

JUDGMENT OF THE COURT
3 December 1987 *

In Case 136/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal d'instance (District Court), Saintes (Charente-Maritime), for a preliminary ruling in the proceedings pending before that Court between

Bureau national interprofessionnel du cognac (National Inter-trade Board for Cognac), Cognac,

v

Yves Aubert, residing at Saint-Porchaise,

on the compatibility with Article 85 of the EEC Treaty of certain measures establishing marketing and storage quotas for alcohol

THE COURT,

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

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

after considering the observations submitted on behalf of

the Bureau national interprofessionnel du cognac, the plaintiff in the main proceedings, by Philippe Calmels,

Yves Aubert, Saint-Porchaise, the defendant in the main proceedings, by C. Thiollet, of the Angoulême Bar,

* Language of the Case: French.

the United Kingdom, by David Donaldson, QC, of Gray's Inn,

the Commission of the European Communities, by Giuliano Marengo, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 2 June 1987,

after hearing the opinion of the Advocate General delivered at the sitting on 15 September 1987,

gives the following

Judgment

- 1 By a judgment of 26 May 1986, which was received at the Court on 4 June 1986, the tribunal d'instance, Saintes (France), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 85 of the EEC Treaty in order to determine the compatibility with the competition rules of the fixing of production quotas for Cognac spirits and levies intended to ensure compliance therewith.
- 2 Those questions were raised in the context of proceedings brought by the Bureau national interprofessionnel du cognac (hereinafter referred to as 'BNIC'), whose headquarters is in Cognac, against Yves Aubert, a wine-grower living in Saint-Porchaire, for the payment of FF 7 916.02, representing the levy due by Mr Aubert for exceeding the marketing quota established in the circumstances set out below.
- 3 As appears from the judgment of the national court and the file in the case, BNIC is an inter-trade body in the wine and cognac sector and was set up by ministerial order of 5 January 1941. BNIC is financed by parafiscal charges. The Order of the Ministry for Agriculture of 18 February 1975 (*Journal officiel de la République française*, 26 February 1975), which was in force at the material time, provides as follows:

‘The bureau national interprofessionnel du cognac shall be composed of:

- (a) Two persons, one representing wine-growers and the other representing dealers in the area defined by the decree of 1 May 1909;
- (b) Upon submission of lists drawn up by the trade organizations concerned:

- 19 delegates of wine-growers and distilling cooperatives,
- 19 delegates of dealers and commercial distillers,
- a delegate of the Syndicat des vins vinés (Fortified Wine Association),
- a delegate of the producers of Pineau des Charentes,
- a delegate of the brokers,
- a delegate of ancillary industries,
- a delegate of managerial staff (trade),
- a delegate of Cognac cellar workers,
- a wine technician,
- a vineyard worker.

No person carrying on the trade of a dealer, broker, distiller or a related trade may represent producers, and vice versa.

The members of the Board shall be appointed for three years by order of the Minister for Agriculture. They may be reappointed.

The following persons shall attend meetings of the Board and may take part in discussions in a consultative capacity:

the Directors of Agriculture and of Taxation for Charente and Charente-Maritime;

the Divisional Inspector of the Anti-fraud Department;

the officials responsible for the economic and financial control of the Board.'

Furthermore, a president and a government commissioner are appointed by the Minister.

- 4 According to the internal rules of BNIC in force at the material time, its members are organized in two 'families' or groups, dealers and wine-growers. After each group has adopted its own position by qualified majority, following internal negotiations, they may, according to Law No 75-600 of 10 July 1975 on inter-trade organization in agriculture, supplemented and amended by Law No 80-502 of 4 July 1980, enter into agreements intended to promote the monitoring of supply and demand, the adjustment and regularization of supply, the implementation, subject to State control, of marketing rules, prices and conditions of payment, product quality, inter-trade relations in the sector concerned and the sale of the product on domestic and external markets.
- 5 By virtue of the combined effect of Articles 2 and 5 of that law, on application by the General Assembly of BNIC the agreement may be made generally binding by ministerial order, and the effect of such a measure is to make the agreement binding upon all members of the trades making up the trade organization concerned.
- 6 The first paragraph of Article 3 of the abovementioned law provides that: 'recognized inter-trade organizations as referred to in Article 1 may charge all members of participating trades levies established by agreements made generally binding according to the procedure laid down in the preceding article; notwithstanding their binding nature, such levies remain debts subject to private law'.
- 7 On 29 October 1979, the government commissioner attached to BNIC, acting on the basis of the deliberations of that body on 18 October 1979, adopted a 'decision' regulating certain matters in regard to the 1979/80 marketing year. A production quota consisting of a marketing quota and a storage quota for pure alcohol per hectare was fixed, together with levies to be paid when those quotas were exceeded. The funds raised by the implementation of that decision were to be

used in part to pay subsidies to wine-growers who had been unable to sell their 'marketing quota' in whole or in part and who agreed not to produce cognac from it (FF 300 per hectolitre of pure alcohol), and in part to finance, *inter alia*, the study and identification of outlets (other than cognac and Pineau des Charentes) for musts and wines from the specialized white vineyards of the defined region of Cognac.

- 8 The greater part of that decision was incorporated in an inter-trade agreement concluded within BNIC on 23 November 1979.
- 9 The agreement was made generally binding by Ministerial Order of 2 January 1980, adopted under Law No 75-600.
- 10 It was on the basis of those provisions that BNIC brought proceedings before the tribunal d'instance, Saintes, against Yves Aubert for the payment of levies for exceeding the marketing quota. That court referred the following questions to the Court of Justice for a preliminary ruling:
 - '(1) Are provisions establishing production quotas consisting of a marketing quota and a storage quota compatible with the provisions of Article 85 of the Treaty of Rome in so far as they are intended to limit the production of a product in order to maintain its quality?
 - (2) If they are not so compatible, is a levy based on such a quota compatible with those provisions of the Treaty of Rome?'
- 11 The national court's questions seek essentially to ascertain whether:

an inter-trade agreement entered into by two groups of traders in the framework and in accordance with the procedure of a body such as BNIC which provides for the payment of a levy where a production quota for pure alcohol per hectare is exceeded is contrary to Article 85 (1) of the EEC Treaty;

a ministerial order which makes such an agreement generally binding is contrary to the obligations imposed on Member States by Article 5 of the EEC Treaty read together with Articles 3 (f) and 85 thereof.

The compatibility of the inter-trade agreement with Article 85 (1) of the Treaty

- 12 BNIC claims first of all that Article 85 (1) is not applicable in this case since what is involved is not an agreement but a measure adopted by the public authorities.
- 13 That argument must be rejected. As the Court decided in its judgment of 30 January 1985 in Case 123/83 *BNIC v Clair* [1985] ECR 391, the fact that an agreement has been entered into by two groups of traders, such as wine-growers and dealers, in the framework of an organization such as BNIC does not remove the agreement from the scope of Article 85 of the Treaty.
- 14 According to BNIC, Article 85 (1) of the Treaty is inapplicable to the abovementioned inter-trade agreement by virtue of the fact that the agreement deals with agricultural products which are the subject-matter of a national organization of the market. Those products are subject to the competition rules laid down in the Treaty, under the conditions fixed by Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (Official Journal, English Special Edition 1959-62, p. 129). Article 2 of that Regulation provides that 'Article 85 (1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in the preceding article as form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty.'
- 15 It should be pointed out in that regard that the production quota and the levy mentioned above concern spirits. As is clear from Annex II to the Treaty (ex 22.09), spirits are expressly excluded from the category of agricultural products, and constitute industrial products. The fact that part of the revenue obtained from the levies is to be used for programmes concerning wines and musts cannot affect the determination of the applicable competition rules.

- 16 It must next be considered whether the agreements at issue are capable of restricting competition and affecting trade between Member States.
- 17 By penalizing any increase in production the agreement in question tends to freeze the existing situation and make it more difficult for a producer to improve his competitive position on the market. It is therefore of such a nature as to restrict competition between producers.
- 18 Although it is true that the agreement deals with spirits used in the manufacture of cognac, that is to say a semi-finished product which is not normally sent out of the region in which it is produced, the fact remains that that product constitutes the raw material from which another product is manufactured, namely cognac, which is marketed throughout the Community. Agreements requiring payment of levies where marketing quotas are exceeded are therefore likely to affect trade between the Member States.
- 19 It follows that the inter-trade agreement referred to above is prohibited by Article 85 (1) of the Treaty.
- 20 BNIC also claims that the provisions adopted cannot be incompatible with Article 85 (1) of the Treaty because they are intended to deal with a situation of stagnating sales and increasing stocks of cognac and to ensure balanced economic conditions in the region, in which 63 000 wine-growers and approximately 9 000 persons employed by wine dealers earn their living from wine-growing.
- 21 Those circumstances might possibly be relied on by BNIC in support of an application to the Commission to have Article 85 (1) declared inapplicable on the basis of Article 85 (3). However, no such application has been made to the Commission.

The compatibility with Article 5 of the EEC Treaty of the order making the agreement generally binding

- 22 The issue is whether and to what extent it is contrary to the obligations imposed on Member States by Article 5 of the EEC Treaty, read together with Articles 3 (f) and 85, for a measure adopted by the public authorities to make generally binding an agreement which is contrary to Article 85.
- 23 As the Court has consistently held, Articles 85 and 86 of the Treaty concern the conduct of undertakings and not legislative or regulatory measures adopted by the Member States, but it is nevertheless true that the Treaty imposes a duty on them not to adopt or maintain in force any measure which could deprive those provisions of their effectiveness (Judgment of 16 November 1977 in Case 13/77 *Inno v ATAB* [1977] ECR 2115).
- 24 That is the case in particular when a Member State, by means of an order making them generally binding, reinforces the effects of agreements which are contrary to Article 85.
- 25 The answer to the national court's questions must therefore be that:

An inter-trade agreement entered into by two groups of traders in the framework and in accordance with the procedure of an organization such as BNIC which provides for the payment of a levy where a production quota for pure alcohol per hectare has been exceeded is contrary to Article 85 (1) of the EEC Treaty;

A ministerial order which makes such an agreement generally binding is contrary to the obligations imposed on the Member States by Article 5 of the EEC Treaty read together with Articles 3 (f) and 85 thereof.

Costs

- 26 The costs incurred by the United Kingdom and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the tribunal d'instance, Saintes, by judgment of 26 May 1986, hereby rules:

- (1) An inter-trade agreement entered into by two groups of traders in the framework and in accordance with the procedure of an organization such as the Bureau national interprofessionnel de cognac which provides for the payment of a levy where a production quota for pure alcohol per hectare has been exceeded is contrary to Article 85 (1) of the EEC Treaty;
- (2) A ministerial order which makes such an agreement generally binding is contrary to the obligations imposed on the Member States by Article 5 of the EEC Treaty read together with Articles 3 (f) and 85 thereof.

Bosco	Due	Moitinho de Almeida	Koopmans	Everling	
Bahlmann	Galmot	Kakouris	Joliet	O'Higgins	Schockweiler

Delivered in open court in Luxembourg on 3 December 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President