

JUDGMENT OF THE COURT (Fifth Chamber)

24 February 2000 *

In Case C-434/97,

Commission of the European Communities, represented by H. Michard and E. Traversa, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and G. Mignot, Foreign Affairs Secretary in that Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by maintaining in force the provisions of Article 26 of Law No 83-25 of 19 January 1983 on the scope and tax base of the 'social security' contribution levied on alcoholic beverages, the French Republic has failed to fulfil its obligations under Article 3(2) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), read in conjunction with, in particular, Article 20 of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Sixth Chamber, acting as President of the Fifth Chamber, L. Sevón, C. Gulmann, J.-P. Puissochet and M. Wathelet (Rapporteur), Judges,

Advocate General: A. Saggio,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 February 1999, at which the Commission was represented by H. Michard and the French Republic by S. Seam, Foreign Affairs Secretary in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 1 July 1999,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 22 December 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by maintaining in force the provisions of Article 26 of Law No 83-25 of 19 January 1983 on the scope and tax base of the 'social security' contribution levied on alcoholic beverages, the French Republic has failed to fulfil its obligations under Article 3(2) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1) ('the excise duty directive'), read in conjunction with, in particular, Article 20 of Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages (OJ 1992 L 316, p. 21) ('the directive on structures').

The Community legislation

- 2 The third recital in the preamble to the excise duty directive states:

‘whereas the concept of products subject to excise duty should be defined; whereas only goods which are treated as such in all the Member States may be the subject of Community provisions; whereas such products may be subject to other indirect taxes for specific purposes; whereas the maintenance or introduction of other indirect taxes must not give rise to border-crossing formalities’.

Article 3 of the excise duty directive provides in this regard:

‘1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

3. Member States shall retain the right to introduce or maintain taxes which are levied on products other than those listed in paragraph 1 provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States.

Subject to the same proviso, Member States shall also retain the right to levy taxes on the supply of services which cannot be characterised as turnover taxes, including those relating to products subject to excise duty.'

- 3 The provisions relating to the structure and rate of excise duty on mineral oils, alcohol and alcoholic beverages, and manufactured tobacco are contained in specific directives. The directive on structures harmonises, in particular, the excise duties on alcohol and alcoholic beverages. Article 19 of that directive requires Member States to apply an excise duty to ethyl alcohol.

4 Article 20 of that directive provides:

‘For the purposes of this Directive the term “ethyl alcohol” covers:

- all products with an actual alcoholic strength by volume exceeding 1.2% volume which fall within CN codes 2207 and 2208, even when those products form part of a product which falls within another chapter of the CN,
- products of CN codes 2204, 2205 and 2206 which have an actual alcoholic strength by volume exceeding 22% vol.,
- potable spirits containing products, whether in solution or not.’

5 Article 21 of the directive on structures fixes the excise duty on ethyl alcohol per hectolitre of pure alcohol at 20 °C, this duty being calculated by reference to the number of hectolitres of pure alcohol. In contrast, Articles 9(1) and 13(1) of the directive provide that the excise duty levied by Member States on wine and fermented beverages other than wine and beer is to be fixed by reference to the number of hectolitres of finished product.

The national legislation

- 6 Article 26 of Law No 83-25 introduced, for the benefit of the Caisse Nationale d'Assurance Maladie (National Sickness Insurance Fund), a contribution levied on tobacco and alcoholic beverages on the ground of the health risks involved in immoderate use of those products ('the "social security" contribution'). Paragraphs II and IV of Article 26 provide:

'II. With regard to alcoholic beverages, the contribution is payable on purchases by consumers of beverages having an alcohol content greater than 25% by volume.

...

IV. With regard to alcoholic beverages, the amount of the special contribution is fixed at FRF 1 per decilitre or fraction of a decilitre ...'

The pre-litigation procedure and the action for failure to fulfil obligations

- 7 While it acknowledged that the 'social security' contribution pursued a specific purpose within the meaning of Article 3(2) of the excise duty directive, the Commission took the view that its scope and tax base were not compatible with the structure of excise duties on alcohols and alcoholic beverages, as defined by the directive on structures.

- 8 The Commission first pointed out that the ‘social security’ contribution was levied on beverages having an alcohol content greater than 25% by volume. Article 20 of the directive on structures sets out a definition of ‘ethyl alcohol’ which covers, *inter alia*, all alcoholic beverages falling within CN codes 2204 (wines), 2205 (vermouths) and 2206 (other fermented beverages) which have an actual alcoholic strength by volume exceeding 22% vol. The difference in scope between the French legislation and the directive on structures is thus equivalent to the creation, within the Community tax category for ‘ethyl alcohol’, of a specific sub-category of alcoholic products not envisaged by that directive.
- 9 Second, Article 21 of the directive on structures retains, as the tax base for excise duty on ethyl alcohol, the number of hectolitres of pure alcohol, whereas the ‘social security’ contribution is determined by reference to the volume of the beverage.
- 10 It was for those two reasons that the Commission, by letter of formal notice of 14 February 1996, pointed out to the French Government that the ‘social security’ contribution could not be covered by the derogation provided for under Article 3(2) of the excise duty directive.
- 11 In its reply of 25 April 1996, the French Government informed the Commission that the interpretation proposed by the latter rendered Article 3(2) of the excise duty directive entirely ineffective. In the French Government’s view, that provision requires Member States to comply only with ‘the tax rules applicable for excise duty [or value added tax] purposes’ and does not require them to adopt the rules applicable to excise duty or value added tax (‘VAT’).

- 12 By reasoned opinion of 12 February 1997, the Commission restated its position and called on the French Government to adopt the measures necessary for compliance with the Community legislation within two months of receiving that opinion. Since the French Government did not take any measures to give effect to the reasoned opinion, the Commission brought the present action.
- 13 According to the Commission, Article 3(2) of the excise duty directive must be interpreted restrictively in so far as it allows Member States to introduce derogations from the harmonised system of excise duties. Consequently, Member States may maintain or create other indirect taxes for specific purposes only if they comply with the tax rules applicable for excise duty and VAT purposes. Apart from being contrary to the wording of that provision, any other interpretation would legitimise the establishment of indirect national taxation in parallel with excise duty. This would threaten attainment of the objective of the excise duty directive, which is to ensure free movement of goods subject to excise duties within the internal market, since it would generate complexity and create legal uncertainty for traders in other Member States.
- 14 Consequently, when Member States exercise the option of maintaining or creating additional indirect taxes on products subject to excise duty, they must ensure compliance with the existing Community framework, particularly in regard to the products covered and the tax base of the Community taxes.
- 15 Against this, the French Government argues that, if the Commission's position were to be accepted, Article 3(2) of the excise duty directive would authorise Member States only to increase the existing excise duty. Such an interpretation would prevent them from pursuing specific purposes, since they would be unable to modify taxation in other particulars than the rate charged. This would

consequently render Article 3(2) of the excise duty directive entirely ineffective. Furthermore, the Commission has never been able to identify the type of specific tax, distinct from the harmonised excise duty, which that provision, as interpreted by the Commission, would authorise.

- 16 Finally, the French Government submits that the ‘social security’ contribution satisfies the conditions laid down by Article 3(2) of the excise duty directive. In particular, its method of calculation is the most appropriate for securing the objective of public-health protection. By being applied to the volume of the beverage rather than to the percentage of alcohol which it contains, the contribution is imposed uniformly on beverages having an alcohol content between 25% and 50% by volume, which are the most widely sold.

Findings of the Court

- 17 It should be observed at the outset that the harmonisation achieved by the excise duty directives and by those on structures is no more than partial. The latter are essentially confined to classifying products on the basis of objective factors, connected in particular with the production methods employed, to defining the conditions governing chargeability to excise duty, to organising a system for circulation of the products subject to excise duty, to determining the tax base of the excise duties and to fixing minimum rates.
- 18 Moreover, it was in view of the different fiscal traditions in the Member States in this regard and the frequent recourse to indirect taxes for the purpose of

implementing non-budgetary policies that the Council inserted Article 3(2) in the excise duty directive.

- 19 That provision is designed to allow the Member States to establish, in addition to the minimum excise duty fixed by the directive on structures, other indirect taxes having a specific purpose, that is to say, a purpose other than a budgetary purpose.
- 20 Apart from the need for a specific purpose, the enabling power thus conferred on the Member States requires compliance with certain tax rules. However, the language versions of the directive diverge in two respects on this point.
- 21 The Court has consistently held in regard to a situation of this kind that, where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (see, *inter alia*, Case 187/87 *Saarland and Others v Minister for Industry, Post and Telecommunications and Tourism and Others* [1988] ECR 5013, paragraph 19).
- 22 Further, where there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, *inter alia*, Case C-372/88 *Milk Marketing Board of England and Wales v Cricket St Thomas Estate* [1990] ECR I-1345, paragraph 19).
- 23 First, in the German, Spanish, French, Italian and Portuguese versions, the use of the word 'or' establishes an alternative between compliance with the Community tax rules applicable for excise duty purposes and compliance with those

applicable for VAT purposes, whereas the term ‘and’ featuring in the English, Danish, Finnish, Greek, Dutch and Swedish versions appears to call for cumulative compliance with those rules.

- 24 VAT and excise duty have a number of incompatible characteristics. VAT is proportional to the price of the goods on which it is charged, whereas excise duty is primarily calculated on the volume of the product. Further, VAT is levied at each stage of the production and distribution process (input tax paid on the occasion of the previous transaction being in principle deductible), whereas excise duty becomes payable when the products subject to it are made available for consumption (without any similar deduction mechanism coming into operation). Finally, VAT is characterised by its general nature, whereas excise duty is imposed only on specified products. Consequently, if Article 3(2) of the excise duty directive were to be construed as requiring Member States to comply simultaneously with the tax rules governing those two categories of charges, it would be laying down a condition that is impossible to satisfy.
- 25 Second, in its English, Danish, Finnish, Dutch, Portuguese and Swedish versions, the excise duty directive requires compliance with the tax rules applicable for excise duty and VAT purposes. In its German version, in contrast, it requires Member States only to comply with the principles of taxation (‘Besteuerungsgrundsätze’) in regard to excise duty or VAT. For their part, the Spanish, French, Greek and Italian versions use circumlocutions such as ‘las normas impositivas aplicables *en relación* con los impuestos especiales o el IVA’, ‘les règles applicables *pour les besoins* des accises ou de la TVA’, ‘κανόνες φορολόγησης που ισχύουν για τις ανάγκες των ειδικών φόρων κατανάλωσης και του ΦΠΑ’, ‘le regole di imposizione applicabili *ai fini* della accise o dell’IVA’.

- 26 In this regard, it follows both from a comparison of paragraphs 2 and 3 of Article 3 and of the third recital in the preamble to the excise duty directive, which envisages concomitantly the hypotheses contemplated by Article 3, that that directive is intended to prevent additional indirect taxes from improperly obstructing trade. That would, in particular, be the case if traders were subject to formalities other than those provided for by the Community legislation on excise duty or VAT, in view of the fact that such formalities are liable to vary from one Member State to another.
- 27 In those circumstances, it must be held that Article 3(2) of the excise duty directive does not require Member States to comply with all rules applicable for excise duty or VAT purposes as far as determination of the tax base, calculation of the tax, and chargeability and monitoring of the tax are concerned. It is sufficient that the indirect taxes pursuing specific objectives should, on these points, accord with the general scheme of one or other of these taxation techniques as structured by the Community legislation.
- 28 It is accordingly necessary to examine, in light of the foregoing considerations, the two complaints which the Commission has raised against Law No 83-25.
- 29 The Commission first criticises the fact that the French charges do not apply to the category of alcoholic beverages, as defined by the directive on structures, in full.
- 30 That complaint, it need merely be observed, relates to the substantive scope of the directive on structures. Article 3(2) of the excise duty directive does not, on this

point, demand compliance with the tax rules applicable for excise duty or VAT purposes.

- 31 Second, the Commission contends that the amount of the ‘social security’ contribution is proportionate to the quantity of beverage, irrespective of its alcohol content.
- 32 It should be pointed out that this tax base is consistent with the general scheme of the tax rules applicable for excise duty purposes. Nor, moreover, is it precluded by the directive on structures. The latter takes the quantity as the tax base for excise duty on wine and fermented beverages other than wine and beer (see Articles 9 and 13 of the directive on structures).
- 33 In light of the foregoing considerations, the application must be dismissed.

Costs

- 34 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the French Republic has applied for the Commission to be ordered to pay the costs and the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;
2. Orders the Commission of the European Communities to pay the costs.

Moitinho de Almeida

Sevón

Gulmann

Puissochet

Wathelet

Delivered in open court in Luxembourg on 24 February 2000.

R. Grass

D.A.O. Edward

Registrar

President of the Fifth Chamber