a reduced rate of excise duty to ouzo. The Hellenic Republic also denies that ouzo is similar to other alcoholic beverages such as gin, vodka and whisky.

15 As to those submissions, it should be pointed out at the outset that Article 23(2) of Directive 92/83 authorises the Hellenic Republic to apply to ouzo a rate of excise duty lower than the minimum rate, provided that it is not more than 50% below the standard national rate of duty on ethyl alcohol.

16 It is not in dispute that the Hellenic Republic relied on Article 23(2) of Directive 92/83 when it fixed the rate of excise duty applicable to ouzo at 50% of the rate set for other alcoholic beverages and that, in so doing, it complied with the terms of that provision.

17 In those circumstances, the Commission's action, which seeks directly to challenge the rate of excise duty that the Hellenic Republic was authorised to apply to ouzo on the basis of Article 23(2) of Directive 92/83, indirectly but necessarily amounts to a challenge to the lawfulness of that provision.

18 Measures of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (see, to that effect, Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48, and Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR I-4643, paragraph 93).

19 By way of exception to that principle, measures tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality (*Commission* v *BASF and Others*, paragraph 49, and *Chemie Linz* v *Commission*, paragraph 94).

20 The gravity of the consequences attaching to a finding that a measure of a Community institution is non-existent means that, for reasons of legal certainty, such a finding might be reserved for quite extreme situations (*Commission* v *BASF and Others*, paragraph 50, and *Chemie Linz* v *Commission*, paragraph 95).

21 However, neither Directive 92/83 as a whole nor Article 23(2) thereof can be regarded as a non-existent measure.

22 It should be added that that directive has not been withdrawn by the Council and that Article 23(2) thereof has not been annulled or declared invalid by the Court.

23 In those circumstances, Article 23(2) of Directive 92/83 produces legal effects which are presumed to be lawful.

24 It follows that since the Hellenic Republic has done no more than maintain in force national rules adopted on the basis of Article 23(2) of Directive 92/83 and which comply with that provision, it has not failed to fulfil its obligations under Community law.

25 In the light of the foregoing, it must be found that the Hellenic Republic has not failed to fulfil its obligations under Community law by maintaining in force in respect of ouzo a rate of excise duty lower than that applied to other alcoholic beverages.

26 The Commission's action for failure to fulfil obligations must therefore be dismissed as unfounded.

Costs

27 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Hellenic Republic has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the United Kingdom, which has intervened, is to bear its own costs.

On those grounds, the Court (sitting as a full Court) hereby:

1. **Dismisses the action;**

2. **Orders the Commission of the European Communities to pay the costs;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.**

Signatures.