2. **To extend the system of graduated rates of tax laid down for home-produced beer to beer imported into a Member State by applying those rates to the quantity of beer imported yearly by a single importer, while at the same time taxing home-produced beer with reference to the quantity of beer produced during one year by each brewery, is incompatible with the first paragraph of Article 95 in so far as beer coming from a brewery of another Member State during one year bears a higher tax than that levied on an equivalent quantity of beer produced by a domestic brewery during the same period.**

3. **If therefore a Member State has elected to apply to home-produced beer a graduated tax calculated on the basis of the quantity which each brewery produces in one year, the first paragraph of Article 95 is only fully complied with if the foreign beer is also taxed at a rate, the same or lower, applied to the quantities of beer produced by each brewery during the period of one year.**

Lecourt Kutscher Donner

Mertens de Wilmars Pescatore Sørensen Capotorti

Delivered in open court in Luxembourg on 22 June 1976.

A. Van Houtte
Registrar

R. Lecourt
President

## OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 2 JUNE 1976

*My Lords,*

This case comes to the Court by way of a reference for a preliminary ruling by the Finanzgericht of Düsseldorf. The events giving rise to the proceedings before that Court were importations of beer from Belgium into the Federal Republic of Germany effected between November 1968 and September 1969. The importer was Bobie Getränkevertrieb GmbH, which is the plaintiff in the proceedings before the Finanzgericht. The defendant in those proceedings is the Hauptzollamt

of Aachen-North. The importations in question amounted to about 52 700 hl in 1968 and to about 45 260 hl in 1969. They were all from a single Belgian brewery, namely the Martens brewery at Bocholt.

The questions referred to the Court by the Finanzgericht are about the interpretation of the first paragraph of Article 95 of the EEC Treaty, which, Your Lordships remember, is in these terms:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products'.

It appears that in the Federal Republic of Germany beer is taxed under a statute passed on 14 March 1952, the Biersteuergesetz.

By virtue of paragraph 3 of that statute beer brewed in Germany is taxed at graduated rates, the purpose being to allow in the case of small and medium-sized breweries for the more favourable conditions under which large breweries produce. Thus the first 2 000 hl of a brewery's annual production are taxed at the rate of DM 12 per hl, the next 8 000 at DM 12·30, the next 10 000 at DM 12·60 and so on. The top rate, 15 DM per hl, is payable on so much of a brewery's production for any year as exceeds 120 000 hl. The result is that the lower a brewery's production, the lower the average rate of tax on the beer it produces. Figures obtained by the Finanzgericht and set out in its order for reference evince that, in 1968 and 1969, the average rate paid on the whole production of the Federal Republic was about DM 13·90 per hl, the variation between the two years being very small.

Originally beer imported into Germany bore tax at a flat rate of DM 15 per hl. In respect at all events of imports from other Member States of the EEC, that rate was reduced to DM 14·40 hl by an amendment of the Biersteuergesetz which came into force on 1 June 1968, i.e. a few months before the first importation in question in this case.

All the rates I have mentioned are those applicable to ordinary beer ('Vollbier'), which was the kind of beer imported by the plaintiff. There are lower rates for lighter beers and higher rates applicable to stronger beers. These are irrelevant in the present case and, throughout this opinion, my references to 'beer' simpliciter are intended as references to ordinary beer.

The Commission, we were told, has always held that the German system of taxation of beer was incompatible with Article 95 of the Treaty, but it has taken the view that the problems presented by that system, and by similar systems in other Member States, could never satisfactorily be solved except by the harmonization of the relevant taxation laws of all the Member States. The Commission, it seems, submitted proposals for that purpose to the Council in 1972, but they have so far come to nothing.

As an interim measure the Commission, on 29 July 1966, addressed to the Member States that had graduated systems of taxation on beer a recommendation (which is not published in the *Official Journal)* that they should tax imports of beer from other Member States at the rate applicable to the production of a 'typical' brewery, which was defined as one producing 300 000 hl of beer a year. It was in compliance with this recommendation that the Federal Republic reduced the rate of tax on its imports from other Member States to DM 14·40 per hl.

The plaintiff was of course assessed to tax on the importations here in question at the rate of DM 14·40 per hl. After unsuccessfully challenging the

assessments through administrative channels, it brought the present proceedings before the Finanzgericht, contending that the reduction in the rate of tax on imports from other Member States to DM 14·40 per hl was not sufficient to comply with the Federal Republic's obligations under Article 95. The plaintiff argued that there was no legal foundation for the criterion of the 'typical brewery', and it claimed to be entitled to be assessed at the rate that would have been applicable under paragraph 3 of the Biersteuergesetz to beer produced by a brewery whose total annual production equalled its (the plaintiff's) total imports from other Member States in each relevant year. I will for convenience call the basis of assessment thus contended for by the plaintiff 'the aggregate imports basis'.

The defendant for its part contended before the Finanzgericht that the assessments made on the plaintiff were perfectly valid. It relied in particular on the circumstance that the relevant laws of the Member States had not yet been harmonized and on the Commission's recommendation of 29 July 1966.

Those rival contentions are reflected in the questions referred to this Court by the Finanzgericht, whose order for reference is dated 26 November 1975, i.e. before this Court delivered Judgment in Case 45/75, *Rewe-Zentrale* v *Hauptzollamt Landau/Pfalz,* on 17 February 1976.

Those questions are (in slightly abbreviated form) as follows:

1. Was it compatible with the first paragraph of Article 95 of the Treaty to charge on beer imported into the Federal Republic from other Member States in 1968 or 1969 tax at the rate of DM 14·40 per hl prescribed by the Biersteuergesetz as amended, when the average rate of tax imposed on home-produced beer was about DM 13·90 per hl and some of this beer bore a lower rate of tax than imported beer because of the graduation of the tax provided for by paragraph 3 of the Biersteuergesetz?
2. If not, would it be compatible with the first paragraph of Article 95 for beer imports to be taxed at the rates laid down in paragraph 3 of the Biersteuergesetz on the basis of the yearly importations by the relevant importer from other Member States (i.e. on the basis that I have called 'the aggregate imports basis')?
3. If the answer to the second question is in the negative, on what basis should the rates of tax to be applied be ascertained, and within what limits should they be kept, in order to comply with the requirements of the first paragraph of Article 95?

No-one now contends that the first question should be answered in the affirmative. Before this Court the Government of the Federal Republic conceded that, in the light of the Judgment of the Court in Case 45/75, that question must be answered in the negative. There can in my opinion be no doubt that that concession was rightly made. Thus the only comment that is called for from me on that question is the obvious one that, in so far as the question refers in terms to the Biersteuergesetz, this Court is thereby invited to go beyond its jurisdiction. It is trite law in this Court that its jurisdiction, in cases referred to it under Article 177 of the Treaty, is confined to ruling on questions of Community law and that it must leave it to the national Court by which the reference has been made to apply that ruling to the facts of the case, a process that includes deciding whether the provisions of a national statute are compatible with Community law as evinced by that ruling.

I therefore think that, in answering the first question, Your Lordships should follow, *mutatis mutandis, the* precedent set by the Judgment of the Court in Case 45/75 and rule that the first paragraph of Article 95 should be interpreted as

forbidding the imposition of taxation on an imported product in a way different from that applying to the similar domestic product in so far as this may lead to higher taxation on the imported product and, in particular, as forbidding the imposition of tax at graduated rates in one case and at a flat rate in the other.

The relevance of the second question lies of course in the fact that, if the first question is answered in the negative and the second in the affirmative, the plaintiff may be entitled to succeed in its claim to be taxed on the 'aggregate imports basis'.

On behalf ot the Government of the Federal Republic it was submitted that, whilst Article 95 did not forbid the adoption of that basis of assessment, it did not require it either, so that, in the absence of German legislation prescribing that basis of assessment, the plaintiff was not entitled to it. It was explained in that connexion that the purpose of the German system was to help small breweries, not to help small merchants.

On behalf of the Commission it was contended that the aggregate imports basis would be incompatible with Article 95. In this respect I agree with the Commission. It is not difficult to figure a case of a large German merchant importing a wide range of beers from different Member States, some of them produced perhaps in relatively small breweries. The aggregate annual imports of such a merchant might significantly exceed the annual production of some of those breweries taken individually. The adoption of the aggregate imports basis of assessment would then result in the beer produced by those small breweries bearing a higher rate of tax in Germany than would beer produced in German breweries of the same size. The truth is that the 'aggregate imports basis' of assessment would be just as blunt an instrument of taxation of imports as a flat rate. It could operate to the advantage of imports in some cases, but to their detriment in others.

I therefore think that Your Lordships should answer the second question in the negative, again eschewing any express reference to the Biersteuergesetz.

To my mind the really difficult question in this case is the third.

The Government of the Federal Republic expressed, in its written observations, a doubt whether that question was admissible. I sympathize to some extent with the Federal Government on that, because the question is in very general terms and virtually amounts to an invitation to the Court to lay down how imports into Germany of beer from other Member States should be taxed.

It is however in my opinion clear that the Court cannot leave the question unanswered. The Finanzgericht is entitled to guidance from this Court as to what the plaintiff's rights are on the footing that (as I think) both the first and second questions fall to be answered in the negative, i.e. on the footing that Article 95 permits taxation of the plaintiff's imports neither on the flat rate basis prescribed by the Biersteuergesetz nor on the 'aggregate imports' basis contended for by the plaintiff.

The Commission contends that the only possible answer to the third question is that imports from other Member States may not be taxed at any rate higher than the lowest rate applicable to any beer brewed in Germany, which means in effect that they must uniformly be taxed at the rate of DM 12 per hl applicable to the first 2 000 hl of a brewery's annual production. The Commission acknowledges that this is not a very satisfactory answer, but says that, in the absence of harmonization of the relevant taxation laws of the Member States, it is the only answer that secures compliance with Article 95, because it is the only answer that ensures that no beer imported from

another Member State bears tax at a rate higher than is borne by any German beer.

The Federal Government, understandably enough, objects that that answer would do much more than secure compliance with Article 95. It would confer a positive advantage on imported beer, particularly since, as is accepted by the Commission, there no longer remains in Germany any brewery producing as little as 2 000 hl a year.

The Federal Government invites the Court, if (as I think) it must answer the third question, to have regard in doing so to a new system of taxing imports of beer from other Member States that has been introduced in the Federal Republic — with, if I may say so, remarkable and commendable speed — in order to take account of the Court's Judgment in Case 45/75.

That Judgment was, as I have mentioned, delivered on 17 February 1976. The Federal Government's written observations in the present case were dated 4 March 1976. As appears from them, the new system, although not yet in force at that date, was in preparation. At the hearing, which took place on 20 May 1976, Counsel for the Federal Government told us that the system was now in force and he outlined to us how it worked.

The purpose of the system is to assimilate the rate of tax on beer produced in any brewery situate in another Member State to that which would be borne on beer produced in Germany in a brewery having the same annual production. As I understand it, instructions have been issued to the German Customs to ask every importer of beer originating in another Member State to identify the brewery where it was produced and state what that brewery's total production was in the previous year. The rate of tax on that beer is then fixed by reference to tables showing the average rate of tax that would be borne by a German brewery producing the same amount. We were told that, to allow for the fact that German breweries are charged to tax monthly on the basis of their production for the current year, whereas imported beer is charged on the basis of the previous year's production of the brewery from which it originates, a system of refunds is provided for, enabling an importer to claim back an appropriate part of the tax where it turns out that there has been a drop in the relevant brewery's production between the previous year and the current year. On the other hand there is no additional assessment where it turns out that the relevant brewery's production has increased in the current year, so that, in this respect, the system advantages imports. Nonetheless Counsel for the Federal Government acknowledged that minor differences in the incidence of tax would remain owing to the necessarily different systems of assessment and collection. It also appears that, for a reason that was not, I think, explained, the new system is not applied where the foreign brewery's production is over hl 300 000 a year.

The Commission argued that, leaving aside such matters, the adoption of that system would not secure compliance by the Federal Republic with Article 95, because what that Article required was not the equal treatment of breweries but the equal treatment of products. All that the Federal Republic was doing, the Commission said, was to export its policy of helping small breweries, which was irrelevant in the context of Article 95.

In my opinion the Court cannot in this case rule upon the merits of the new German system as such. Not only is the Court, despite the assistance it received from Counsel at the hearing, underinformed about the details of that system, but the system was not in force in 1968 and 1969 when the importations here in question were effected. It was not even in force when the Finanzgericht

made its order for reference. The merits of that system as such are therefore clearly outside the scope of this reference.

That is not however to say that the Court cannot rule on the question of principle raised by the contentions of the Commission and of the Federal Government and thereby effectively help the Finanzgericht to decide this case. That question is whether a Member State that imposes upon a product a tax graduated according to the size of the production units where it is made must, in order to comply with Article 95, impose on the similar products of other Member States tax at no more than the lowest rate provided for in its domestic scale or may apply that scale to such products according to the size of the production units from which they originate.

It seems to me that to answer that question in the manner contended for by the Commission would boil down to saying that Article 95 forbade the maintenance in force of any such graduated system, for no Member State could in practice retain such a system if precluded from doing so except at the price of conferring on imports from other Member States the advantage of being taxed uniformly at the lowest rate.

There are undoubtedly arguments for saying that such a graduated system is undesirable because it encourages inefficient production. But, to those, there are counterarguments. The German system applicable to beer may well keep in business breweries that would otherwise have to close, to the advantage not only of themselves but also of those beer-lovers who prefer to have a wider choice than would be left to them if all beer production were concentrated in the big breweries. The important point in my opinion is that such arguments belong to the domain of social and economic policy, a domain different from that of Article 95, which is concerned only with levels of taxation. It is in my opinion impossible to interpret Article 95 as directed to the elimination of graduated systems of taxation of the kind here in question.

I would therefore reject the contention of the Commission. In my opinion, where a Member State has a graduated system of that kind, Article 95 must be applied consistently with that system. All that Article 95 requires is that the products of other Member States should not bear more tax than is imposed on similar domestic products. Where the domestic products are classified for tax purposes according to the size of the production units where they are made, it seems to me that the requirements of Article 95 are satisfied if the products of other Member States are treated in the same way. In the present case this means that the Finanzgericht will have to ascertain as best it can what was the total production of the Martens brewery in 1968 and 1969 and determine the plaintiff's tax liability on that basis.

In the result, I am of the opinion that Your Lordships should answer the third question referred to the Court by the Finanzgericht by saying that, where a Member State imposes upon a product a tax graduated according to the annual output of the production units where it is made, Article 95 should be interpreted as forbidding the imposition of taxation on an imported product at a higher rate than would be applicable if the production unit from which it originated had been situate in that Member State.