# JUDGMENT OF THE COURT
12 March 1987 *

In Case 176/84

**Commission of the European Communities,** represented by R. C. Beraud, Principal Adviser, and X. Yatanagas, a member of the Commission's Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, also a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

**Hellenic Republic,** represented by S. Perrakis, Special Adviser at the Ministry of Foreign Affairs, and A. Ambariotou, Special Legal Assistant at the Ministry of Foreign Affairs, assisted by V. Skouris, University Professor, having an address for service in Luxembourg at the Greek Embassy, 117 val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by prohibiting the importation into Greece of beers manufactured in other Member States which do not comply with the requirements laid down in Greek legislation, the Hellenic Republic has failed to fulfil its obligations under Article 30 *et seq.* of the EEC Treaty,

## THE COURT

composed of: Lord Mackenzie Stuart, President, Y. Galmot, C. Kakouris, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due, U. Everling, K. Bahlmann, R. Joliet, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: Greek.

having regard to the Report for the Hearing as supplemented further to the hearing on 14 May 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 18 September 1986,

gives the following

## Judgment

1 By an application lodged at the Court Registry on 6 July 1984, the Commission of the European Communities has brought an action under Article 169 of the EEC Treaty for a declaration that, by prohibiting the marketing of beers lawfully manufactured and marketed in another Member State if they do not comply with the requirements laid down in the Greek legislation, the Hellenic Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty.

2 Reference is made to the Report for the Hearing for the facts of the case, the course of the procedure and the arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

### The applicable national law

3 In the course of the proceedings before the Court, the Greek Government gave the following account of its legislation on beer, which was not contested by the Commission and is to be accepted for the purposes of these proceedings.

4 Under Law No 2963 of 1922 amending the legislation governing the taxation of beer (Greek Government Gazette No 134/1922, Part One) (hereinafter referred to as the 'Beer Tax Law'), the excise duty on beer is calculated not on the basis of the quantities of beer produced but on the quantities of malted barley utilized to manufacture it.

5 Article 3 of that law sets out the rules on the manufacture of beer, which apply as such only to breweries established in Greece. Article 3 (2) provides that beer must be manufactured exclusively from malt and hops and Article 3 (4) prohibits the addition to beer during or after its manufacture of malt extracts, glycerine, glycyrrhizin, dextrose or sugar, dextrine or other starches, or other substitutes for malt, or extra alcohol. The original version of the law itself made provision for fines to be imposed on brewers marketing beer manufactured in breach of Article 3. Article 8 of the Decree-Law of 1923 amending and supplementing the Beer Tax Law (Greek Government Gazette No 384/1923, Part One) provides for the imposition of other, stricter, criminal sanctions on persons manufacturing beer from materials other than malted barley and hops.

6 Article 7 of the Code on Foodstuffs and Beverages (Greek Government Gazette No 677/1971, Part Two) (hereinafter referred to as the 'Food Code') provides that imported foodstuffs must fulfil all the conditions applying to foodstuffs of Greek origin. As a result, beers produced abroad may not be imported into Greece unless they are manufactured exclusively from malted barley and hops.

7 In conjunction with other provisions of the Food Code, the Beer Tax Law further prohibits the use of any additive or enzyme in beer.

8 Prompted by considerations relating to the protection of public health, Article 29 (4) of the Food Code prohibits the addition of any additive to foodstuffs. Additives are defined in Article 3 (8) as 'inorganic or organic chemical substances alien to the foodstuff whose presence is not justified by the nature and composition of the foodstuff'. That definition covers enzymes. Moreover, Article 3 (8) also prohibits the marketing of any foodstuff containing additives.

9 However, the principle of the prohibition of the use of additives is not absolute. On the one hand, the Food Code, which itself lays down the ingredients which

may be used in the manufacture of the most common foodstuffs and beverages, expressly authorizes the use of certain additives in certain foodstuffs and beverages. On the other hand, Article 29 (4) provides that the Chemistry Commission may authorize the use of certain additives in a specific product where such a possibility is not afforded by the Food Code itself.

10 Article 144 (4) of the Food Code refers to the Beer Tax Law as regards the rules on the manufacture and marketing of beer. Since the Beer Tax Law does not expressly authorize the use of additives or enzymes it follows that it is prohibited in principle under Article 29 (4) of the Food Code. Moreover, as far as beer is concerned, the Chemistry Commission has never exercised its power to authorize the use of specific additives pursuant to Article 29 (4).

11 As a result, there is an absolute ban in Greece on marketing beers from other Member States which were manufactured from raw materials other than those stipulated in Article 3 of the Beer Tax Law or contain additives or in whose manufacture enzymes were used.

**The subject-matter of the proceedings**

12 It must be established whether the proceedings are limited to the prohibition on the marketing of beers from other Member States manufactured from raw materials other than those laid down by the Beer Tax Law or whether they extend to the ban on the marketing of beers from other Member States containing additives or in whose manufacture enzymes were used.

13 In its letter giving the Hellenic Republic formal notice and in its reasoned opinion, the Commission's objections were directed against the provisions of the Beer Tax Law in so far as they preclude the importation into Greece of beers which, although lawfully manufactured in other Member States, have not been manufactured in accordance with the requirements laid down in the Greek legislation. The Commission took the view that that marketing prohibition could not be justified on the ground that it was necessary to satisfy imperative requirements relating, in particular, to the efficacy of fiscal supervision or, under Article 36 of the Treaty, to protecting public health.

14 In its reply to the reasoned opinion the Greek Government explained that its legislation on beer was necessary in order to protect public health since the use of raw materials other than malted barley and hops rendered necessary the use of additives and enzymes. However, it did not explain the exact scope of the prohibition set out in the Beer Tax Law or its relationship to the legislation on additives.

15 In the statement of the grounds it relies on in its application the Commission complains of the barriers to imports resulting from the application of the Beer Tax Law to beers manufactured in other Member States from raw materials other than malted barley and hops or not fulfilling certain manufacturing criteria.

16 It was only when it submitted its defence that the Greek Government stated that the rules on beer were based in fact on two separate but complementary pieces of legislation, and provided the description of its legislation which is given above.

17 In its reply the Commission set out its separate objections to the prohibition on the marketing of beers from other Member States manufactured from raw materials other than those prescribed in the Beer Tax Law and to the prohibition on the marketing of beers from other Member States containing additives or in whose manufacture enzymes have been used.

18 In those circumstances there are two reasons why it must be considered that the application is directed both against the prohibition on the marketing of beers from other Member States manufactured from raw materials other than those prescribed by the Beer Tax Law and against the prohibition on the marketing of beers from other Member States containing additives whose use is authorized in the Member State of origin but prohibited in Greece or in whose manufacture enzymes have been used.

19 In the first place, the Commission identified the substance of the infringement from the outset in so far as from the beginning of the pre-litigation procedure it challenged the prohibition on the marketing of beer imported into Greece from other Member States which is not brewed in accordance with the rules in force in

Greece. It referred to the Beer Tax Law in the grounds on which its application was based only in order to specify those rules. Moreover, as the Greek Government has made clear, that law is not restricted in scope to raw materials but also covers additives, including enzymes.

20 In the second place, it must be observed that, from the start of the procedure, the Greek Government itself raised in its defence mainly arguments concerning additives and the protection of public health which shows that it understood and acknowledged that the subject-matter of the proceedings also covered the prohibition on the marketing of beers containing additives or in whose manufacture enzymes have been used and makes it clear that it has not been denied the right to a fair hearing in that respect.

**The prohibition on the marketing of beers manufactured from raw materials other than those prescribed by the Beer Tax Law**

21 It must be noted in the first place that the manufacturing rules set out in the Beer Tax Law are at issue in these proceedings only in so far as Article 7 of the Food Code extends the application of that law to cover beers imported from other Member States.

22 The Commission concedes that as long as harmonization has not been achieved at Community level the Member States retain the right to lay down rules governing the manufacture, the composition and the marketing of beverages. It considers, however, that the prohibition on the marketing of beers manufactured by methods other than those prescribed by the Beer Tax Law constitutes a measure having an effect equivalent to a quantitative restriction which is not justified by any imperative requirement relating to the efficacy of fiscal supervision or consumer protection. Effective fiscal supervision could be achieved perfectly well by a system of taxation of the finished product, which, in the event of the frontiers being opened, would prevent domestically produced beers from being in any way placed at a disadvantage. Moreover, consumer protection could be secured by means of labelling or notices. Lastly, the Greek legislation on beer is not intended to safeguard public health since the manufacture of beers from raw materials other than malted barley does not necessarily entail the use of additives. Moreover, although the use of such raw materials does necessitate the use of amyolitic enzymes, such enzymes are harmless to health.

23 The Greek Government maintains in the first place that the prohibition on the marketing of beers from other Member States which have been manufactured from raw materials other than malted barley was justified by imperative requirements relating to the efficacy of fiscal supervision. Since excise duty on beer is charged on the basis of the quantities of malted barley utilized, to open the frontiers to beers manufactured from other raw materials would have the effect of giving those beers a tax advantage over Greek beers. Furthermore, the Greek Government considers that the prohibition on the marketing of beer made from raw materials other than malted barley is intended to prevent consumers from being misled and hence to protect them. Lastly, the Greek Government maintains that its legislation is justified on grounds of the protection of public health. The use of materials other than malted barley and hops necessarily entails the utilization of amyolytic enzymes and additives. Such enzymes are dangerous to health where they are used in products which have not been made from sound raw materials. As far as additives are concerned, their consumption should be minimized in view of the uncertainty about their long-term effects on health.

24 Reference should be made in the first place to a consistent line of decisions of the Court (above all, the judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837), according to which the prohibition of measures having an effect equivalent to quantitative restrictions under Article 30 of the EEC Treaty covers 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.

25 The Court has also consistently held (in particular in the judgment of 20 February 1979 in Case 120/78 *REWE-Zentrale AG* v *Bundesmonopolverwaltung* [1979] ECR 469, and the judgment of 10 November 1982 in Case 261/81 *Walter Rau Lebensmittelwerke* v *De Smedt* [1982] ECR 3961) that in the absence of common rules relating to the marketing of the products concerned, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and to imported products without distinction, may be recognized as being necessary in order to satisfy imperative requirements relating *inter alia* to consumer protection and the efficacy of fiscal supervision. It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective, it should choose the means which least restricts the free movement of goods.

26 It is not contested that the application of the Beer Tax Law to beers from other Member States in whose manufacture raw materials other than malted barley have been lawfully used, in particular rice and maize, is liable to prevent them from being imported into Greece.

27 It must be established whether the application of that provision may be justified by imperative requirements relating to the efficacy of fiscal supervision or consumer protection, or, under Article 36 of the Treaty, on grounds relating to the protection of human health.

28 Firstly, as regards the argument relating to the need to ensure effective fiscal supervision, it must be pointed out that Community law does not deprive the Member States of the possibility of selecting whatever method of taxing products they consider most appropriate. However, the Hellenic Republic is not entitled to use its system of taxation as justification for barriers to trade between Member States. If it wishes to prevent beer manufactured from raw materials other than malted barley from enjoying a tax advantage over beers produced in Greece when the frontiers are opened, it merely has to adopt a system of excise duty based on the quantity of finished product and not on the quantity of malted barley used.

29 Secondly, as regards the consumer protection argument, it must be pointed out that the Greek prohibition on marketing is out of proportion with the aim pursued. It could be replaced by a system making it compulsory to indicate the nature of the raw materials used. Such a system of consumer information may operate perfectly well even in the case of a product which, like beer, is not necessarily supplied to consumers in bottles or in cans capable of bearing the appropriate details. Where beers are sold on draught, the requisite information may appear, for example, on the casks or beer taps.

30 Thirdly, as regards whether that prohibition on marketing can be justified under Article 36 of the Treaty by the need to protect human health, it should be noted that it is not contested that the raw materials used as a partial substitute for malted barley are not in themselves dangerous to public health. In so far as the Greek

Government's argument relates to the risks resulting from the utilization of additives and enzymes, that point will be considered below.

31 It follows from the foregoing that by applying the prohibition on marketing resulting from the Beer Tax Law and Article 7 of the Food Code to beers imported from other Member States which were manufactured and marketed lawfully in those States, the Hellenic Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty.

**The ban on the marketing of beers containing additives or manufactured using enzymes**

32 In the Commission's opinion the ban on the marketing of beers containing additives or manufactured using enzymes cannot be justified on public health grounds. It maintains that there should be a presumption that beers which were manufactured in other Member States and contain additives authorized there or in whose manufacture enzymes were used represent no danger to public health. If the Hellenic Republic wishes to oppose the importation of such beers, it bears the onus of proving that they are dangerous to public health. The Commission considers that in this case that burden of proof has not been discharged. The rules on additives and enzymes which are applicable to beer in Greece are disproportionate in any event in so far as they completely preclude the use of additives and enzymes.

33 For its part, the Hellenic Republic considers that, in view of the dangers resulting from the utilization of additives whose long-term effects are not yet known and in particular of the risks resulting from the accumulation of additives in the organism and their interaction with other substances, it is necessary to minimize the quantity of additives ingested. It is especially necessary to preclude the use of additives and enzymes in the manufacture of beer since they are not technologically necessary when beer is manufactured using only the raw materials prescribed by the Beer Tax Law. In those circumstances, the Greek rules on additives and enzymes in beer are fully justified by the need to safeguard public health and do not infringe the principle of proportionality.

34 It is not contested that the prohibition on the marketing of beers containing additives or manufactured using enzymes constitutes a barrier to the importation from other Member States of beers which contain additives authorized in those States or in whose manufacture enzymes were used, and is to that extent covered by Article 30 of the EEC Treaty. However, it must be ascertained whether it is possible to justify that prohibition under Article 36 of the Treaty on grounds of the protection of human health.

35 In so far as additives are concerned, the Court has consistently held (in particular in the judgment of 14 July 1983 in Case 174/82 *Sandoz BV* [1983] ECR 2445) that 'in so far as there are uncertainties at the present state of scientific research it is for the Member States, in the absence of harmonization, to decide what degree of protection of the health and life of humans they intend to assure, having regard, however, to the requirements of the free movement of goods within the Community'.

36 As may also be seen from the decisions of the Court (and especially the judgment of 14 July 1983 in the *Sandoz* case, cited above, the judgment of 10 December 1985 in Case 247/84 *Motte* [1985] ECR 3887, and the judgment of 6 May 1986 in Case 304/84 *Ministère public* v *Muller and Others* [1986] ECR 1511, in such circumstances Community law does not preclude the adoption by the Member States of legislation whereby the use of additives is subjected to prior authorization granted by a measure of general application for specific additives, in respect of all products, for certain products only or for certain uses. Such legislation meets a genuine need of health policy, namely that of restricting the uncontrolled consumption of food additives.

37 However, the application to imported products of prohibitions on marketing products containing additives which are authorized in the Member State of production but prohibited in the Member State of importation is permissible only in so far as it complies with the requirements of Article 36 of the Treaty as it has been interpreted by the Court.

38 It must be borne in mind, in the first place, that in its judgments in the *Sandoz*, *Motte* and *Muller* cases, cited above, the Court inferred from the principle of proportionality underlying the last sentence of Article 36 of the Treaty that prohibitions on the marketing of products containing additives authorized in the

Member State of production but prohibited in the Member State of importation must be restricted to what is actually necessary to secure the protection of public health. The Court also concluded that the use of a specific additive which is authorized in another Member State must be authorized in the case of a product imported from that Member State where, in view, on the one hand, of the findings of international scientific research, and in particular of the work of the Community's Scientific Committee for Food, the Codex Alimentarius Committee of the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization, and, on the other hand, of the eating habits prevailing in the importing Member State, the additive in question does not present a risk to public health and meets a real need, especially a technical one.

39 Secondly, it should be remembered that, as the Court held in its judgment of 6 May 1986 in the *Muller* case, cited above, by virtue of the principle of proportionality, traders must also be able to apply, under a procedure which is easily accessible to them and can be concluded within a reasonable time, for the use of specific additives to be authorized by means of a measure of general application.

40 It should be pointed out that it must be open to traders to challenge before the courts an unjustified failure to grant authorization. Without prejudice to the right of the competent national authorities of the importing Member State to ask traders to produce the information in their possession which may be useful for the purposes of assessing the facts, it is for those authorities to demonstrate, as the Court held in its judgment of 6 May 1986 in the *Muller* case, cited above, that the prohibition is justified on grounds relating to the protection of the health of its population.

41 It must be observed that the Greek rules on additives applicable to beer result in the exclusion of all the additives authorized in the other Member States and not the exclusion of just some of them for which there is concrete justification by reason of the risks which they involve in view of the eating habits of the Greek population; moreover, those rules do not lay down any procedure whereby traders can obtain authorization for the use of a specific additive in the manufacture of beer by means of a measure of general application.

42 As regards more specifically the dangers inherent in the ingestion of additives generally, which, in the Greek Government's view, justify the prohibition on the use of any additive in beer, it must be pointed out that mere reference to the potential risks does not suffice to justify the imposition of an absolute ban on their use in beer when the rules applicable to other products permit the use of additives.

43 As regards the need, and in particular the technological need, for additives, the Greek Government argues that there is no need for additives if beer is manufactured in accordance with the requirements of Article 3 of the Beer Tax Law.

44 It must be emphasized that mere reference to the fact that beer can be manufactured without additives if it is made from only the raw materials prescribed in Greece does not suffice to preclude the possibility that some additives may meet a technological need. Such an interpretation of the concept of technological need, which results in favouring national production methods, constitutes a disguised means of restricting trade between Member States.

45 The concept of technological need must be assessed in the light of the raw materials utilized and bearing in mind the assessment made by the authorities of the Member State where the product was lawfully manufactured and marketed. Account must also be taken of the findings of international scientific research, and in particular the work of the Community's Scientific Committee for Food, the Codex Alimentarius Committee of the FAO and the World Health Organization.

46 Consequently, in so far as the Greek rules on additives in beer entail a general ban on additives, their application to beers imported from other Member States is contrary to the requirements of Community law as laid down in the case-law of the Court, since that prohibition is contrary to the principle of proportionality and is therefore not covered by the exception provided for in Article 36 of the EEC Treaty.

47 That assessment applies *a fortiori* to the prohibition on the marketing of beer manufactured using enzymes. On the one hand, it cannot be seriously argued that such enzymes are dangerous for human health since their utilization in fruit juice is permitted at Community level by Council Directive 75/726/EEC of 17 November 1975 (Official Journal 1975, L 311, p. 40), as amended by Council Directive 79/168 of 13 February 1979 (Official Journal 1979, L 37, p. 27). Furthermore, the Greek Government itself does not deny that the enzymes disappear during manufacture or remain in the finished product only in negligible proportions.

48 In view of the foregoing considerations it must be held that, by prohibiting the marketing of beers lawfully manufactured and marketed in another Member State if they do not comply with the requirements laid down in the Greek legislation, the Hellenic Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty.

## Costs

49 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

## THE COURT

hereby:

**(1) Declares that, by prohibiting the marketing of beers lawfully manufactured and marketed in another Member State if they do not comply with the requirements laid down in the Greek legislation, the Hellenic Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty;**

**(2) Orders the Hellenic Republic to pay the costs.**

Mackenzie Stuart Galmot Kakouris O'Higgins

Schockweiler Bosco Koopmans Due Everling

Bahlmann Joliet Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 12 March 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President