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-153/89 *

I — Facts and procedure

Under rules common to the Belgo-Luxembourg Economic Union, in both Belgium and Luxembourg 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, pursuant to Article 96 of the Belgian Inter-ministerial Decree of 25 November 1968 (*Moniteur belge* of 22 December 1968), replaced by Article 26 of the Belgian Ministerial Decree of 28 November 1973 (*Moniteur belge* of 30 November 1973), 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, expressed in terms of hectolitre/degrees. For the calculation of wastage, the quantity of wort arrived at by the conversion

* Language of the case: French.

calculation is increased by 5%, which results in a wastage rate of 4.7619% of hot wort.

Considering that the wastage percentages adopted by Belgium exceeded the real level of wastage in Belgium, and thus went beyond the bounds of Articles 95 and 96 of the Treaty, the Commission wrote to the national authorities on 16 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 Belgian breweries was any greater. According to the Commission, under the Belgian 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, the Belgian Government 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 Belgium 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 Belgium.

By letter of 6 April 1987 the Belgian Government replied that because of the average size of most Belgian production units they could not achieve the productivity achieved by the high-output breweries on which the Commission experts based their report.

The Belgian Government also suggested a meeting between the Commission and representatives of the Belgian administration and of the Belgian brewing industry, and such a meeting was held on 9 July 1987. Thereafter, the Belgian Government sent the Commission a memorandum accompanied by a study prepared by Dr Wittmann at the request of the Confédération des Brasseries de Belgique according to which the rate of wastage in Belgian breweries for exported beers was 10.25%.

Considering that there are Belgian breweries with lower wastage rates and that there must be breweries elsewhere in the Community exporting to Belgium that have a lower wastage rate, 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 Belgian brewing industry and in any event exceeds that of certain Belgian breweries the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty, in particular Articles 95 and 96 thereof;

Order the Kingdom of Belgium to pay the costs.

The *Kingdom of Belgium* contends that the Court should:

Dismiss the application as unfounded;

Order the Commission to pay the costs.

III — Submissions and arguments of the parties

The *Commission* claims essentially that the Kingdom of Belgium 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 Belgian brewer operating rationally has the benefit of a differential duty in so far as the imported product is always taxed as if the average wastage incurred in Belgium had actually been incurred in each Belgian brewery.

In the Commission's view, Belgium 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 *Bobbie 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 Belgian 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 Belgium 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.

As regards Belgium's objections to the results of the study prepared by Dr Dalgliesh and Professor Narziss, on which the Commission relied, the Commission states that the study took account of all the documentation produced by the Belgian brewing industry. Professor Narziss suggested treating 7.95% as the central rate, with an upward or downward variance of 1.5%. and the Commission considers that, for evidential purposes, matters can be taken no further.

The fact that there can be no under-compensation in the case of many small breweries producing special top-fermentation beers is a problem which affects only Belgium and cannot, in the Commission's view, be invoked to justify failure to fulfil obligations under Articles 95 and 96 of the Treaty.

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, as is apparent from the judgment in Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205. Belgium could, whilst still maintaining the present system for small breweries not producing for export, make an exact estimate of the wastage rates in other breweries. But, having chosen a flat-rate system, the Belgian Government must prove that that system remains within the limits of Articles 95 and 96 of the Treaty.

The *Belgian Government* states in the first place that the Commission, which bears the burden of proof, was not able to prove the existence of any over-compensation. It contends in that regard that the study prepared by Dr Dalgliesh and Professor Narziss, on which the Commission relied, contains omissions and inconsistencies. In its view, the studies were carried out at foreign breweries and did not take account of all the features of brewing processes in Belgium.

Belgium then refers to the study prepared by Dr Wittmann at the request of the Confédération des Brasseries de Belgique according to which the rate of wastage in Belgian breweries for exported beers is 10.25%. It considers that it is for the Commission to prove that study to be incorrect.

Finally, the Belgian Government contends that the use of a flat-rate system for calculating countervailing charges on imports and export refunds, with a view to avoiding the costs involved in estimating the wastage rate for each brewery, does not infringe the Treaty. It refers to the Court's judgment in Case 45/64 *Commission* v *Italian Republic* [1965] ECR 857, which does not exclude recourse to a flat-rate system even where Article 97 of the Treaty is not applicable.

G. C. Rodríguez Iglesias
Judge-Rapporteur