JUDGMENT OF THE COURT
14 July 1988 *

In Case 298/86

Commission of the European Communities, represented by Daniel Jacob and Johannes Fons Buhl, members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, Jean Monnet Building, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Robert Hoebaer, Director of the Ministry of Foreign Relations, Foreign Trade and Cooperation with Developing Countries, acting as Agent, assisted by Paul Bastin, Adviser to the Ministry of Finance, with an address for service in Luxembourg at the Belgian Embassy, 4, rue des Girondins,

defendant,

APPLICATION for a declaration that, by fixing for certain categories of manufactured tobacco retail selling prices other than those determined freely by manufacturers and importers, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty, in particular Article 3O thereof, and Article 5 (1) of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: J. L. Cruz Vilaça
Registrar: D. Louterman, Administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 1 March 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 19 May 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 28 November 1986, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by fixing for certain categories of manufactured tobacco retail selling prices other than those determined freely by manufacturers and importers, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty, in particular Article 30 thereof, and under Article 5 (1) of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (Official Journal, English Special Edition 1972 (31 December), L 303, p. 1).

2 In Belgium, manufactured tobacco is subject to excise duty in the form of an *ad valorem* excise duty calculated on the basis of the retail selling price, including value-added tax. The combined sum of the two taxes is paid by the manufacturer or the importer by means of the purchase from the national authorities of tax stamps which are affixed to the various manufactured or imported tobacco products and indicate their retail selling price. Once a tax stamp has been affixed the products must be sold to the consumer at a price which is no greater than that indicated on the stamps.

3 The origin of this action lies in the discovery by the Commission that the Belgian authorities were interpreting that legislation as entitling them to fix a uniform retail selling price applicable to each manufactured tobacco product of the same category and the same trade mark. That uniform price, on the basis of which VAT

and excise duty were calculated, was the highest price amongst those submitted by the manufacturer or importers of the relevant product when purchasing the stamps. Consequently, traders who decided to fix a sale price lower than that of their competitors were obliged to pay the two taxes in question on the basis of a price which they had not freely determined.

4 On 18 April 1984 the Commission sent a formal notice of complaint to the Belgian Government pursuant to the first paragraph of Article 169 of the Treaty. It noted therein that the price system practised by the Belgian authorities was contrary to Article 5 (1) of Directive 72/464/EEC, which provides that 'manufacturers and importers shall be free to determine the maximum retail selling price for each of their products'. Furthermore, the Commission indicated that Article 58 of the Belgian law on VAT, which governs the levying of that tax as regards manufactured tobacco, was contrary to Article 30 of the Treaty since its effect was, *inter alia*, to prevent parallel importers from fixing prices lower than the price applied by the manufacturer and thereby increasing their penetration of the Belgian market. No reply was forthcoming to the formal notice and on 5 December 1984 the Commission delivered a reasoned opinion in which it reiterated its view and requested the Belgian Government to adopt the measures necessary to comply with it within one month.

5 On 13 December 1984 the Belgian Government replied to the reasoned opinion. It informed the Commission *inter alia* that it was prepared to allow importers to fix retail selling prices lower than those of their competitors and thereby accept the existence of different maximum prices for identical products. As to the compatibility of Article 58 of the law on VAT with Article 30 of the Treaty, the Belgian Government maintained that the Belgian tax system did not make any distinction between different importers. The Commission took the view that the Belgian Government's reply to the reasoned opinion was not satisfactory and brought this action.

6 Reference is made to the Report for the Hearing for a more detailed account of the national legislation, 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.

7 Upon request by the Court the Commission stated the exact subject-matter of its action, indicating in particular that it considered the following to be infringements of Community law:

1. The fact that the Belgian authorities did not allow manufacturers and importers of manufactured tobacco freely to determine maximum retail selling prices for each of their products. This complaint concerned the refusal of the Belgian authorities:

   (a) to issue parallel importers with tax stamps corresponding to retail selling prices lower than the price fixed by the exclusive importer of the product in question;

   (b) to issue tax stamps corresponding to retail selling prices higher than the price fixed when a product was first marketed when an importer or the manufacturer wished to increase the price of his products; and

   (c) to issue tax stamps corresponding to retail selling prices lower than those provided for in the Table of Tax Stamps for Tobacco.

2. The fact that the national legislation instituting the system of retail selling prices for manufactured tobacco did not inform the persons affected that Directive 72/464/EEC, and in particular Article 5 (1) thereof, guarantees domestic manufacturers and importers the right to determine maximum retail selling prices for each of their manufactured tobacco products. In this respect, claims the Commission, the legislation in question must be amended.

8 First, it is clear that the complaint that the national legislation must be amended in order to inform the traders concerned of their rights (Complaint No 2) cannot be examined. It is not included in the Commission's claims as set out in the application, which merely refers to a practice of the Belgian authorities concerning price-fixing and contains no mention whatsoever of the need to amend the national legislation.

9 As for the refusal of the Belgian authorities to issue tax stamps corresponding to retail selling prices lower than those provided for in the Table of Tax Stamps for Tobacco (Complaint 1 (c)), the Belgian Government submits that this complaint was not included in the subject-matter of the pre-litigation procedure since the range of the scale of tax stamps was not challenged in the formal notice or in the reasoned opinion.

10 The Belgian Government's argument in this respect must be accepted. No complaint as to the range of the scale was made in the formal notice or the reasoned opinion, and the Court has consistently held that the subject-matter of an application under Article 169 of the Treaty is limited to that defined during the pre-litigation procedure provided for by that article. Consequently, the Commission's reasoned opinion and the application must be based on the same arguments and submissions.

11 Consequently, the application is inadmissible in so far as it concerns the range of the scale of tax stamps.

12 It follows that the only questions to be examined concern the possibility of obtaining tax stamps corresponding to a retail selling price lower than that fixed by the manufacturer or main importer and of changing the price of a product after it has first been placed on the market (Complaints 1 (a) and 1 (b)).

13 Regarding those two points, the Commission states that the price system practised by the Belgian authorities does not allow manufacturers and importers freely to determine their prices. At the hearing, the Commission submitted that a particular consequence of the practices in question was that supermarkets, which could be both retailer and importer, found it virtually impossible to make special price offers since such special offers could only be made by selling the product at a price lower than that indicated on the tax stamp, which entailed payment of the excise duty and VAT calculated on the basis of the latter (higher) price.

14 The Belgian Government takes the view that those complaints are no longer well founded. In its reply to the reasoned opinion it indicated that it was prepared to allow parallel importers to determine retail selling prices for their products lower

than those of their competitors and thereby accept the existence of different prices for identical products on the Belgian market. As to the possibility of altering prices after the product has first been put into circulation it had informed the Commission as early as May 1979 that retail selling prices could be either lowered or raised.

15 The import of the Belgian Government's defence is that the contested practices have been ceased since the expiry of the time limit indicated in the reasoned opinion. Under the second paragraph of Article 169 of the Treaty, however, an application for a declaration that a State has failed to fulfil its obligations may only be made to the Court if the State concerned has not complied with the reasoned opinion within the period laid down by the Commission. In those circumstances it was for the Commission to adduce evidence that the administrative practices continued after the expiry of that period, notwithstanding the commitments undertaken by the Belgian Government. The Court has received no such evidence from the Commission.

16 As regards the possibility of altering the retail selling price of a product after it has first been placed on the market, the Commission has adduced no evidence of an administrative practice precluding such alterations. The same finding must be made as regards the refusal of the national authorities to issue tax stamps corresponding to a retail selling price lower than that fixed by the manufacturer or main importer. The Commission made the general statement that on many occasions traders, in particular supermarkets, were unable to obtain such stamps (which is disputed by the Belgian Government), but it failed to support this complaint by any concrete evidence capable of being reviewed by the Court.

17 In the circumstances, the application must be dismissed as unfounded inasmuch as it relates to those two complaints.

18 It follows from the foregoing that the whole of the application must be dismissed.

Costs

19 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the Commission to pay the costs.

Mackenzie Stuart Bosco Due

Rodríguez Iglesias Koopmans O'Higgins Schockweiler

Delivered in open court in Luxembourg on 14 July 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President