JUDGMENT OF THE COURT
20 September 1988 *

In Case 302/86

Commission of the European Communities, represented by R. Wainwright, Legal Adviser, and J. Christoffersen, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by S. J. Hay, Treasury Solicitor, acting as Agent, with an address for service in Luxembourg at the British Embassy, 14 boulevard Roosevelt,

intervener,

v

Kingdom of Denmark, represented by J. Molde, Legal Adviser in the Ministry for Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Danish Embassy, 11b boulevard Joseph-II,

defendant,

APPLICATION for a declaration that by introducing and applying by Order No 397 of 2 July 1981 a system under which all containers of beer and soft drinks must be returnable, the Kingdom of Denmark has failed to fulfil its obligations under Article 30 of the EEC Treaty,

* Language of the Case: Danish.

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), U. Everling, K. Bahlmann, Y. Galmot, C. N. Kakouris, R. Joliet and F. A. Schockweiler, Judges,

Advocate General: Sir Gordon Slynn
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 15 March 1988,

after hearing the Opinion of the Advocate General, delivered at the sitting on 24 May 1988,

gives the following,

Judgment

1 By an application lodged at the Court Registry on 1 December 1986, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by introducing and applying by Order No 397 of 2 July 1981 a system under which all containers for beer and soft drinks must be returnable, the Kingdom of Denmark had failed to fulfil its obligations under Article 30 of the EEC Treaty.

2 The main feature of the system which the Commission challenges as incompatible with Community law is that manufacturers must market beer and soft drinks only in re-usable containers. The containers must be approved by the National Agency for the Protection of the Environment, which may refuse approval of new kinds of container, especially if it considers that a container is not technically suitable for a system for returning containers or that the return system envisaged does not ensure that a sufficient proportion of containers are actually re-used or if a

container of equal capacity, which is both available and suitable for the same use, has already been approved.

3 Order No 95 of 16 March 1984 amended the aforementioned rules in such a way that, provided that a deposit-and-return system is established, non-approved containers, except for any form of metal container, may be used for quantities not exceeding 3 000 hectolitres a year per producer and for drinks which are sold by foreign producers in order to test the market.

4 By order of 8 May 1987 the United Kingdom was granted leave to intervene in the case in support of the Commission's conclusions.

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

6 The first point which must be made in resolving this dispute is that, according to an established body of case-law of the Court (judgment of 20 February 1979 in Case 120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649; judgment of 10 November 1982 in Case 261/81 *Walter Rau Lebensmittelwerke* v *De Smedt PvbA* [1982] ECR 3961), in the absence of common rules relating to the marketing of the products in question, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirements recognized by Community law. Such rules must also be proportionate to the aim in view. If a Member State has a choice between various measures for achieving the same aim, it should choose the means which least restricts the free movement of goods.

7 In the present case the Danish Government contends that the mandatory collection system for containers of beer and soft drinks applied in Denmark is justified by a mandatory requirement related to the protection of the environment.

8 The Court has already held in its judgment of 7 February 1985 in Case 240/83 *Procureur de la République* v *Association de défense des brûleurs d'huiles usagées* [1985] ECR 531 that the protection of the environment is 'one of the Community's essential objectives', which may as such justify certain limitations of the principle of the free movement of goods. That view is moreover confirmed by the Single European Act.

9 In view of the foregoing, it must therefore be stated that the protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty.

10 The Commission submits that the Danish rules are contrary to the principle of proportionality in so far as the aim of the protection of the environment may be achieved by means less restrictive of intra-Community trade.

11 In that regard, it must be pointed out that in its aforementioned judgment of 7 February 1985 the Court stated that measures adopted to protect the environment must not 'go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection'.

12 It is therefore necessary to examine whether all the restrictions which the contested rules impose on the free movement of goods are necessary to achieve the objectives pursued by those rules.

13 First of all, as regards the obligation to establish a deposit-and-return system for empty containers, it must be observed that this requirement is an indispensable element of a system intended to ensure the re-use of containers and therefore appears necessary to achieve the aims pursued by the contested rules. That being so, the restrictions which it imposes on the free movement of goods cannot be regarded as disproportionate.

14 Next, it is necessary to consider the requirement that producers and importers must use only containers approved by the National Agency for the Protection of the Environment.

15 The Danish Government stated in the proceedings before the Court that the present deposit-and-return system would not work if the number of approved containers were to exceed 30 or so, since the retailers taking part in the system would not be prepared to accept too many types of bottles owing to the higher handling costs and the need for more storage space. For that reason the Agency has hitherto followed the practice of ensuring that fresh approvals are normally accompanied by the withdrawal of existing approvals.

16 Even though there is some force in that argument, it must nevertheless be observed that under the system at present in force in Denmark the Danish authorities may refuse approval to a foreign producer even if he is prepared to ensure that returned containers are re-used.

17 In those circumstances, a foreign producer who still wished to sell his products in Denmark would be obliged to manufacture or purchase containers of a type already approved, which would involve substantial additional costs for that producer and therefore make the importation of his products into Denmark very difficult.

18 To overcome that obstacle the Danish Government altered its rules by the aforementioned Order No 95 of 16 March 1984, which allows a producer to market up to 3 000 hectolitres of beer and soft drinks a year in non-approved containers, provided that a deposit-and-return system is established.

19 The provision in Order No 95 restricting the quantity of beer and soft drinks which may be marketed by a producer in non-approved containers to 3 000 hectolitres a year is challenged by the Commission on the ground that it is unnecessary to achieve the objectives pursued by the system.

20 It is undoubtedly true that the existing system for returning approved containers ensures a maximum rate of re-use and therefore a very considerable degree of protection of the environment since empty containers can be returned to any retailer of beverages. Non-approved containers, on the other hand, can be returned only to the retailer who sold the beverages, since it is impossible to set up such a comprehensive system for those containers as well.

21 Nevertheless, the system for returning non-approved containers is capable of protecting the environment and, as far as imports are concerned, affects only limited quantities of beverages compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement that containers should be returnable has on imports. In those circumstances, a restriction of the quantity of products which may be marketed by importers is disproportionate to the objective pursued.

22 It must therefore be held that by restricting, by Order No 95 of 16 March 1984, the quantity of beer and soft drinks which may be marketed by a single producer in non-approved containers to 3 000 hectolitres a year, the Kingdom of Denmark has failed, as regards imports of those products from other Member States, to fulfil its obligations under Article 30 of the EEC Treaty.

23 The remainder of the application must be dismissed.

Costs

24 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under the first paragraph of Article 69 (3), where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs in whole or in part. Since the application has been successful only in part, the parties must be ordered to bear their own costs. The United Kingdom, which has intervened in the case, shall bear its own costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by restricting, by Order No 95 of 16 March 1984, the quantity of beer and soft drinks which may be marketed by a single producer in non-approved containers to 3 000 hectolitres a year, the Kingdom of Denmark has failed, as regards imports of those products from other Member States, to fulfil its obligations under Article 30 of the EEC Treaty;

(2) Dismisses the remainder of the application;

(3) Orders the parties and the intervener to bear their own costs.

Mackenzie Stuart Bosco Due Moitinho de Almeida

Rodríguez Iglesias Everling Bahlmann

Galmot Kakouris Joliet Schockweiler

Delivered in open court in Luxembourg on 20 September 1988.

J.-G Giraud
Registrar

A. J. Mackenzie Stuart
President