JUDGMENT OF THE COURT
7 May 1991 *

In Case C-287/89,

Commission of the European Communities, represented by Pieter Jan Kuijper, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Service, Centre Wagner, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Jan Devadder, Assistant Legal Adviser at the Ministry of Foreign Relations, Foreign Trade and Cooperation with Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the EEC Treaty by refusing to provide an importer of tobacco products with tax stamps showing lower prices than the prescribed minimum prices,

* Language of the case: Dutch.

THE COURT,

composed of: O. Due, President, G. C Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: J. Mischo
Registrar: J.-G. Giraud

having regard to the Report for the Hearing and further to the hearing on 28 February 1991,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1991,

gives the following

Judgment

1 By application lodged at the Court Registry on 18 September 1989, the Commission brought an action under Article 169 of the EEC Treaty for a declaration that, by refusing to provide an importer of tobacco products with tax stamps showing lower prices than the prescribed minimum prices, the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the EEC Treaty.

2 In Belgium manufactured tobacco is subject to excise duties, the levying of which is ensured by a system of tax stamps. Those stamps, which are affixed to sales wrappers, show the retail price. A regulation annexed to a Ministerial Decree of 22 January 1948 (*Moniteur belge*, 18. 2. 1948, p. 1275) fixes a scale showing different classes of retail prices for the products affected, in particular for packets of cigarettes, and the corresponding amount of taxes payable by the manufacturer or importer.

3 On 12 December 1986 the Belgian Minister of Finance refused to supply an importer, Bene BV (hereinafter 'Bene'), with tax stamps showing a selling price lower than the lowest price on the scale as prescribed by the Decree of 22 January 1948, amended by a Ministerial Decree of 26 March 1986 (*Moniteur belge*, 28. 3. 1986, p. 4111). The lowest classes on that scale were BFR 59 for packets of 20 cigarettes and BFR 67 for packets of 25 cigarettes. Bene's application was made in respect of stamps showing prices of BFR 48 and BFR 58 respectively.

4 The Commission, taking the view that the Belgian authorities had thus failed to observe the provisions of Article 30 of the Treaty, brought the present action on the basis of Article 169 of the Treaty.

5 Reference is made to the Report for the Hearing for a fuller account of the national provisions at issue, 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 Commission contends that, by refusing to supply Bene with tax stamps bearing selling prices lower than those prescribed for the lowest categories on the scale, the Belgian authorities have, in effect, imposed minimum retail selling prices on that undertaking. Those prices were fixed at a level which did not allow Bene to reflect in the selling price the competitive advantage resulting from a lower cost price. As the Court has consistently held, fixing minimum prices in such circumstances constitutes a measure having equivalent effect to a quantitative restriction on imports and is, therefore, prohibited by the provisions of Article 30 of the Treaty.

7 The Belgian Government claims that the Commission has not produced any figures capable of establishing that the application of the scale, which has sufficient scope and variety to satisfy the requirements 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), has had a disruptive effect on the market by

making access to the national market more difficult. According to the defendant, Bene has always refused to supply details concerning its production costs and the prices of its raw materials. Furthermore, as the scale decreases in proportion to the number of cigarettes contained in the package offered for sale, Bene has actually been able to market its products at the desired price by selling packets of 20 cigarettes in a package of 100 cigarettes containing 5 packets.

8 Before ruling on the existence of the alleged infringement, it is appropriate to establish the obligations imposed on Member States concerning retail selling prices for manufactured tobacco.

9 Obstacles to imports between Member States resulting from indirect taxation are covered by Article 99 of the Treaty, which in the version in force prior to the Single European Act imposed on the Commission the duty to consider how the legislation of the Member States in this area could be harmonized in the interest of the common market, in conjunction with Article 100 on the approximation of laws (see the judgment in Case 13/77 *SA G.B.-Inno-B.M.* [1977] ECR 2115, paragraph 50).

10 It was on the basis of those provisions of the Treaty that the Council issued Directive 72/464 of 19 December 1972.

11 As is apparent from the second recital in its preamble, that directive has as its objective the fixing of the general principles for harmonizing the rules on taxation of tobacco, which by reason of their characteristics have the effect of hindering the free movement of tobacco, and the establishment of normal conditions of competition in that specific market. According to that recital, taxes affecting the consumption of manufactured tobacco 'are not neutral from the point of view of competition and often constitute serious obstacles to the interpenetration of markets'. It is, therefore, in order to establish 'a healthy competition' within the common market (first recital of the preamble), to eliminate from existing schemes 'those factors which are likely to hinder free movement and distort the conditions of competition, whether at the national level or at Community level' (third recital)

and to achieve 'the opening of the national markets of the Member States' (fifth recital) that the directive establishes, as the basis of the rules, 'a system of freely formed prices for all groups of manufactured tobacco' (eighth recital).

12 It is to that end (judgment in Case 90/82 *Commission* v *France* [1983] ECR 2011, paragraph 18) that Article 5(1) of the directive provides: 'Manufacturers and importers shall be free to determine the maximum retail price for each of their products. This provision may not, however, hinder implementation of national systems of legislation regarding the control of price levels or the observance of imposed prices'.

13 As may be seen from the judgment in *Commission* v *France* (paragraphs 22 and 23), the expression 'control of price levels' can refer only to national legislation of a general nature, intended to check the increase in prices. As to the expression 'observance of imposed prices', it must be understood as referring to a price which, once determined by the manufacturer or importer and approved by the public authority, is compulsory as a maximum price and must be observed as such at all stages of the distribution chain, up to the sale to the consumer (judgment in *SA G.B.-Inno-B.M.*, *supra*, paragraph 64). It follows from that case law that the aforementioned provisions of the directive do not authorise the Member States to fix the prices of manufactured tobacco in disregard of the rule that manufacturers or importers are free to determine prices.

14 While Article 5(2) of Directive 72/464 of 19 December 1972 authorises the Member States to fix a scale of retail selling prices for each group of manufactured tobacco, the scope of those provisions is limited. They are exclusively intended to facilitate the levying of excise duty and they require that each scale should have sufficient scope and variety to correspond in fact with the variety of Community products.

15 Conversely, they have neither the object nor the effect of allowing the Member States to impose on importers of manufactured tobacco a minimum retail selling price in conditions which disregard the provisions of Article 30 of the Treaty.

16 It must be recalled, in that respect, that the prohibition, laid down in those provisions, of measures having equivalent effect to quantitative restrictions applies, as the Court has consistently held, to any measure capable of hindering, directly or indirectly, actually or potentially, imports between Member States (judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).

17 With respect to the application of those principles to national rules fixing a minimum price which is applicable without distinction to domestic products and imported products, the Court considers that a minimum price which is situated at such a level that the competitive advantage conferred on the importer by lower cost prices is cancelled out constitutes a measure having equivalent effect to a quantitative restriction for the purposes of Article 30 (see the judgment in Case 82/77 *Van Tiggele* [1978] ECR 25, paragraph 14, and the judgment in Case 231/83 *Cullet* [1985] ECR 305, paragraph 23).

18 In the present case, the documents before the Court show that the Belgian authorities asked Bene, by letter of 1 August 1986, for full information concerning the retail selling price of its products.

19 By letter dated 24 September 1986, Bene produced, in response to that request, a statement drawn up by a firm of accountants, the conclusions of which were that the undertaking in question had not engaged in any 'price manipulation intended to create unfair competition'.

20 Without refuting the figures and the conclusions of that document, the Minister of Finance, by letter of 12 December 1986, rejected the application for tax stamps submitted by Bene, confirming that 'current scales have sufficient variety to allow healthy competition between the various manufacturers and importers'.

21 It follows from that letter that, contrary to the obligation placed on them to observe the provisions of Article 30 of the Treaty, the Belgian authorities sought purely and simply to apply the lowest prices established by the scale without taking into account Bene's cost prices and the possibility for that undertaking to reflect the competitive advantage resulting therefrom in the retail selling prices of its products.

22 It is clear, moreover, that the Belgian authorities also committed an error of law by disregarding the principle laid down by Article 5(1) of Directive 72/464 of 19 December 1972, according to which manufacturers and importers shall be free to determine the maximum retail selling price for each of their products.

23 The arguments put forward by the Belgian Government in its defence cannot be upheld.

24 In the first place, contrary to what the defendant contends, the Commission is not required, in order to support its application, to produce figures establishing the existence of a disruption of the market. The taking into account, in the conditions described above, of the lowest prices on the Belgian scale constitutes in itself a measure liable potentially to hinder imports prohibited by Article 30 of the Treaty.

25 In the second place, the fact that the national scale has scope and variety is not sufficient to establish that the prices of the lowest classes on that scale satisfy, in all cases, the requirements of Article 30 of the Treaty.

26 In the third place, even if Bene's reply in its letter of 24 September 1986 was incomplete, that fact was not such as to justify the refusal to supply tax stamps for the reasons given by the Minister of Finance. It was for the latter either to ask for additional information from the undertaking or to establish that Bene's proposals were contrary to the requirements of fair trading.

27 Finally, there was no reason to make the benefit of the prices sought by Bene subject to an alteration in the conditions in which it marketed and presented its products.

28 It follows from the foregoing that, by refusing, by its decision of 12 December 1986, to issue the undertaking Bene BV with tax stamps showing lower prices for manufactured tobacco than those laid down by the national price scale, the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the EEC Treaty.

Costs

29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the Kingdom of Belgium has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by refusing, by its decision of 12 December 1986, to issue the undertaking Bene BV with tax stamps showing lower prices for manufactured tobacco than those laid down by the national price scale, the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the EEC Treaty;

(2) Orders the Kingdom of Belgium to pay the costs.

Due Rodríguez Iglesias Díez de Velasco Slynn

Kakouris Joliet Grévisse Zuleeg Kapteyn

Delivered in open Court in Luxembourg on 7 May 1991.

J.-G. Giraud
Registrar

G. F. Mancini
President of Chamber