

JUDGMENT OF THE COURT (Fifth Chamber)

27 February 2002

(Failure by a Member State to fulfil its obligations - Directives 95/59/EC and 92/79/EEC - [Article 110 TFEU] - Taxes affecting the consumption of manufactured tobaccos - Minimum reference price for all cigarettes of the same brand - Different rates of tax on dark-tobacco and light-tobacco cigarettes)

In Case C-302/00,

**Commission of the European [Union]**, represented by E. Traversa and C. Giolito, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**French Republic**, represented by G. de Bergues and S. Seam, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that by maintaining in force:

- a system imposing a minimum reference price on all cigarettes, and
- a system imposing different tax rates on dark-tobacco and light-tobacco cigarettes, to the disadvantage of the latter,

the French Republic has failed to fulfil its obligations under Article 9(1), Article 8(2) and Article 16(5) of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40), as amended by Council Directive 1999/81/EC of 29 July 1999 (OJ 1999 L 211, p. 47), and Article 2 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8), and under the first paragraph of [Article 110 TFEU], or alternatively under the second paragraph of [Article 110 TFEU],

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr (Rapporteur) and A. La Pergola, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2001,

gives the following

### **Judgment**

1.

By application lodged at the Court Registry on 7 August 2000, the Commission of the European [Union] brought an action under [Article 258 TFEU] for a declaration that by maintaining in force:

- a system imposing a minimum reference price on all cigarettes, and
- a system imposing different tax rates on dark-tobacco and light-tobacco cigarettes, to the disadvantage of the latter,

the French Republic has failed to fulfil its obligations under Article 9(1), Article 8(2) and Article 16(5) of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40), as amended by Council Directive 1999/81/EC of 29 July 1999 (OJ 1999 L 211, p. 47, □ Directive 95/59□), and Article 2 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8), and under the first paragraph of [Article 110 TFEU], or alternatively under the second paragraph of [Article 110 TFEU].

### **The [Union] legislation**

2.

Manufactured tobaccos are subject to a harmonised [Union] excise duty. Directive 95/59 defines the different categories of products subject to excise duties and the methods of calculating the latter. Directive 92/79 fixes the minimum rate of excise duty for each category of products.

3.

Article 8(1) and (2) of Directive 95/59 provides that:

1. Cigarettes manufactured in the [Union] and those imported from third countries shall be subject to a proportional excise duty calculated on the maximum retail selling price, including customs duties, and also to a specific excise duty calculated per unit of the product.

2. The rate of the proportional excise duty and the amount of the specific excise duty must be the same for all cigarettes.□

4.

Article 9(1) of Directive 95/59 provides that:

1. A natural or legal person established in the [Union] who converts tobacco into manufactured products prepared for retail sale shall be deemed to be a manufacturer.

Manufacturers, or, where appropriate, their representatives or authorised agents in the [Union] and importers of tobacco from non-member countries shall be free to determine the maximum retail selling price for each of their products for each Member State for which the products in question are to be released for consumption.

The second paragraph may not, however, hinder implementation of national systems of legislation regarding the control of price levels or the observance of imposed prices, provided that they are compatible with [Union] legislation.□

5.

Under the fifth subparagraph of Article 16 of Directive 95/59:

Member States may levy a minimum excise duty on cigarettes provided that this does not have the effect of raising the total tax to more than 90% of the total tax on the most popular price category of cigarettes.□

6.

The wording of Article 2 of Directive 92/79 is as follows:

Not later than 1 January 1993, each Member State shall apply an overall minimum excise duty (specific duty plus *ad valorem* duty excluding VAT) the incidence of which shall be set at 57% of the retail selling price (inclusive of all taxes) for cigarettes of the price category most in demand.

The overall minimum excise duty on cigarettes shall be determined on the basis of cigarettes of the price category most in demand according to data established as at 1 January of each year, beginning on 1 January 1993.

7.

The first and second paragraphs of [Article 110 TFEU] provide that:

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.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.□

### **The national legislation**

8.

Article 37 of Law No 97-1269, of 30 December 1997, on Finance Law 1998 (JORF of 31 December 1997, p. 19261, hereinafter  the Finance Law 1998□), in force from 1 January 1998, introduced certain amendments to Article 572 et seq. of the Code Général des Impôts (General Tax Code, hereinafter the  GTC□).

9.

Article 37(1)(2) of the Finance Law 1998 inserted a paragraph after Article 572(1) of the GTC drafted in the following terms:

For the category of dark-tobacco cigarettes defined by the final paragraph of Article 575A and in respect of the category of other cigarettes, the price for 1 000 units of a category of products sold under the same brand, regardless of the other components registered with the brand may not be less, independently of the method or the unit of packaging used, than that applied to the product with the highest sales of that brand.□

10.

Moreover, Article 37(3) of the Finance Act 1998 replaced the final paragraph of Article 575A of the GTC with the following three paragraphs:

The lowest rate of tax mentioned by Article 575 is fixed at FRF 500 for cigarettes. Nevertheless, for dark-tobacco cigarettes, that rate of tax is fixed at FRF 400, and at FRF 420 from 1 January 1999.

The rate is fixed at FRF 230 for fine-cut tobacco for roll-up cigarettes.

Cigarettes containing a minimum of 60 per cent of natural tobaccos covered by Customs tariffs codes NC 2401.10.41, 2401.10.70, 2401.20.41 or 2401.20.70 shall be deemed to be dark-tobacco cigarettes.□

### **Pre-Litigation Procedure**

11.

Having given the French Republic formal notice to submit its observations, the Commission sent it a reasoned opinion by letter of 26 January 1999 requesting it to take the measures necessary to comply with its obligations under Directives 95/59 and 92/79 and [Article 110 TFEU] within two months from the date of notification of the opinion. Taking the view that the response of the French authorities was not satisfactory, the Commission initiated the present action.

### **Findings of the Court**

#### *The first complaint*

12.

The Commission takes the view that Article 572 of the GTC, as amended by the Finance Act 1998 (hereinafter □ the amended GTC□), according to which the price of 1 000 units of a category of cigarettes sold under the same brand may not be inferior, regardless of the mode or unit of packaging used, to that applied to the most popular product of that brand, is contrary to Article 9(1) of Directive 95/59 which provides that producers and importers are free to determine the maximum retail prices for cigarettes.

13.

According to the French Government, Article 572 of the amended GTC merely imposes the obligation on producers and importers to express the retail selling price of cigarettes in a particular way, without fixing the price level. That provision has neither the effect nor the purpose of permitting the French authorities to determine unilaterally and in the exercise of its authority the maximum retail selling prices of cigarettes and it is not therefore incompatible with Article 9(1) of Directive 95/59.

14.

In that context, it should be observed that, by stipulating that the price of 1 000 units of a category of cigarettes sold under the same brand may not be less than the price of the most popular product of the same brand, Article 572 of the amended GTC in actual fact imposes a minimum retail selling price for cigarettes, even if that minimum price is not directly but indirectly set by reference to the price charged for another product.

15.

The setting of a minimum retail selling price by public authorities inevitably has the effect of limiting the freedom of producers and importers to determine their maximum retail selling prices since, in any event, those prices cannot be lower than the compulsory minimum price (Case C-216/98 *Commission v Greece* [2000] ECR I-8921, paragraph 21).

16.

Article 572 of the amended GTC therefore appears to be contrary to Article 9(1) of Directive 95/59.

17.

It follows, that by maintaining in force a system imposing a minimum reference price for all cigarettes sold under the same brand, the French Republic has failed to fulfil its obligations under Article 9(1) of Directive 95/59.

#### *The second complaint*

18.

The Commission argues that Article 575A of the amended GTC which provides, for the levy of the consumption duty introduced by Article 575, a minimum tax rate higher for light-tobacco cigarettes, which are essentially imported products, than for dark-tobacco cigarettes, which are almost exclusively made in France, is contrary to Articles 8(2) and 16(5) of Directive 95/59, Article 2 of Directive 92/79 and [Article 110 TFEU].

19.

The French Government does not dispute this complaint so far as it is founded on Directives 95/59 and 92/79. As far as this complaint is founded on [Article 110 TFEU], it argues that Article 575A of the amended GTC has neither the discriminatory effect contrary to the first paragraph of that provision nor the protective effect prohibited by the second paragraph of that provision.

20.

Further, it must be held that the application of different minimum tax rates for dark- and light-tobacco cigarettes under Article 575A of the amended GTC infringes Article 8(2) and Article 16(5) of Directive 95/59 and Article 2 of Directive 92/79, which require the application of a single minimum global excise duty, identical for all cigarettes.

21.

Concerning the question of whether a different rate of taxation for dark- and light-tobacco cigarettes also infringes [Article 110 TFEU], it should be observed that, according to the settled case-law, a system of taxation may be considered compatible with [Article 110 TFEU] only if it is such as to exclude any possibility of imported products being taxed more heavily than similar domestic products (see, in particular, Case C-265/99 *Commission v France* [2001] ECR I-2305, paragraph 40).

22.

For the purpose of examining the compatibility of the system of taxation called in question by the Commission with the first paragraph of [Article 110 TFEU], it is necessary, first, to specify to what extent dark- and light-tobacco cigarettes can be regarded as similar products.

23.

According to the settled case-law of the Court, which has interpreted the concept of similarity widely, in order to determine whether products are similar it is necessary to consider whether they have similar characteristics and meet the same needs from the point of view of consumers, the test being not whether they are strictly identical but whether their use is similar and comparable (Joined Cases C-367/93 to C-377/93 *Röders and Others* [1995] ECR I-2229, paragraph 27).

24.

It is important to note as a preliminary point that dark- and light-tobacco cigarettes are manufactured from different types of the same base product, tobacco, using comparable processes. While the organoleptic characteristics of dark- and light-tobacco cigarettes, such as their taste and smell, are not identical they are nevertheless similar.

25.

As Article 575A of the amended GTC demonstrates, the difference between dark- and light-tobacco cigarettes is one of degree. Under this provision, cigarettes which contain a minimum of 60% of certain types of tobacco are considered to be dark-tobacco cigarettes while all the rest are considered to be light-tobacco cigarettes.

26.

Further, the two types of products can satisfy the same needs of consumers, given their similar properties, since they are intended for tobacco consumption in the typical form of cigarettes, that is ready-made cylinders of tobacco rolled in sheets of paper. The fact that the average age of consumers of dark-tobacco is clearly higher than the average age of consumers of light-tobacco cannot cast doubt on that finding.

27.

Moreover, the similarity of dark- and light-tobacco cigarettes is recognised by the [Union] legislature which, in Directives 95/59 and 92/79, provides for uniform tax treatment for all cigarettes.

28.

Dark- and light-tobacco cigarettes fall within the same sub-heading of the Combined Nomenclature contained in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1).

29.

Since the similarity of the two products in question for the purposes of the first paragraph of [Article 110 TFEU] has been established, it should be considered whether Article 575A of the amended GTC is discriminatory in that it fixes a minimum level of consumer tax higher for light-tobacco cigarettes, which are primarily imported products, than for dark-tobacco cigarettes, which are almost exclusively manufactured in France.

30.

Although Article 575A of the amended GTC does not establish any formal distinction according to the origin of the products, it adjusts the system of taxation in such a way that the cigarettes falling within the most favourable tax category come almost exclusively from domestic production whereas almost all imported products come within the least advantageous category. Those features of the system are not nullified by the fact that a very small fraction of imported cigarettes come within the most favourable category whereas, conversely, a certain proportion of domestic production comes within the same tax category as imported cigarettes. It appears, therefore, that the system of taxation is designed in such a way as to benefit a typical domestic product and handicaps imported cigarettes to the same extent (see Case 171/78 *Commission v Denmark* [1980] ECR 447, paragraph 36).

31.

In view of the preceding observations, it is not necessary to examine the compatibility of Article 575A of the amended GTC with the second paragraph of [Article 110 TFEU].

32.

Without explicitly invoking Article 36 [TFEU], the French Government argues that Article 575A of the amended GTC is conducive to the protection of human health and life.

33.

In this regard, it is sufficient to point out that Article 36 of the [TFEU] must be interpreted strictly and thus cannot be understood as authorising measures of a different nature from the quantitative restrictions on imports and exports and measures having equivalent effect laid down by [Articles 34 and 35 TFEU] (see Case 29/72 *Marimex* [1972] ECR 1309, paragraphs 4 and 5, and Case 46/76 *Bauhuis* [1977] ECR 5, at paragraphs 12 to 14).

34.

It follows that, by maintaining in force a system imposing a different rate of tax for dark- and light-tobacco cigarettes, to the detriment of the latter, the French Republic has failed to fulfil its obligations under Article 8(2) and Article 16(5) of Directive 95/59, Article 2 of Directive 92/79 and the first paragraph of [Article 110 TFEU].

35.

Having regard to the foregoing conclusions, it must be held that, by maintaining in force:

- a system imposing a minimum reference price on all cigarettes sold under the same brand and
- a system imposing a different rate of tax for dark- and light-tobacco cigarettes to the detriment of the latter,

the French Republic has failed to fulfil its obligations under Article 9(1), Article 8(2) and Article 16(5) of Directive 95/59, Article 2 of Directive 92/79 and the first paragraph of [Article 110 TFEU].

## Costs

36.

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 Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

**1. Declares that, by maintaining in force**

- a system imposing a minimum reference price on all cigarettes sold under the same brand and
- a system imposing a different rate of tax for dark- and light-tobacco cigarettes, to the detriment of the latter,

the French Republic has failed to fulfil its obligations under Article 9(1), Article 8(2) and Article 16(5) of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, as amended by Council Directive 1999/81/EC of 29 July 1999, Article 2 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes and the first paragraph of [Article 110 TFEU];

**2. The French Republic is ordered to pay the costs.**

Jann

von Bahr

La Pergola

Delivered in open court in Luxembourg on 27 February 2002.

R. Grass

P. Jann

Registrar

President of the Fifth Chamber