JUDGMENT OF THE COURT (Third Chamber)

4 March 2010 *

In Case C-197/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 May 2008,

European Commission, represented by R. Lyal and W. Mölls, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues, J.-S. Pilczer, J.-C. Gracia and B. Beaupère-Manokha, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 18 June 2009,

after hearing the Opinion of the Advocate General at the sitting on 22 October 2009,

gives the following

Judgment

1 By its action, the Commission of the European Communities requests the Court to declare that, by adopting and maintaining in force a system of minimum prices for the retail sale of cigarettes released for consumption in France and a prohibition on selling tobacco products 'at a promotional price which is contrary to public health objectives', the French Republic has failed to fulfil its obligations under Article 9(1) 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 2002/10/EC of 12 February 2002 (OJ 2002 L 46, p. 26) ('Directive 95/59').

Legal framework

Community legislation

2 Recitals 2, 3 and 7 in the preamble to Directive 95/59 read as follows:

'(2) Whereas the objective of the [EC] Treaty is to establish an economic union within which there is healthy competition and whose characteristics are similar to those of a domestic market; and, 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;

(3) Whereas, as far as excise duties are concerned, harmonisation of structures must, in particular, result in competition in the different categories of manufactured tobacco belonging to the same group not being distorted by the effects of the charging of the tax and, consequently, in the opening of the national markets of the Member States;

...

(7) Whereas the imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco.'

3 Under Article 2(1) of that directive:

'The following shall be considered to be manufactured tobacco:

(a) cigarettes;

(b) cigars and cigarillos;

(c) smoking tobacco:

— fine-cut tobacco for the rolling of cigarettes;

— other smoking tobacco,

as defined in Articles 3 to 7.'

4 Article 8 of Directive 95/59 provides:

'1. Cigarettes manufactured in the Community and those imported from non-member 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.

...'

5 Under Article 9(1) of the directive:

'A natural or legal person established in the Community 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 Community 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 Community legislation.'

6 Article 16 of the directive provides:

'1. The amount of the specific excise duty on cigarettes shall be established by reference to cigarettes in the most popular price category according to the information available at 1 January each year, beginning 1 January 1978.

2. The specific component of the excise duty may not be less than 5% or more than 55% of the amount of the total tax burden resulting from the aggregation of the proportional excise duty, the specific excise duty and the turnover tax levied on these cigarettes.

...

5. Member States may levy a minimum excise duty on cigarettes sold at a price lower than the retail selling price for cigarettes of the price category most in demand, provided that such excise duty does not exceed the amount of the excise duty levied on cigarettes of the price category most in demand.'

7 Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8) and Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10), as amended by Council Directive 2003/117/EC of 5 December

2003 (OJ 2003 L 333, p. 49), lay down the rates and/or minimum amounts of the overall excise duty on cigarettes and manufactured tobacco other than cigarettes. Directive 92/80 also contains certain rules on the structure of the excise duty on cigarettes.

8 By Council Decision 2004/513/EC of 2 June 2004 (OJ 2004 L 213, p. 8), the World Health Organisation Framework Convention on Tobacco Control, signed at Geneva on 21 May 2003 ('the WHO Convention'), was approved on behalf of the Community. Article 6 of that Convention, headed 'Price and tax measures to reduce the demand for tobacco', states:

'1. The Parties recognise that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.

2. Without prejudice to the sovereign right of the Parties to determine and establish their taxation policies, each Party should take account of its national health objectives concerning tobacco control and adopt or maintain, as appropriate, measures which may include:

a) implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption, …

…'

National legislation

9 The Code général des impôts (General Tax Code; 'CGI') governs inter alia the taxation of tobacco in France. Article 572, first paragraph, of the CGI was amended by Article 38, paragraph II, of Law No 2004-806 of 9 August 2004 on public health policy (Journal Officiel de la République Française (JORF), 11 August 2004, p. 14277). Article 572, first paragraph, as amended, provides:

'The retail price of each product, expressed per 1 000 items or 1 000 grams, is the same throughout the whole territory and is determined freely by the manufacturers and the approved suppliers. It applies following confirmation under the conditions laid down by decree adopted after consultation of the Conseil d'État. The retail price for cigarettes, expressed per 1 000 items, may not however be confirmed if it is below that obtained by applying, to the average price of those products, a percentage fixed by decree.'

10 Under Article 1 of Decree No 2004-975 of 13 September 2004 applying the first paragraph of Article 572 of the CGI (JORF, 18 September 2004, p. 16264), '[t]he percentage referred to in the first paragraph of Article 572 of the [CGI] shall be 95.'

11 Article 572a of the CGI was amended by Article 30, paragraph II, of Law No 2005-1719 of 30 December 2005 on the 2006 budget (JORF, 31 December 2005, p. 20597). Article 572a, as amended, provides:

'The retail sale of the products sold by the retailers referred to in the first paragraph of Article 568 and of the products supplied to travellers by the re-sellers referred to in the fourth paragraph of that article shall be determined freely, subject however to the condition that that price may not be lower than the retail price expressed per 1 000 items or per 1 000 grams stated in the confirmation decision. …'

12 The Code de la santé publique (Code on Public Health; 'CSP') contains inter alia provisions to combat nicotine addiction. Article L. 3511-1 of the CSP, as amended by Regulation No 2006-596 of 23 May 2006 (JORF, 25 May 2006, p. 7791), provides:

'The following shall be considered to be tobacco products: products intended to be smoked, taken as snuff, chewed or sucked, provided that they consist, even in part, of tobacco, and products intended to be smoked even if they do not contain tobacco, excluding only products intended for medical use, within the meaning of the third paragraph (point 2) of Article 564i of the [CGI].

The following shall be considered to be an ingredient: any substance or any component other than the leaves or other natural or non-processed parts of the tobacco plant, used in the manufacture or preparation of a tobacco product and still present in the finished product, even in a modified form, including paper, filter, ink and glue.'

13 Article L. 3511-3, first paragraph, of the CSP, in the version applicable on 4 September 2006, the date of expiry of the period laid down in the reasoned opinion referred to in paragraph 17 of the present judgment, and the version which results from Law No 2004-806, referred to in paragraph 9 of this judgment, reads as follows:

'Promotion or advertising, whether direct or indirect, of tobacco, tobacco products or the ingredients defined in the second paragraph of Article L. 3511-1, and any free distribution or sale of a tobacco product at a promotional price which is contrary to public health objectives, shall be prohibited.'

14 The CSP provisions on the combating of nicotine addiction are accompanied by criminal sanctions, laid down in Articles L. 3512-1 to L. 3512-4 of the CSP.

Pre-litigation procedure

15 On 21 March 2005, the Commission sent a letter of formal notice to the French Republic in which it argued that the system of minimum retail selling prices of cigarettes and the prohibition on imposing tobacco prices 'of a promotional nature which is contrary to the objectives of public health', laid down by French legislation, are incompatible with Article 9(1) of Directive 95/59.

16 In its reply of 29 July 2005, the French Republic argued that that legislation was justified by the objective of public health protection laid down in Article 30 EC.

17 On 4 July 2006, the Commission sent a reasoned opinion in which it repeated its point of view and called upon the French Republic to comply with its obligations under Article 9(1) of Directive 95/59 within a period of two months from the receipt of that reasoned opinion.

18 Taking the view, in the light of the French Republic's replies of 5 October and 22 December 2006, that the situation remained unsatisfactory, the Commission brought the present action.

The action

Arguments of the parties

19 According to the Commission, Directive 95/59 aims to ensure healthy competition, undistorted by the effects of taxation, in order to achieve the opening of Member States' national markets. Article 9(1) of that directive guarantees that the excise duty tax base is calculated according to the same principles in all the Member States, and that national pricing rules cannot frustrate the achievement of those objectives. The wording and objectives of that provision leave no doubt that it prohibits the imposition of minimum retail selling prices. Imposing those prices would eliminate the price differences which may exist between the various products on the basis of the factors influencing price formulation by different manufacturers. Such a mechanism would, therefore, lead to a distortion in trade between the Member States. The importation of products the net price of which (excluding taxes) is lower than that of comparable products placed on the market in Member States imposing a minimum price would be restricted in those Member States.

20 The Commission claims that the French system of taxation of cigarettes imposes a minimum price equivalent to 95% of the average price of cigarettes, below which the retail selling prices of the cigarettes cannot be confirmed, that confirmation being a condition for application of those prices on the market. Therefore, manufacturers or importers cannot freely determine the maximum retail selling price of their products, since, in any event, that maximum price may not be less than the minimum price imposed. That system of taxation of cigarettes is therefore incompatible with Article 9(1) of Directive 95/59.

21 In addition, the provisions of the CSP in question confer on the French authorities the discretion to prohibit the retail sale of manufactured tobacco at a certain price

and thus prevent manufacturers and importers from freely fixing the maximum retail selling price of their products. The concept of 'promotional price which is contrary to public health objectives' contained in Article L. 3511-3 of the CSP is not defined by national legislation and thus does not allow economic operators to understand their rights and obligations clearly, or enable national courts to enforce them. That concept is therefore contrary to the principles of legal certainty and the protection of individuals.

22 According to the Commission, the fact that Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) (OJ 1992 L 228, p. 1) contains a principle of the free determination of prices, does not mean that a similar principle, clearly laid down in another provision of Community law, namely Article 9(1) of Directive 95/59, must be regarded as inapplicable.

23 The Commission also argues that, even if the prohibitions imposed by that provision and by Article 28 EC respectively may overlap, Article 9 of Directive 95/59 is an autonomous provision of secondary law which performs an autonomous function in the context of that directive, and its application cannot be limited to cases in which Article 28 EC is also infringed.

24 The Commission considers that the argument that the French legislation in question prevents the free determination of maximum selling prices for tobacco products is not called into question by the third paragraph of Article 9(1) of Directive 95/59, under which the implementation of 'national systems of legislation regarding the control of price levels' or 'national legislation regarding the … observance of imposed prices …' is to be maintained.

25 The Commission argues that public health considerations, provided for in Article 30 EC, cannot justify the infringement of Community law alleged in the present case. The lawfulness of national measures falling within an area subject to harmonised legislation at Community level must be assessed in the light of that legislation alone, and not in the light of provisions of primary Community law which allow derogations from the fundamental freedoms. In any case, in so far as the protection of public health can be ensured by imposing high selling prices for manufactured tobacco, that objective can be fully achieved by appropriate taxation policies. Public health considerations played a role in the drafting and amendment of the Community directives on harmonisation in the field of excise duty on tobacco products, but the principle of the free determination of prices was not revoked. By contrast, a system of minimum prices is capable of producing damaging effects for public health because, by protecting producers' margins, that system provides them with extra revenue which can be invested to increase sales of manufactured tobacco.

26 Article 9(1) of Directive 95/59 is also compatible with the WHO Convention. First, that Convention does not oblige the Contracting Parties to apply minimum prices. Second, it does not confer on the Member States a right, enforceable against the Community, to choose between the application of tax measures or the application of price measures, since under Article 35(2) of that convention, that is a matter for the internal functioning of the Community.

27 The Commission also considers that the terms of Council Recommendation 2003/54/EC of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control (OJ 2003 L 22, p. 31), to which the French Republic refers, are not binding and that, in any case, they cannot be interpreted as encouraging an infringement of Article 9(1) of Directive 95/59. The Report from the Commission to the European Parliament and the Council on the structure and rates of excise duty applied

on cigarettes and other manufactured tobacco products (COM(2008) 460 Final), also relied on by the French Republic, refers, moreover, to taxation as a part of an overall strategy of prevention and dissuasion of tobacco consumption.

28 Finally, the Commission takes the view that the Member States may maintain high prices for tobacco products by increasing the level of taxation on them, under the conditions laid down by the relevant directives. Those directives do not provide for a maximum level of taxation. The Member States would therefore be able to achieve the desired price level through the effect of the tax on the final price. Manufacturers' capacity to bear the losses incurred through not passing on the tax charge in the selling prices would, furthermore, necessarily be subject to economic limits.

29 The French Republic contends that the national legislation in question does not infringe the second paragraph of Article 9(1) of Directive 95/59. In its opinion that provision does not establish a general principle that prices are to be determined freely by manufacturers and importers. It calls upon the Court to reconsider to that effect the interpretation which it has given to that provision. Contrary, for example, to Directive 92/49, which aims to harmonise the conditions for access to self-employed activities, the purpose of Directive 95/59 is not to harmonise part of Member States' legislation on excise duties. According to the French Republic, while a principle of the free determination of prices or the freedom to set rates can be linked to the harmonisation of the conditions for exercise of a self-employed activity, it cannot be linked to tax harmonisation. Furthermore, such a principle would have to be interpreted in the light of the free movement of goods provided for in Article 28 EC, which merely prohibits national legislation on prices which places imported products at a disadvantage.

30 The French Republic also considers that, in any case, the national legislation in question falls under the reservations laid down in Article 9(1), third paragraph, of Directive 95/59. First, the expression 'national systems of legislation regarding the control of price levels' in that provision encompasses both national legislation on pricing which is of a general character, and that which is specific, such as the legislation at issue. The French Republic therefore contests the case-law of the Court resulting from Case C-216/98 *Commission* v *Greece* [2000] ECR I-8921, according to which that expression cannot be interpreted as reserving to the Member States a discretion to lay down anything other than national legislation of a general nature, intended to check the increase in prices. Second, according to the same case-law, the expression 'national systems of legislation regarding the ... observance of imposed prices' refers to a price which, once determined by the manufacturer or the importer and approved by the public authorities, is binding as a maximum price. In the opinion of the French Republic, if the price has to be approved by the public authorities, they may also reject it.

31 In the alternative, the French Republic argues that the national legislation in question is justified by the objective of public health protection in Article 30 EC. The case-law of the Court allows the Member States to apply provisions of national law which restrict intra-Community trade in order to protect public health. The French Republic refers in that regard to *Commission* v *Greece*. The national legislation at issue is necessary and proportionate with regard to that objective. A tax increase would not achieve that objective because it would not necessarily be passed on by producers and importers in the sales price and, therefore, would not necessarily lead to reduced consumption.

32 According to the French Republic, the fixing of a minimum price is an appropriate means of keeping the price level high and thus of preventing young people from smoking. That follows from Article 6(2)(a) of the WHO Convention. The French Republic's argument is also confirmed by paragraph 7 of Recommendation 2003/54,

and by section 3.3, paragraph 1, of the Report from the Commission of 16 July 2008 to the European Parliament and the Council on the structure and rates of excise duty applied on cigarettes and other manufactured tobacco products.

Findings of the Court

33 It must be recalled as a preliminary point that, as recital 3 in the preamble to Directive 95/59 makes clear, the directive is part of a policy of harmonisation of the structures of excise duty on manufactured tobacco, the objective of which is to prevent the distortion of competition between different categories of manufactured tobacco belonging to the same group and, consequently, to open the national markets of the Member States.

34 To that end, Article 8(1) of the directive provides that cigarettes manufactured in the Community and those imported from non-member countries are to be subject in each Member State 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 (*Commission* v *Greece*, paragraph 19).

35 It is, furthermore, apparent from recital 7 in the preamble to Directive 95/59 that the imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco.

36 In that regard, Article 9(1) of Directive 95/59 provides that manufacturers, or, where appropriate, their representatives or authorised agents in the Community and

importers of tobacco from non-member countries are to be free to determine the maximum retail selling price for each of their products, the aim being to ensure effective competition between them (*Commission* v *Greece*, paragraph 20). That provision seeks to ensure that the determination of the tax base of the proportional excise duty on tobacco products, that is the maximum retail selling price of those products, is subject to the same rules in all the Member States. It also aims, as the Advocate General states in point 40 of her Opinion, to maintain the freedom of the abovementioned economic operators, by which they may make effective use of the competitive advantage resulting from any lower cost prices.

37 The imposition of a minimum retail selling price by the public authorities thus means that the maximum retail selling price determined by manufacturers and importers cannot, in any event, be lower than that obligatory minimum price. Legislation imposing such a minimum price is therefore capable of undermining competition by preventing some of those producers or importers from taking advantage of lower cost prices so as to offer more attractive retail selling prices.

38 Consequently, a system of minimum retail selling prices for tobacco products cannot be regarded as compatible with Article 9(1) of Directive 95/59 unless it is structured in such a way as to ensure, in any event, that the competitive advantage which could result for some producers and importers of those products from lower cost prices is not impaired and, thus, competition is not distorted (see judgments in Case C-198/08 *Commission* v *Austria* [2010] ECR I-1645, paragraph 30, and Case C-221/08 *Commission* v *Ireland* [2010] ECR I-1669, paragraph 41).

39 The national legislation which is the subject of the present action must be examined in the light of those principles.

40 The provisions of the CGI in question, read in conjunction with Decree No 2004-975, impose on producers and importers a minimum retail selling price for cigarettes in France, amounting to 95% of the average price of those products, and Article L. 3511-3, first paragraph, of the CSP prohibits the sale of any tobacco product at a 'promotional price which is contrary to public health objectives'. At the hearing, the French Republic explained that the concept of 'promotional price which is contrary to public health objectives' must be understood as referring to any price which is lower than that fixed pursuant to Article 572, first paragraph, of the CGI.

41 That system does not make it possible to ensure, in any event, that the minimum price imposed does not impair the competitive advantage which could result for some producers and importers of tobacco products from lower cost prices. On the contrary, as the Commission pointed out at the hearing, without being contradicted by the French Republic, such a system, which furthermore fixes the minimum price by reference to the average price on the market, is likely to eliminate price differences between competing products and to cause prices to converge around the price of the most expensive product. That system therefore undermines the freedom of producers and importers to determine their maximum retail selling price, guaranteed by the second paragraph of Article 9(1) of Directive 95/59.

42 Moreover, contrary to the French Republic's arguments, the system of minimum prices in question is not covered by the derogation in the third paragraph of Article 9(1) of that directive.

43 With regard to that provision, it should be noted, first, that the expression 'control of price levels' has been interpreted as applying to national legislation of a general character, for example that intended to check inflation (see, to that effect, *Commission* v *Greece*, paragraph 25 and case-law cited). Second, in relation to the machinery

for the taxation of tobacco, the expression 'observance of imposed prices' must be understood as referring to a price which, once determined by the manufacturer or the importer and approved by the public authorities, is binding as a maximum price and must be observed as such at every stage of the distribution chain until it is sold to the consumer. That price-fixing machinery performs the function of ensuring that the integrity of tax revenue is not undermined by the exceeding of imposed prices (see, to that effect, *Commission* v *Greece*, paragraph 26 and case-law cited).

44 It is common ground that the legislation in question is intended neither to check inflation nor to avoid the loss of tax revenue caused by the exceeding of the maximum retail selling price freely fixed by producers or importers.

45 With regard to the WHO Convention, as the Advocate General stated in points 50 and 51 of her Opinion, that convention imposes no actual obligation on the Contracting Parties with regard to price policies for tobacco products, and merely describes possible approaches by which to take account of national health objectives concerning tobacco control. Article 6(2) of the convention provides only that the Contracting Parties are to adopt or maintain measures which 'may include' implementing tax policies and, 'where appropriate', price policies, concerning tobacco products.

46 Equally, no specific conclusions concerning the recourse to systems of minimum prices can be drawn from Recommendation 2003/54 or from the Report from the Commission of 16 July 2008 to the European Parliament and the Council on the structure and rates of excise duty applied on cigarettes and other manufactured tobacco products, which, furthermore, are not binding. The extracts from those documents to which the French Republic refers merely express the idea that high prices for tobacco products discourage tobacco consumption.

47 In any case, as is clear from paragraph 38 of the present judgment, Directive 95/59 does not preclude a pricing policy provided that it does not run counter to the objectives of that directive, in particular that of ensuring that competition between the different categories of manufactured tobacco belonging to the same group is not distorted.

48 The French Republic also contends that the system of minimum prices in question is justified by the objective of protection of health and life of humans under Article 30 EC. It argues that an increase in the level of tax cannot guarantee sufficiently high prices of tobacco products, because that increase could be absorbed by producers or importers by sacrificing part of their profit margins, or even by selling at a loss.

49 It should be pointed out, in that regard, that Article 30 EC cannot be understood as authorising measures other than the quantitative restrictions on imports and exports and the measures having equivalent effect envisaged by Articles 28 EC and 29 EC (see, to that effect Case C-302/00 *Commission* v *France* [2002] ECR I-2055, paragraph 33). In the present case, the Commission has not alleged any infringement of Articles 28 EC or 29 EC.

50 The fact remains that Directive 95/59 does not prevent the French Republic from taking measures to combat smoking, which forms part of the objective of protecting public health.

51 As noted in recital 7 in the preamble to Directive 2002/10, which was the last directive to amend Directive 95/59 but which left Article 9 unchanged, the EC Treaty, and in particular the first paragraph of Article 152(1) EC, requires a high level of human health protection in the definition and implementation of all Community policies and activities.

52 That recital also explains that the level of taxation is a major factor in the price of tobacco products, which in turn influences consumers' smoking habits. Equally, the Court has already held that fiscal legislation is an important and effective instrument for discouraging consumption of tobacco products and, therefore, for the protection of public health (Case C-140/05 *Valeško* [2006] ECR I-10025, paragraph 58), and that the objective of ensuring that a high price level is fixed for those products may adequately be attained by increased taxation of those products, the excise duty increases sooner or later being reflected in an increase in the retail selling price, without undermining the freedom to determine prices (see, to that effect, *Commission* v *Greece*, paragraph 31).

53 Moreover, if the Member States wish to exclude once and for all any possibility for producers or importers to absorb, even temporarily, the impact of taxes on the retail selling price of manufactured tobacco products by selling them at a loss, it is inter alia open to them, while allowing those producers and importers to make effective use of the competitive advantage resulting from any lower cost prices, to prohibit the sale of manufactured tobacco products at a price below the sum of the cost price and all taxes (see *Commission* v *Austria*, paragraph 43, and *Commission* v *Ireland*, paragraph 55).

54 It follows from all of the above considerations that the Commission's action should be upheld.

55 It must, therefore, be held that, by adopting and maintaining in force a system of minimum prices for the retail sale of cigarettes released for consumption in France and a prohibition on selling tobacco products 'at a promotional price which is contrary to public health objectives', the French Republic has failed to fulfil its obligations under Article 9(1) of Council Directive 95/59.

Costs

56 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 (Third Chamber) hereby:

1. **Declares that, by adopting and maintaining in force a system of minimum prices for the retail sale of cigarettes released for consumption in France and a prohibition on selling tobacco products 'at a promotional price which is contrary to public health objectives', the French Republic has failed to fulfil its obligations under Article 9(1) 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 2002/10/EC of 12 February 2002;**

2. **Orders the French Republic to pay the costs.**

[Signatures]