JUDGMENT OF THE COURT
26 June 1991 *

In Case C-153/89,

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

Kingdom of Belgium, represented by J. Devadder, Assistant Adviser at the Ministry for Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, assisted by Paul Bastin, Inspector General at the Ministry for Finance, acting as Agents, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

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 Belgian brewing industry and in any event exceeds that of certain Belgian breweries, the Kingdom of Belgium 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, at which the Kingdom of Belgium was represented by M. Hoebaer, acting as Agent,

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 Belgian brewing industry and in any event exceeds that of certain Belgian breweries, the Kingdom of Belgium 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 16 December 1983, pursuant to Article 169 of the EEC Treaty, the Commission addressed a letter of formal notice to the Belgian Government. According to that letter, the wastage percentages applied by Belgium 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 Belgian breweries was any greater. According to the Commission, under the Belgian 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, the Belgian Government 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 Belgium 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 6 April 1987, the Belgian Government replied that the average size of most of the Belgian breweries was such that their productivity could not match that of the efficient breweries on which the Commission's experts had based their

studies. The Belgian Government also proposed a meeting between the Commission and representatives from the Administration and the Belgian brewers which was in fact held on 9 July 1987. Following this meeting, the Belgian Government sent to the Commission a note accompanied by a study carried out by Dr Wittmann at the request of the Confederation of Belgian Breweries which estimated the rate of loss for beer for export in Belgian breweries to be 10.25%. 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.

Article 95

8 The Commission claims that Belgium applies to imported beer a different system from that for the taxation of domestic beer. Whereas a Belgian 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 Belgium 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 Belgian breweries, even the most efficient ones.

9 The Belgian 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. It contends that the studies by Dr Dalgliesh and Professor Narziss relied on by the Commission were incomplete and inconsistent. It considers that those studies were carried out in foreign breweries and failed to take account of all the characteristics of Belgian beer production.

10 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.

11 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.

12 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).

13 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.

14 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.

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

16 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.

17 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 convenience 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.

18 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%.

19 Belgium puts forward two different reports. The first, drawn up by the Centre Technique et Scientifique de la Brasserie, de la Malterie et des Industries Connexes, concludes that a minimum wastage of 10% is more than reasonable in

view of the particular circumstances of the Belgian brewing industry. The second report, drawn up by Dr Wittmann and based on a study of the four breweries which account for 70% of Belgian production, concludes that a wastage coefficient of 10.25% can be considered appropriate for the Benelux brewing industry. However, addition of the lowest average figures given by Belgium yields a figure of 6.5%.

20 It follows from the experts' reports produced by the Commission 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 Belgian breweries. That conclusion is not contradicted by the reports put forward by Belgium, which do not examine the question of the minimum level of wastage capable of being achieved by a particularly efficient Belgian brewery.

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

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

Article 96

23 With respect to exports, the Commission claims that a Belgian 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, the

Belgian Government has not even been able to prove that that figure represents the average wastage factor.

24 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.

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

26 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.

27 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.

28 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.

29 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 Belgian breweries, the Kingdom of Belgium has failed to fulfil its obligations under Articles 95 and 96 of the EEC Treaty.

Costs

30 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium 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 Belgian breweries, the Kingdom of Belgium has failed to fulfil its obligations under Articles 95 and 96 of the EEC Treaty;

(2) Orders the Kingdom of Belgium 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