In Case 127/75

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Düsseldorf for a preliminary ruling in the action pending before that court between

BOBIE GETRÄNKEVERTRIEB GMBH, Gelsenkirchen,

and

HAUPTZOLLAMT AACHEN-NORD,

on the interpretation of the first paragraph of Article 95 of the EEC Treaty relating to the application of a tax on beer imported into the Federal Republic of Germany coming from other Member States

THE COURT

composed of: R. Lecourt, President, H. Kutscher, President of Chamber, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen and F. Capotorti, Judges,

Advocate-General: J.P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. In the Federal Republic of Germany beer is subject to a tax calculated in accordance with the version of the Biersteuergesetz (Law on Beer Tax) in force on 14 March 1952 (BGBl. I p. 149).

In the case of *home-produced ordinary beer* ('Vollbier') this tax is applied, as provided for in Paragraph 3 of that Law, at a graduated rate. The tax is charged at the rate of DM 12 per hectolitre on the first 2 000 hectolitres per year; the rate increases on the successive amounts up

to DM 15 per hectolitre on quantities exceeding 120 000 hectolitres.

The tax is charged at a lower or higher rate, as the case may be, on beer of other qualitites.

Tax is charged on *ordinary imported beer* at a flat rate of DM 14·40 per hectolitre in accordance with Paragraph 6 (5) of the abovementioned Law as amended on 10 May 1968 (BGBl. I p. 349).

2. During 1968 and 1969 'Bobie Getränkevertrieb GmbH' imported ordinary beer from Belgium into the Federal Republic of Germany, the approximate quantities being 52 700 hectolitres in 1968 and 45 260 hectolitres in 1969. It did not import any other beer from the Community during this period.

These proceedings relate only to those imports through the customs office of Horbach which were taxed at the flat rate of DM 14·40 per hectolitre.

As the company concerned took the view that this form of taxation, which is applied without taking into account the quantities of beer imported, infringes the first paragraph of Article 95 of the EEC Treaty, it lodged a complaint with the Hauptzollamt Aachen-Nord. As this complaint was rejected the said company brought an action before the Finanzgericht Düsseldorf for a declaration that a graduated tax should be charged on the abovementioned imports at the rates laid down by Paragraph 3 of the Law on Beer Tax. The Hauptzollamt has on the other hand argued that Article 95 of the Treaty is not directly applicable to the beer tax, since the national authorities of the importing State do not have at their disposal the data which have to be considered in order to guarantee that imported beer is treated in exactly the same way as home-produced beer.

The Finanzgericht, Düsseldorf, decided, by an order of 26 November 1975, to stay the proceedings and to refer to the Court of Justice pursuant to Article 177 of the Treaty the following questions:

'1. Was it compatible with the first paragraph of Article 95 of the EEC Treaty in 1968 and 1969 for ordinary beer ('Vollbier') imported into the Federal Republic of Germany from the Member States to be subject to a beer tax of DM 14·40 per hectolitre under Paragraph 6 (a) (5) of the Biersteuergesetz (Law on Beer Tax) whilst the amount of beer tax imposed on home-produced beer at that time was only DM 13·897 or DM 13·934 per hectolitre (DM 13·862 or 13·909 per hectolitre) and for some of the latter beer however to be subject to a lower rate of tax than imported beer because of the graduated taxation laid down in Paragraph 3 (1) of the Biersteuergesetz?

2. If not, is it compatible with the first paragraph of Article 95 of the EEC Treaty if beer imports are charged at the rates of tax laid down in Paragraph 3 of the Biersteuergesetz and which arise on the basis of the yearly beer imports by the relevant importers from the Member States of the Communities?

3. If the answer to the second question is in the negative, according to what data must the rates of tax to be applied be ascertained and within what limits must they keep themselves in order to comply with the requirements of the first paragraph of Article 95 of the EEC Treaty?

3. A certified copy of the order for reference was received at the Court Registry on 19 December 1975.

The Government of the Federal Republic of Germany, represented by Martin Seidel, and the Commission of the European Communities, represented by its Legal Adviser Rolf Wägenbaur, have submitted written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without holding any preparatory enquiry.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

A — Observations submitted by the Government of the Federal Republic of Germany

The *German Government* takes the view that the *first question* must be answered in the negative. After recalling the judgment of the Court in Case 45/75 it states that the German authorities have up till now continued to charge the standard rate applicable to beer imports — in the same way as Belgium, the Netherlands and Luxembourg — so as not to anticipate the outcome of the harmonization of taxes on consumption within the Community. The Commission, by a recommendation of 29 July 1966, suggested that the Member States which subject beer production to graduated taxation should maintain for the time being a standard flat-rate tax on imported beer. According to this suggestion the Member States concerned had to tax imported beer at an average rate corresponding to the average amount of tax borne by a typical brewery, that is to say, a brewery producing each year 300 000 hectolitres of beer having a density of 12·5° Balling (the standard with which ordinary German 'Vollbier' complies). The Commission was at that time obviously of the opinion that such a set of rules could be reconciled with the first paragraph of Article 95 of the Treaty.

With regard to the *second question* the German Government states that the first paragraph of Article 95 should be interpreted as meaning that it allows the beer tax graduated according to quantity provided for by Paragraph 3 of the 'Biersteuergesetz' to be levied on imported beer by taking as its base the importer's annual imports of beer, if such a rule was applied in the Federal Republic of Germany.

Levying such a tax on imported beer does not entail levying higher taxes on this beer than those borne by home-produced beer. On the contrary the tax burden on imported beer is not so heavy if the volume of imports is small. Although it is true that the first paragraph of Article 95 prohibits tax discrimination against imported products, nevertheless it does not follow that it prohibits imported products being given more favourable tax treatment.

Accordingly the levying on imported beer of the beer tax graduated according to quantity referred to in Paragraph 3 of the 'Biersteuergesetz' is entirely compatible with the first paragraph of Article 95 of the Treaty in so far as it leads to a system of taxation which favours imported beer.

However, German positive law does not provide for levying the tax referred to in the abovementioned Paragraph 3 on the basis of the yearly imports of beer. On the contrary this tax is only applied to home-produced beer.

The German Government takes the view on the other hand that it is not possible to infer from the first paragraph of Article 95 of the Treaty that such a tax is applicable to imported beer. The effect of levying on imported beer the tax graduated according to quantity on the basis of the volume of yearly imports is that small importers obtain a tax advantage. Even though the tax on beer graduated according to quantity is intended to procure for small and medium-sized undertakings, on the national territory, the equivalent of the more favourable conditions which the large breweries enjoy and in this way to counteract the mergers which are a

feature of the brewing industry, the application of this system to imports causes tax discrimination between the large and small marketing undertakings, without its being possible to discern the justification for such a rule. As the German Government will submit in connexion with the third question, it seems in any event possible to accept, in the context of importations, the application to the 'breweries' of other Member States of the basic principle of a tax on beer graduated according to quantity.

Further, the effect produced by levying the tax in question on imported beer may in practice be that all the imports of beer from the Community are taxed at the lower rates of the graduated tax whatever the yearly production of the brewery of origin. In fact, in so far as deliveries of beer from certain large breweries are effected through a large number of small importers, the whole of these imports can reach the Federal Republic at the lowest rate for each importation. This result also makes it quite impossible to infer from the first paragraph of Article 95 of the Treaty that the tax on beer graduated according to quantity is applicable to imported beer.

The answer to the second question should therefore be as follows:

'The first paragraph of Article 85 of the Treaty must be interpreted as meaning that the taxation of imported beer on the basis of the tax on beer graduated according to quantity applicable to home-produced beer does not contravene the prohibition on tax discrimination against imported beer, but it does not follow from this provision that this system of taxation must be applied to imported beers.'

With regard to the *third question* the German Government first expresses its doubt as to the admissibility of the question in the form in which it is formulated. Having regard to the requirements of Article 177 of the Treaty such a question is admissible to the extent to which its is interpreted as asking whether, in appropriate cases, the levying of the tax graduated according to quantity on foreign breweries where the beer delivered to the Federal Republic originates — the only alternative worth considering along with that of levying the said tax on the imports themselves — is compatible with Article 95 of the Treaty.

The German Government takes the view that there is nothing in the beforementioned Article to preclude the extension of the tax on beer graduated according to quantity to include the breweries of other Member States which deliver beer to the Federal Republic and declares that it will forthwith adopt the necessary measures for this purpose. As such a tax is designed to compensate small and medium-sized breweries for the additional charges which they bear as compared with the large breweries, the effect of extending it so as to include the breweries of other Member States which supply the market of the Federal Republic with beer would be to eliminate the discrimination which has so far been found to exist in the taxation of imported beer. In addition it would prevent any new distortion of competition from occurring, which is quite the opposite of what would happen if the tax on beer graduated according to quantity were applied to imports.

The German Government ends its case by indicating the measures to be taken for the purpose of extending this tax which are of such a nature as to avoid any formal discrimination and at the same time to ensure that the system is applied in a simplified and expeditious manner.

B — Observations submitted by the Commission of the EEC

The *Commission* takes the view that the prohibition stipulated in the first

paragraph of Article 95 of the EEC Treaty is also aimed at flat-rate taxation affecting products imported from another Member State and corresponding more or less to the average of the domestic tax. The effect which the application of a burden of tax based on average figures has on the products affected by it is invariably that some of them receive favourable and others unfavourable treatment. It does not guarantee that in intra-Community trade the tax levied on products imported from other Member States is not higher than that imposed upon similar domestic products. Nor is such a charge the kind of tax which is likely to guarantee the neutrality of Member States in the field of competition.

Naturally the prohibition in the first paragraph of Article 95 does not go so far as to stipulate that Member States must apply to imported products a method of taxation identical to that applicable to similar domestic products. However, if a Member State decides to apply in the case of imported products a different method of taxation, that method would only be accepted to the extent to which it guarantees that the mandatory limits of Article 95 are observed.

If a tax graduated according to quantitiy is levied on similar domestic products, imported products can therefore only be taxed at the lowest level. The application to imports of the rates specified for the taxation of domestic products graduated according to quantity which are based on the yearly imports of beer by the importer concerned, is incompatible with Article 95 of the Treaty, since it does not guarantee that imported products shall not be taxed more heavily than similar domestic products.

Having drawn attention to the case-law of the Court on this point the Commission submits that the question referred should be answered in this way:

'It is forbidden under Article 95 to use a method for calculating the tax to be levied on imported products which does not conclusively rule out the possibility that a higher tax may be charged on imported products than on similar domestic products.

Accordingly Article 95 precludes *inter alia* the levying of a flat-rate tax on imports if similar domestic products are subject to a graduated tax, unless the said flat-rate corresponds to the lower limit of the graduated tax applied in the country in question.

Article 95 therefore also precludes the application of the graduated tax on home-produced products to imports on the basis of the quantities thereof which are imported.'

III — Oral procedure

'Bobie Getränkevertrieb GmbH', represented by Horst Maiwals, the Government of the Federal Republic of Germany and the Commission of the European Communities submitted their oral observations at the hearing on 20 May 1976.

'Bobie Getränkevertrieb GmbH' submitted that the application of the taxation in dispute to beer imported into the Federal Republic of Germany in 1968 and 1969 is incompatible with the first paragraph of Article 95 of the EEC Treaty.

Further, the case-law of the Court shows that any taxation of imported products contravenes the abovementioned provision, even if only minimal amounts are involved, once it leads to any discrimination against these products as compared with national products.

This is what would happen if, following the proposal of the Federal Republic of Germany, beer coming from other Member States were taxed by applying

the tax on home-produced beer graduated according to quantity to exporting breweries having a yearly production of less than 300 000 hectolitres.

The Commission stated during the oral proceedings that the reply which it suggests in its written observation should be given to the national court should be expanded by stating that Article 95 also precludes the application of the graduated tax to imports based on the quantities imported or the quantities produced by the foreign producer.

The Advocate-General delivered his opinion at the hearing on 2 June 1976.

Law

1 By an order of 26 November 1975 which was received at the Court on 19 December 1975 the Finanzgericht, Düsseldorf, referred three questions to the Court under Article 177 of the EEC Treaty relating to the interpretation of the first paragraph of Article 95 of the Treaty establishing the European Economic Community.

These questions were raised during an action brought before that court in connexion with the taxation in the Federal Republic of Germany of imports of ordinary beer from Belgium in 1968 and 1969.

It is apparent from the file that a flat-rate tax of DM 14·40 per hectolitre as provided for in Paragraph 6 of the Biersteuergesetz was levied in the Federal Republic of Germany in 1968 and 1969 on imports of ordinary beer, whereas home-produced beer is subject under Paragraph 3 of this Law to a graduated tax increasing from DM 12 per hectolitre on the first 2 000 hectolitres per year up to DM 15 per hectolitre on quantities exceedings 120 000 hectolitres per year.

The first question

2 The first question is whether it is compatible with the first paragraph of Article 95 of the EEC Treaty for a flat-rate tax of DM 14·40 per hectolitre to be applied under German legislation to ordinary beer imported into the Federal Republic from other Member States whilst the average rate of the tax on the similar domestic product is approximately DM 13·90 per hectolitre and part of the latter product is in any event subject to a lower rate of tax than that applied to imported beer because of the graduated taxation laid down in the abovementioned legislation.

3 As provided for in the first paragraph of Article 95 of the EEC Treaty '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'.

This provision seeks to ensure, by means of the prohibition which it lays down, that an importing Member State does not, by means of internal taxation of imported products and similar domestic products, give domestic traders preferential treatment as compared with their competitors from other Member States who sell similar products on the market of that State.

Although under this provision a Member State may apply to the imported product a system of taxation different from the one to which the similar domestic product is subject, it may only do so if the charge to tax on the imported product remains at all times the same as or lower than the charge applicable to the similar domestic product.

Consequently the first paragraph of Article 95 would be infringed if the tax on the imported product and that applied to the similar domestic product were calculated in a different way and in accordance with different rules, leading, even if only in certain cases, to lower taxation of the domestic product.

4 The answer to the first question must therefore be that the levying by a Member State of a tax on a product imported from another Member State in accordance with a method of calculation or rules which differ from those used for the taxation of the similar domestic product, for example a flat-rate amount in one case and a graduated amount in the other, would be incompatible with the first paragraph of Article 95 of the EEC Treaty if the latter product were subject, even if only in certain cases, by reason of graduated taxation, to a charge to tax lower than that on the imported product.

The second question

5 The next question is whether the first paragraph of Article 95 of the Treaty precludes the taxation of beer imports into the Federal Republic of Germany at the rates laid down in Paragraph 3 of the 'Biersteuergesetz', applied to the quantities of beer imported yearly from other Member States by each importer and not to the quantities of beer produced every year by each brewery.

6 A system of taxation such as the one presently in force in Germany as regards home-produced beer and based on the application of a graduated rate of tax varying according to the quantities produced by a single brewery, is clearly different from a system of taxation based on the application of the same graduated rate of tax according to the quantities which are imported by a single importer but which may come from several breweries of other Member States.

This difference may result in beer imported from a specific country being at a disadvantage as compared with the similar domestic product, if the foreign beer is subject to a tax calculated on the total quantity imported by a single importer in one year which may include beer from several breweries of other Member States, whereas home-produced beer is subject to a tax calculated on the total quantity produced by each brewery.

7 Consequently the answer to the second question referred by the national court must be that to extend the 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 in 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.

The third question

8 The third question asks, should the answer to the second question be in the negative, what are the criteria for calculating the tax rates to be applied to imported beer and within what limits must the said rates be confined in order to comply with the requirements of the first paragraph of Article 95 of the EEC Treaty.

9 Although this provision prevents taxes being levied on the products of other Member States which are higher than the taxes applicable to similar domestic products, it does not however restrict the freedom of each Member State to establish the system of taxation which it considers the most suitable in relation to each product.

Consequently the application to home-produced beer of a graduated tax calculated on the basis of the yearly production of each brewery is a matter which falls within the discretion of each State.

However, it is the system of taxation chosen by each Member State in relation to a specific domestic product which constitutes the point of reference for the purposes of determining whether the tax applied to the similar product of another Member State complies with the requirements of the first paragraph of Article 95 or not.

10 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.

Costs

11 The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities which have submitted observations are not recoverable and, since the proceedings are, so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Finanzgericht, Düsseldorf, by order of 26 November 1975, hereby rules:

1. **The levying by a Member State of a tax on a product imported from another Member State in accordance with a method of calculation or rules which differ from those used for the taxation of the similar domestic product, for example a flat-rate amount in one case and a graduated amount in another would be incompatible with the first paragraph of Article 95 of the EEC Treaty if the latter product were subject, even if only in certain cases, by reason of graduated taxation, to a charge to tax lower than that on the imported product.**

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