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. 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 manufactured and the findings of international scientific research. 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 a measure of general application.

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 pruduce the information in their possession which may be useful for the purpose of assessing the facts, it is for those authorities to demonstrate that the prohibition is justified on grounds relating to the protection of the health of its population.

REPORT FOR THE HEARING
delivered in Case 176/84*

Contents

I — Facts and pre-litigation procedure 1196
A — The product 1196
B — The legislation 1196
1. The Greek legislation on beer 1196
2. Greek tax provision 1197
3. The Greek legislation on additives 1197
4. The Community directives on harmonization 1198
C — The pre-litigation procedure 1198
II — Conclusions of the parties 1199

* Language of the Case: Greek.

III — Submissions and arguments of the parties 1199
A — The precise scope of the Greek legislation 1199
B — Compatibility of the Greek legislation on beer with Community law 1200
1. Preliminary remarks 1200
2. The argument relating to the protection of public health 1201
(a) Public-health risk in the use of enzymes in beer 1201
(b) Public-health risk in the use of additives other than enzymes in beer 1202
(1) Risks connected with the use of additives other than enzymes 1202
(2) The application of Community law to national legislation on additives 1203
3. The argument relating to the protection of the consumer against being misled 1205
4. The argument regarding the efficacy of the tax rules 1205

I — Facts and pre-litigation procedure

A — *The product*

Beer is a beverage which can be manufactured from malted barley, hops, yeast and water. There are several stages in its manufacture. The first is malting, a process which makes use of the early stages of the natural germination of barley. The soluble components of the malt are extracted with water and may be flavoured by boiling with hops. The result is a 'wort', which is fermented with yeast. Finally, the fermented wort is clarified, matured and drawn off.

It is possible, however, to replace some of the malted barley with raw cereals such as rice, maize or sorghum. The use of such raw cereals in the manufacture of beer is permitted in all the Member States with the exception of the Federal Republic of Germany and Greece. According to the information supplied by the Commission, moreover, all the Member States, again with the exception of the Federal Republic of Germany and Greece, permit certain additives to be used in manufacturing beer.

B — *The legislation*

1. *The Greek legislation on beer*

Greece has adopted a Code of Legislation on Foodstuffs and Beverages (the Food Code), the latest version of which dates from 1971 (Greek Government Gazette No 677/71, Part Two).

Article 144 (4) of the Code provides that beer must 'be manufactured and marketed in accordance with the provisions and requirements of the special legislation relating to beer'.

That special legislation is Law No 2963/1922 (Greek Government Gazette No 134/1922, Part One). Article 3 of the Law provides as follows:

'2. Beer manufactured in Greece must be manufactured exclusively from malt and hops and meet the requirements set out hereunder.

3. Beer intended by the brewers for consumption in Greece or for export must show, on chemical analysis, a minimum extract of the original wort prior to fermentation of 11.50 and a minimum degree of fermentation of 45.

4. The manufacture of beer which does not comply with paragraphs (2) and (3) of this article, the addition to the beer during or after its manufacture of malt extracts, glycerine, glycyrrhizin, dextrose or sugar, dextrine or other starches, or substitutes for barley malt, and the addition of alcohol are prohibited.'

Criminal penalties are laid down by Article 8 of the Decree-Law of 29 December 1923 (amending and supplementing the rules regarding tax on beer) under which:

'any person who makes in Greece beer or malt without due authorization, any person who makes beer from any materials other than malt and hops, and any person who, in the production of beer, uses one of the substances prohibited by law ... shall be liable to imprisonment of between one month and two years and to a fine'.

An emergency law adopted in 1945 (Law No 205/1945) added *inter alia* two paragraphs to Article 3 of Law No 2963/1922, which provided as follows:

'In exceptional cases, the manufacture of beer from starch products other than malt or from extracts of those substances or from malt extracts may be authorized by decree of the Minister for Finance, to be published in the Government Gazette.

Any such decree shall state the raw materials the use of which is authorized by way of exception, the length of time for which they must be subject to processing, the duty to be levied per kilogram of the raw material and any other relevant details.'

The emergency law was repealed with retroactive effect from 1 January 1981 by Article 101 of Law No 1402/1983 adjusting customs and tariff legislation to European Community law (Government Gazette No 167/1983, Part One).

Article 7 (1) of the Food Code provides that imported foodstuffs must comply with the Greek legislation. Consequently beer may be imported only if it is made from malted barley and hops.

2. *Greek tax provision*

Article 2 of the Decree-Law of 29 December 1923 (cited above) provides that the excise duty applicable to beer shall be calculated not on the final product but on the raw materials used. The rate of duty is actually fixed per kilogram of malted barley used.

3. *The Greek legislation on additives*

The Food Code contains a number of provisions governing the use of additives.

Article 29 (4) provides as follows:

'Save where expressly provided for in the provisions of this Code relating to a particular foodstuff, no additive referred to in this chapter may be added to foodstuffs without the authorization of the Chemistry Commission; the use of additives otherwise

than in accordance with these provisions shall be regarded as an act endangering public health and treated accordingly.'

Article 3 (8) prohibits the marketing of foodstuffs containing:

'... inorganic or organic chemical substances alien to the foodstuff whose presence is not justified by the nature and composition of the foodstuff, or residues of such substances resulting from permitted methods of treatment, if the amount of the residues exceeds that resulting from a proper application of such treatment and if they are liable to present a public health risk'.

This definition includes enzymes.

4. *The Community directives on harmonization*

Four Council directives have been adopted in order to achieve a degree of harmonization in national legislation on additives. They are the Council Directive of 23 October 1962 on the approximation of the rules of the Member States concerning the colouring matters authorized for use in foodstuffs intended for human consumption (Official Journal, English Special Edition 1959-62, p. 279); Council Directive 64/54/EEC of 5 November 1963 on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption (Official Journal, English Special Edition 1963-64, p. 99); Council Directive 70/357/EEC of 13 July 1970 on the approximation of the laws of the Member States concerning the antioxidants authorized for use in foodstuffs intended for human consumption (Official Journal, English Special Edition 1970 (II), p. 429); and Council Directive 74/329/EEC of 18 June 1974 on the approximation of the laws of the Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs (Official Journal 1974, L 189, p. 1).

The directives all use the same method: a list of additives is annexed to them and Member States must prohibit the use of additives not listed therein. In addition, the use of any listed additive may not be prohibited altogether. However, Member States are not obliged to authorize the use of substances listed in the annexes in all foodstuffs.

There are no provisions on harmonizing the ingredients which may be used in the manufacture of beer.

C — *The pre-litigation procedure*

The origin of this action lies in a complaint submitted to the Commission in 1981 by the Italian Beer and Malt Association, which claimed that the effect of the Greek legislation was to exclude from the Greek market beer manufactured with raw cereal, although such beer was traditionally produced in almost all the Member States of the Community and was exported to Greece prior to the date of its accession.

Notwithstanding the explanations supplied by the Greek Government, the Commission decided to initiate the procedure laid down in Article 169 of the EEC Treaty, formally notifying the Greek Government of that fact by a letter dated 11 February 1982. The Commission maintained that the Greek legislation on beer was contrary to Articles 30 and 36 of the EEC Treaty because it prohibited the importation and marketing of beer lawfully produced and marketed in other Member States but manufactured from substances other than malted barley or not in conformity with certain requirements regarding its manufacture.

The Commission maintained its views in a reasoned opinion dated 1 August 1983, supplemented by a reasoned opinion dated 3 April 1984.

Since Greece did not terminate the alleged infringement before the time-limit given in the last opinion, the Commission brought this action by an application dated 16 April 1984 and lodged at the Court Registry on 6 July 1984.

II — Conclusions of the parties

The applicant claims that the Court should:

(1) Declare that by prohibiting the importation of beer lawfully produced and marketed in other Member States, but not in conformity with Greek legislation, the Hellenic Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty;

(2) Order the Hellenic Republic to pay the costs.

The defendant contends that the Court should:

(1) Dismiss the Commission's application;

(2) Order the Commission to pay the costs.

III — Submissions and arguments of the parties

A — *The precise scope of the Greek legislation*

The *Commission* states that beer imported from other Member States and not produced in conformity with the requirements of Law No 2963/1922 may be imported into Greece. However, it may not be marketed under the description of 'beer', regardless of whether that description is given in Greek or in another language. The Commission refers to a circular dated 6 December 1980 issued by the State Chemistry Laboratory and distributed to all the chemistry departments and customs offices in the country a few days prior to the entry into force of the Act of Accession. The circular stated that beer imported from other Member States must comply with Law No 2963/1922. If it did not, it would not be released for consumption in Greece under the description of 'beer', and the word 'beer' could not be shown on the packaging either in Greek or in a foreign language.

The Commission also considers that the Food Code does not impose a general prohibition on the use of additives. Article 29 (4) of the Code provides that certain additives may be used as described therein, as may specific additives the use of which has been approved by the Chemistry Commission.

Finally, the Commission expresses its surprise that Law No 1402/1983 repealed with retroactive effect as from 1 January 1981 (the date of Greece's accession) Article 1 of Emergency Law No 205/1945, which permitted beer made from raw materials other than malted barley to be produced and marketed, subject to certain conditions.

The *Greek Government* submits that Article 3 (2) of Law No 2963/1922 in conjunction with Article 7 (1) of the Food Code would make it very difficult to import into Greece beer manufactured from raw materials other than malted barley. It is therefore not correct to maintain that such beer could be

marketed under a different name. The obstacle to importing beer from other Member States is thus not the result of the fact that there is a prohibition regarding its description, but the result of the prohibition on the marketing of beer containing additives and which may, as a result of that, be harmful. It follows from Article 144 (4) of the Food Code and from Law No 2963/1922 that no additive and no enzyme may be used in the manufacture of beer.

The Greek Government also considers that Article 29 (4) of the Food Code lays down quite unequivocally the principle that additives are prohibited. The principle admits of only a very few restrictions. The use of certain additives has been authorized only exceptionally, and always subject to the requirements of the Food Code.

Finally, the Greek Government points out that it informed representatives of the Commission that it intended to repeal Emergency Law No 205/1945 more than a year before the reasoned opinion in this case was issued. The Greek Government also emphasizes the fact that the repeal related to a derogation from the general rules, namely the possibility of producing beer from raw materials other than malted barley. The derogation was made in special circumstances due to the fact that it was wartime, and in any case it was never applied in practice.

B — *Compatibility of the Greek legislation on beer with Community law*

1. *Preliminary remarks*

The *Commission* concedes that the Member States have retained the right to adopt legislation governing the manufacture and marketing of products where there are no common or harmonized rules. However, the prohibition on the introduction of measures having an effect equivalent to quantitative restrictions laid down in Article 30 of the EEC Treaty applies to such legislation and Member States may not plead the absence of harmonization in that connection.

The Court of Justice has held that any product lawfully produced and marketed in a Member State must, in principle, be permitted to enter the market in another Member State. In this instance, the Greek legislation prevents beer lawfully produced and marketed in another Member State from being marketed in Greece. It is true that the legislation applies to national and imported products alike. However, as it is not justified by any overriding requirement or by any of the reasons set out in Article 36 of the EEC Treaty, the Greek legislation must be regarded as a measure having an effect equivalent to a quantitative restriction on importation, and hence prohibited by Article 30 of the EEC Treaty.

The *Greek Government* rejects the assertion that the Member States have only a very restricted power to adopt national rules when there is no harmonization at the Community level. If there is no Community legislation on the matter, there is nothing in principle to prevent the Member States from regulating the composition, manufacture and marketing of products on the national market. Obstacles to free movement of goods resulting from differences between the laws of the Member States must be accepted if, and in so far as, the national legislation is applied to national and imported products alike and may be

justified on the ground that it meets an overriding requirement. In this case, the Greek Government relies on three arguments to justify its legislation: the protection of public health, the protection of the consumer against misrepresentation, and the efficacy of its tax rules.

2. *The argument relating to the protection of public health*

The *Commission* emphasizes at the outset that the Greek Government has submitted no proof that beer manufactured from raw materials other than malted barley may be harmful to public health. It is, however, established in the case-law of the Court that any Member State relying on the existence of an overriding requirement or an exception provided for in Article 36 must supply proof of that fact.

The Commission maintains that it has been established that beer manufactured from raw materials other than malted barley is harmless to health. That is borne out by the fact, first, that ingredients other than barley are used throughout the world in the making of beer. The Commission also relies on the fact that the use of raw cereals was permitted in Greece for some years under Emergency Law No 205/1945. Even if no use was made of that derogation in practice, it constitutes indirect recognition by the Greek Government of the fact that beer made from raw materials other than malted barley is not harmful.

As to the latter point, the *Greek Government* wishes to point out that it is unreasonable to maintain that the existence of an emergency law dictated by circumstance may serve to show that the Greek Government concedes that the manufacture and distribution of beer made from raw materials other than malted barley represents no risk.

Moreover, to underscore its point that the use of additives in beer is a danger to public health, the Greek Government observes that the use of foam stabilizers has led to deaths in a number of countries in the past.

(a) *Public-health risk in the use of enzymes in beer*

The *Commission* concedes that if beer is made from raw cereals rather than from malted barley, amylolytic enzymes have to be used during mashing. The Commission considers, however, that the use of such enzymes does not present a public-health risk because they are already widely used in foodstuffs.

In any case, there is a clear consensus for their free use *inter alia* in fruit juices. For example, two Community directives (Council Directive 75/726/EEC of 17 November 1975, Official Journal 1975, L 311, p. 40, as amended by Council Directive 79/168/EEC of 5 February 1979, Official Journal 1979, L 37, p. 27) permit their use, subject to the condition that the basic ingredients are properly treated in order to eliminate any risk. Proper treatment of the basic ingredients is already the rule throughout the Community.

The *Greek Government* points out that the two directives show that the use of amylolytic enzymes is not without risk: the use of such enzymes is subject to restrictions and requires purity in the raw material and sound technology in its preparation.

In the case of beer, however, it is impossible to determine whether the conditions under which it was manufactured were such as to

eliminate any risk attaching to the use of enzymes. Consequently, in order to avoid any risk to public health it is simpler to prohibit entirely the manufacture of beer for which enzymes are necessary.

The Greek Government stresses that the use of such enzymes in fruit juices, which is permitted in Greece, cannot furnish an argument against the rules concerning beer. In a judgment delivered on 19 September 1984 (Case 94/83 *Heijn* [1984] ECR 3263), the Court of Justice held that the rules governing a certain substance could vary from one foodstuff to another in the same State under the same national legislation.

(b) *Public-health risk in the use of additives other than enzymes in beer*

(1) Risks connected with the use of additives other than enzymes

The *Commission* considers it useful to explain first the Community rules on additives. The basic principle is that an additive may not be used in food unless it has been proved safe. The safety tests generally result in the fixing of an acceptable daily intake (ADI), which is the average amount of a substance expressed in milligrams per kilogram of body weight, which can be ingested daily by the human organism in food, even in a lifetime, without noticeably affecting health, bearing in mind all factors known at the time of the assessment. The ADI usually represents 1% of the intake which has no effect on a laboratory animal. For certain groups of additives it is not even necessary to fix an ADI because the amounts likely to be ingested are in any case too small.

The Commission also points out that additives are the safest elements in our habitual diet. In the first place, a wide safety margin is incorporated in the ADI so as to eliminate any risk. Secondly, there are far more serious threats to public health (traffic, atmospheric pollution and so on). Thirdly, additives are subject to strict controls which do not apply to other natural products presenting a risk, such as tobacco and alcoholic drinks. Finally, it is more or less generally accepted that the risks inherent in the use of additives are lower than any of the other risks connected with human nutrition such as, for example, malnutrition or contamination by microbes.

The *Greek Government* considers that the most important point is the risk inherent in the uncertainty as to the harmful effects of additives on the human organism.

It maintains that the manufacture of beer with additives involves the use of more than 50 different substances and more than 10 categories of substances which have not yet been proved to be absolutely harmless. Numerous chemical combinations which were formerly used have proved to be carcinogenic and have subsequently been prohibited.

There are many risks in using additives, it submits. Those risks are attributable *inter alia* to the inadequacy of scientific data, the impossibility of foreseeing the long-term effects of regular ingestion of additives,

inadequate study of the risks to which certain vulnerable categories of population are exposed, and so on. Moreover, it is not possible to extrapolate from experiments on animals conclusive results applicable to human beings. The risks resulting from interaction with other substances must also not be overlooked.

As regards in particular the acceptable daily intake, the Greek Government points out that scientific research conducted by the Joint Committee of Experts of the Food and Agriculture Organization and the World Health Organization indicates that the ADI is only an approximative guideline and depends on numerous factors which must all be taken into account.

(2) The application of Community law to national legislation on additives

By way of a preliminary remark the *Commission* states that ensuring complete freedom of movement for all products throughout the Community will not alter the total amount of additives consumed in any one Member State. The presence of additives in some imported products will be counterbalanced by their absence in other imported products. In each Member State the result will be the same balance as before.

Proceeding to consider the relevant Community law, the Commission states that the four directives on additives cited above constitute a first step towards harmonization; under no circumstances do they restrict the application of Articles 30 and 36 of the EEC Treaty.

The Commission goes on to analyse the case-law of the Court of Justice on the use of additives, but points out that the cases in question concern substances which were manifestly harmful or the safety of which was uncertain, rather than additives in common use. It draws a number of conclusions from the decisions considered:

(1) In the first place, Member States retain freedom to determine which substances may be authorized.

(2) National legislation on the matter must, *inter alia*, have regard to the principle of proportionality which is implicit in Article 36 of the EEC Treaty. Consequently, the Member States are bound to permit the importation and marketing of products which do not constitute a public-health risk, particularly when the use of additives is required for commercial or technical reasons.

(3) The onus is on the national authorities to show that any restrictions they have imposed comply with the criteria laid down in Article 36.

(4) In view of the uncertainty in scientific circles as to the safety of certain substances, and the fact that food habits differ from one country to another, Article 36 of the EEC Treaty may be applied even where the restrictions adopted by the Member States are not consistent.

In the light of those principles, Member States may adopt a general policy of prevention against the possible risks inherent in the unguarded use of additives in foodstuffs. The Commission even concedes that the application of such a policy may be subject to requirements relating to climate and national food habits. However, the

principle of proportionality requires that any measures which are adopted must govern objectively the use of harmful additives over the whole range of foodstuffs, and must not result in an absolute ban on the importation of a particular foodstuff.

The Commission also concedes that it may be sensible to reduce to the minimum additives used in the manufacture of food, while bearing in mind that they often serve a very useful purpose. Once again, however, the Commission submits that the use of additives should be controlled in a balanced and proportional manner throughout the range of human food, taking into account of course traditional methods of manufacturing products in other Member States without imposing a general prohibition on the manufacture and importation of a particular product.

The Commission also emphasizes that technical requirements dictate the use of additives more widely than the Greek Government appears to admit. Studies undertaken by the Scientific Committee for Food indicate that the use of an additive should be permitted if it results in a definite benefit for the consumer, and that benefit may be technical, economic or even psychological. Technical necessity is the criterion underlying all national legislation on additives. Of course, beer may be produced without the use of additives. Since the Community is a unified economic area, however, the existence of a technical requirement in one part thereof must be recognized in other areas for products which come from that part.

The *Greek Government* repeats its assertion that the main point is that there is general uncertainty as to the risks inherent in the use of additives.

It also points out that Article 36 of the EEC Treaty enables Member States to adopt measures affecting trade between Member States if, and in so far as, those measures are necessary. According to the Greek Government, Article 36 of the EEC Treaty thus confers on the Member States a discretion in deciding how harmful a product is for health. The power conferred on each Member State cannot be binding on the others since that would compel the Member States to adopt uniform legislation based on that of the Member State with the least strict requirements.

In addition, the Greek Government considers that the directives governing additives recognize that protection of public health is an overriding requirement and that the desirability of free movement of goods must be subject to the fact that public health requirements are not protected to the same degree in every Member State.

The Greek Government goes on to submit that free movement should not be permitted for products containing additives as to the safety of which Member States are not agreed. It also points out that the studies undertaken by the Codex Alimentarius Committee of the Food and Agriculture Organization and by the WHO found that additives which had not been proved to be safe should not be used unless their use was a technical requirement. While the nature of the requirement of technical necessity is not entirely clear, there is no doubt that it is possible to make beer without using additives; consequently, there is no technical necessity for their use in this case. In conclusion the Greek Government emphasizes that technical factors or factors relating to hygiene should only be taken into consideration after the health of the general public has been guaranteed.

As far as the principle of proportionality is concerned, the Greek Government points out that the distribution of additives among

foodstuffs still differs very considerably from one Member State to another. The differences are attributable to differences in climate, nutrition, economic conditions and manufacturing conditions. They may also be attributed to different assessments of the health risk presented by a particular additive.

Thus the use of some additives is wholly or largely prohibited by all the Member States, whereas they all permit the use of other additives. As a result, the Greek Government submits, the prohibition on additives in beer-making in Greece is not an exception; it merely serves to show that Member States apply different criteria and reach different conclusions with regard to food. So long as harmonization has not been achieved as required by Article 100 of the EEC Treaty there will be obstacles to intra-Community trade and the principle of proportionality cannot be implemented.

3. *The argument relating to the protection of the consumer against being misled*

The *Commission* points out that the Court has consistently held that the interests of the consumer are sufficiently protected if the packaging of the goods in question bears an appropriate indication of the nature of the product, its ingredients and the additives used in its manufacture.

It is true that Community law has not as yet imposed any obligation on beer manufacturers to include such information on their packaging. All that exists at present is a proposal for a directive submitted by the Commission to the Council.

The Commission points out, however, that the Greek Government could amend its legislation to require beer manufacturers henceforth to indicate the ingredients they have used on their packaging. More detailed labelling of beer would be a measure liable to guarantee free movement of goods whilst ensuring the protection of the consumer and transparency in trade.

The *Greek Government* explains why beer made from barley is of better quality.

It then states that at present consumers may be misled if the importation into Greece of beer made partly from a raw material other than malted barley is permitted. It considers that protecting the consumer against the danger of being misled falls within the concept of public policy envisaged in Article 36 of the EEC Treaty.

Finally, the Greek Government expresses its surprise at being the first Member State to be asked to require manufacturers to label beer adequately, when there is as yet no agreement at Community level on the subject. It is very doubtful of the advisability of thus anticipating the work on harmonization which is still in progress.

4. *The argument regarding the efficacy of the tax rules*

Since excise duty in Greece is calculated on the amount of barley used in the manufacture of the beer, the *Commission* admits that the present tax system in Greece might, if the borders are opened, be more favourable to imported beer which contains less barley than to Greek beer.

However, the Commission points out that the system of taxation applied in Greece is an outdated one which is not applied in any other Member State in the Community.

As a result, it considers that there is nothing to prevent the Greek Government from altering its tax system so as to introduce equal treatment for beer produced in Greece and that imported from other Member States. Even if there is not yet harmonization throughout the Community, the Commission would welcome with satisfaction any amendment of the Greek taxation system which would bring it closer to the future Community system.

In any case, the Commission considers that the delay in harmonizing excise duty on alcoholic drinks cannot be permitted to serve as a pretext for perpetrating an infringement of Community law.

The *Greek Government* outlines the historical background to the system of taxation in force at present, and concludes that its legislation serves the interest of the Treasury and has stood the test of several decades of practice. That system, applied to imported products, is more favourable than it is to beer manufactured in Greece, which contains a much higher quantity of malted barley.

The Greek Government emphasizes that work on harmonizing consumer taxes on beer is currently in progress. Moreover Member States are being allowed a great measure of discretion. Consequently, there can be no obligation as yet to amend the Greek legislation as long as the work on harmonization procedures has not been completed.

R. Joliet
Judge-Rapporteur