made to the Court if the Member State concerned has not complied with the reasoned opinion within the period laid down by the Commission. If in its reply the Member State to which the reasoned opinion is addressed has undertaken to remedy the alleged failure, it is for the Commission to show that, despite that undertaking, the failure persisted after the expiry of that period. In the absence of such proof the application is unfounded.

# REPORT FOR THE HEARING
delivered in Case 298/86 *

## I — Facts and procedure

### 1. *Legal background*

#### 1.1. *Community legal background*

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), hereinafter referred to as 'the directive', indicates in its first recital that the objective of the Treaty is to create an economic union within which there is healthy competition and whose characteristics are similar to those of a domestic market, and that as regards manufactured tobacco achievement of this aim presupposes that the application in the Member States of taxes affecting the consumption of products in this sector does not distort conditions of competition and does not impede their free movement within the Community.

The Council's purpose in adopting the directive was to lay down the general principles governing the progressive harmonization of the excise duty applied by Member States to manufactured tobacco and the special criteria applicable during the first stage of this harmonization. In particular, Article 4 (1) of the directive provides that 'in each Member State national and imported cigarettes shall be subjected 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'. Article 4 (2) provides that the rate of the proportional excise duty and the amount of the specific excise duty must be the same for all cigarettes.

The wording of Article 5 of the directive is as follows:

'1. Manufacturers and importers shall be free to determine the maximum retail selling price for each of their products. This provision may not, however, hinder

* Language of the Case: French.

implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices.

2. However, in order to facilitate the levying of the excise duty, the Member States may, for each group of manufactured tobacco, fix a scale of retail selling prices on condition that each scale has sufficient scope and variety to correspond in fact with the variety of Community products. Each scale shall be valid for all the products belonging to the group of manufactured tobacco which it concerns, without distinction on the basis of quality, presentation, the origin of the products or of the materials used, the characteristics of the undertaking or of any other criterion.'

1.2. *National legal background*

In order to collect excise duty and VAT the Kingdom of Belgium, in common with certain other Member States, uses the system of tax stamps. The manufacturer or importer pays the two taxes by purchasing from the tax authorities stamps which must be affixed to manufactured tobacco products. The stamps mention the retail selling price and they differ according to whether they are to be affixed to cigars, cigarillos, cigarettes or smoking tobacco. In order to facilitate the collection of the relevant taxes a scale of retail selling prices and thus a scale of tax stamps is provided for each category of products. This scale is valid for all products belonging to the group of manufactured tobacco which it concerns without distinction on the basis of quality, presentation, the origin of the products or on any other criterion. The products may not be sold by retail unless they bear the tax stamp.

The collection of excise duty is governed by a regulation annexed to the Ministerial Decree of 22 January 1948 governing the collection of excise duty on manufactured tobaccos (*Moniteur belge*, 18 February 1948). The Table of Tax Stamps for Tobacco, which in fact constitutes the scale of retail selling prices, is annexed to this regulation. Article 7 of the regulation provides as follows:

'Excise duty is calculated according to the retail selling price which includes the cost price of the products and the cost of packaging, both internal and external, in addition to duties (customs duties, excise duty, transmission tax etc.) and expenses, commissions etc. which are normally pertinent to retail trade.'

Article 12 of the regulation provides as follows:

'In the case of tobacco delivered to retailers having an outlet in a place accessible to the public the parties concerned themselves determine the category in which their products must be classed by the choice of retail price.

Nothing in the foregoing is to prevent the parties concerned affixing a tax stamp corresponding to a sale price greater than the real value of the product. But once the stamp has been affixed, except in the case of an indefinite price stamp, products must be sold to the consumer at the price indicated on the stamp.'

Finally, Article 15 of the regulation provides as follows:

'Tax stamps are provided by the Belgian or Luxembourg administration, as the case may be, to manufacturers or importers against payment of the duty which they represent.'

The retail selling price which manufacturers, and, in the case of imported products, importers, display on each of their products by means of the tax stamps represents a maximum price. The purpose of prohibiting the charging of a price greater than that indicated on the tax stamp is to prevent the possibility of a low retail price being displayed on products which in fact belong to expensive categories, and is thus intended to prevent tax avoidance.

The VAT applicable to manufactured tobaccos is governed by Article 58 of the law on VAT of 3 July 1969. The first paragraph of this article is worded as follows:

'With respect to manufactured tobacco, whether imported or produced in the country, the tax is levied in every case where excise duty is payable pursuant to the laws or regulations concerning tax on tobacco. The tax is calculated on the basis of the price indicated on the tax stamps, which must be the price prescribed for sale to the consumer; or, if no price is provided for, then on the basis adopted for the levying of the excise duty.'

2. *Background to the dispute*

At the origin of the dispute is the Commission's finding that the Belgian tax authorities were interpreting Belgian national law so as to give them the right to fix a uniform retail selling price applicable to each product of the same category and the same trade mark. This 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. The particular result of this system was that an importer who wished to fix a retail selling price lower than that of his competitors was none the less obliged to pay excise duty and VAT on the basis of the higher uniform price.

By letters of 24 October 1978 and 27 February 1979 the Commission informed the Belgian Government that, in its view, fixing a uniform price was not necessary for tax collection purposes and that this practice was contrary to Article 5 (1) of the directive, which provides that manufacturers and importers must be free to determine the maximum retail selling price for each product.

In reply to this letter the Belgian Government informed the Commission that it interpreted the provision of the directive in a different way: on the one hand it gave Member States the right to fix prices for manufactured tobaccos and on the other hand importers could not submit retail selling prices without the agreement of the foreign manufacturer; the term 'manufacturer' in Article 5 (1) of the directive embraced both domestic and foreign manufacturers.

The Commission disputed that view in a letter dated 19 February 1980, and on 18

April 1984 sent a formal request to the Belgian Government inviting it under Article 169 of the Treaty to submit its observations within one month. Since there was no reply to the formal request the Commission delivered the reasoned opinion provided for in Article 169 of the Treaty on 5 December 1984 and invited the Belgian Government to comply with it within one month. In the reasoned opinion the Commission noted first that manufacturers and importers should be free to fix the retail selling prices themselves; they should be able to exercise this right freely, not only when the manufactured tobaccos were first placed on the market but also when manufacturers or importers considered it necessary to change the price of the products. Secondly, the Commission explained that the term 'manufacturer' in the directive could only refer to domestic manufacturers who, along with domestic importers, were the only people liable to pay taxes to the national tax authorities. For these reasons the system of fixed prices as practised by the Belgian authorities under the legislation on excise duty and Article 58 of the law on VAT was contrary to Article 5 (1) of the directive. Moreover, Article 58 of the VAT law was also contrary to Article 30 of the Treaty. In this respect the Commission referred in particular to the fact that parallel importers could not increase their share of the Belgian market by charging a price lower than that imposed by the manufacturer and approved by the State.

The Belgian Government responded to the reasoned opinion in a letter dated 13 December 1984. It conceded that the Belgian tax system went further than the directive in that it made the price determined by the manufacturer or importer a compulsory price, at the same time both maximum and minimum. However, the Belgian tax system did permit a manufacturer or importer to fix a retail selling price lower than that of competing products of the same type, the same quality and the same characteristics. The Commission's complaint could therefore only concern traders situated down the chain from the manufacturer or importer, in other words wholesalers or retailers. However, the directive did not grant them any rights in the determination of prices.

The Belgian Government also informed the Commission that it accepted the latter's view that the term 'manufacturer' in the directive referred to domestic manufacturers. The view to the contrary which it had previously expressed had been inspired by the fact that it was unlikely from a commercial point of view that where a foreign product had already been marketed in Belgium by an importer another importer would obtain from the manufacturer more favourable price conditions for the same product. The Government stated, however, that it was prepared to allow a parallel importer to fix for his own products a retail selling price lower than that of his competitor and thus to tolerate the existence on the Belgian market of different maximum prices for identical products imported by different importers. Furthermore, in order to give manufacturers and importers more freedom as regards price-fixing the Government declared that it was prepared to accede to the requests that the range of tax stamps be extended, in particular towards the bottom end.

Considering that the Belgian Government's reply to the reasoned opinion did not justify its conduct, the Commission commenced the present action.

3. *Procedure*

The Commission's application was registered at the Court Registry on 28 November 1986.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

However, by letter of 23 October 1987 the Court invited the Commission to reply in writing to certain questions in order to specify the purpose of its application and the Commission complied with this request within the relevant time.

## II — Conclusions of the parties

The *Commission*, the applicant, claims that the Court should:

(1) Declare 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 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;

(2) Order the defendant to pay the costs.

The *Government of the Kingdom of Belgium*, the defendant, contends that the Court should declare the Commission's application inadmissible and ill-founded.

## III — The Commission's grounds of complaint

In reply to the questions put by the Court the Commission stated that in its view the following constituted a failure to fulfil obligations under Community law:

(1) The fact that the Belgian authorities would not allow manufacturers and importers of manufactured tobacco freely to determine the maximum retail selling prices of each of their products.

This ground of complaint concerned:

(a) the refusal of the Belgian authorities 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) the refusal of the Belgian authorities to issue tax stamps corresponding to

retail selling prices greater than the price fixed when the product was first put into circulation when an importer or a manufacturer wished to increase the price of his products; and

(c) 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.

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

## IV — Submissions and arguments of the parties

1. *Fixing the retail selling prices*

As regards the refusal to issue parallel importers with tax stamps corresponding to retail selling prices lower than those fixed by the exclusive importer of the product concerned, the Commission notes that this practice prevents the parallel importer from seeking and obtaining a price lower than that imposed by the manufacturer and agreed to by the State and thereby increasing his opportunities for importing products and penetrating the Belgian market. In the Commission's view the tax system concerned is therefore contrary to Article 30 of the Treaty. In this respect the Commission refers in particular to the following judgments of the Court: that of 24 January 1978 in Case 82/77 (*Openbaar Ministerie of the Kingdom of the Netherlands* v *Van Tiggele* [1978] ECR 25), that of 16 November 1977 in Case 13/77 (*Inno* v *ATAB* [1977] ECR 2115) and that of 5 April 1984 in Joined Cases 177/82 and 178/82 (*Van de Haar and Kaveka de Meern* [1984] ECR 1797).

As regards the refusal to issue tax stamps for prices higher than those fixed when the products were first placed on the market, or for prices lower than those provided for in the Table of Tax Stamps for Tobacco, the Commission notes that such a refusal is inconsistent with Article 5 (1) of the directive, which leaves the manufacturers and importers free to fix the retail selling prices of manufactured tobacco themselves. In particular, the refusal to grant a lower price than those provided for in the scale of tax stamps prevents manufacturers and importers from passing on to the consumer the advantage of a more competitive price especially in the case of manufacturers or importers who might wish to introduce a new product at a lower price than that of products already on the market in Belgium. On this point the Commission refers *inter alia* to the recent complaint of an importer who wished to import cigarettes from the Netherlands.

The Belgian Government notes first that the Commission's grounds of complaint set out above in Point 1 (a) and (b) have become devoid of purpose. The Government has expressly informed the Commission in its reply to the reasoned opinion that the Belgian authorities are prepared to allow importers to fix retail selling prices lower than those fixed by their competitors; they have therefore accepted that there may be different retail selling prices for identical

products on the Belgian market. As regards alteration of prices after the products have been placed on the market, the Government has also informed the Commission that both the importer and the manufacturer may either increase or reduce the price fixed when the products were first placed on the market.

The Belgian Government also points out that the Commission's ground of complaint set out in Point 1 (c), concerning the issuing of tax stamps for prices lower than those provided for in the Table of Tax Stamps, goes beyond the scope of both the application and the procedure prior to the action. The Government points out that the range of prices from which the manufacturer or importer may choose is determined by the scale of tax stamps, and states that if the Commission wishes to challenge the scale it should do so in a new procedure.

Nevertheless, the Belgian Government points out that the Belgian scale of tax stamps is sufficiently wide and varied to allow healthy competition between manufacturers and importers and that it conforms in every respect to the provisions of Article 5 (2) of the directive. Within this scale, as within any other scale, there must necessarily be a lower price class which, in an almost exclusively *ad valorem* system such as that in Belgium, is intended to guarantee the maintenance of a certain level of tax revenue. This budgetary aim could equally well be achieved by an appropriate tax increase, rather than by maintaining a minimum retail selling price. In the Government's view, however, such a measure would not go far enough, since it would accentuate price differences so that eventually superior quality products would, beyond a certain price threshold, be handicapped in relation to products of poor quality. Finally, the Belgian Government notes that the recent complaint of an importer to which the Commission referred concerned an exceptional case: the importer concerned had asked for tax stamps for a price which was considerably lower than the lowest class of price in the scale.

2. *Adaptation of the national legislation*

As regards the complaint concerning the adaptation of the rules in question the Commission states that in its view Belgium must publish a text which is available to the public and the Commission which will give information as to the extent of the rights of taxpayers under the Treaty and the directive. Such a measure is indispensable in order to inform the parties concerned of the exact scope of the legislation concerning the fixing of retail selling prices for manufactured tobacco and to ascertain whether the national tax authorities are respecting them. In the Commission's view the present legislation leaves the parties to whom it is addressed uncertain as to when it is possible for them to rely on Community law. It is apparent from the consistent case-law of the Court that maintaining such ambiguity in legislation constitutes a failure to fulfil obligations under the Treaty. In this respect the Commission refers in particular to the following judgments of the Court: that of 15 October 1986 in Case 168/85 (*Commission* v *Italy* [1986] ECR 2945), and that of 15 December 1982 in Case 160/82 (*Commission* v *Netherlands* [1982] ECR 4637).

The Belgian Government notes first that the failure to fulfil the obligation to inform as to the content of the Belgian rules constitutes a new ground of complaint which was not mentioned in the course of the administrative procedure and which does not appear in the relevant part of the application. It is therefore inadmissible. Secondly, the Government points out that the Commission has not specified the content of the information which should be published and has not indicated in what respect the present rules might mislead traders.

T. Koopmans
Judge-Rapporteur