determined by the manufacturer or importer and approved by the public authorities, is binding as a maximum price and must be observed as such at all stages of the distribution chain, up to the sale to the consumer.

Similarly, Article 5(2) of the directive, which authorizes the Member States to fix a scale of retail selling prices for each group of manufactured tobacco, has neither the object nor the effect of allowing the Member States to impose on traders a minimum retail selling price in conditions which disregard Article 30 of the Treaty, the object of the provision being solely to facilitate the levying of excise duty on tobacco.

2. The imposition by a Member State of minimum retail selling prices on an undertaking importing manufactured tobacco by means of a refusal to supply tax stamps showing selling prices lower that those envisaged by the national scale, without taking any account of the cost prices of the undertaking and the possibility for it to reflect the resultant competitive advantage in its selling prices, constitutes a measure having effect equivalent to a quantitative restriction on imports, prohibited by Article 30 of the Treaty.

REPORT FOR THE HEARING
in Case C-287/89 *

I — Facts and procedure

A — *Legal background*

(1) *Community background*

The following texts are mentioned in the present case:

— Article 30 et seq. of the EEC Treaty on quantitative restrictions on imports between the Member States and measures having equivalent effect;

— Council Directive 72/464 of 19 December 1972 on taxes other than turnover taxes on the consumption of manufactured tobacco (Official Journal, English Special Edition 1972 (31 December) L 303, p. 1).

* Language of the case: Dutch.

That directive, issued on the basis of Articles 99 and 100 of the Treaty, indicates, in the first paragraph of its preamble, 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; 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 directive fixes the general principles for harmonizing, in several stages, the structures of the excise duty to which the Member States subject manufactured tobacco, as well as the specific provisions applicable during each of the stages of that harmonization. The second stage of harmonization commenced on 1 July 1978 (Article 3 of Council Directive 77/805/EEC of 19 December 1977 (Official Journal L 338, p. 22); it was extended by, successively, Council Directive 80/1275/EEC of 22 December 1980 (Official Journal L 375, p. 76), Council Directive 81/463/EEC of 24 June 1981 (Official Journal L 183, p. 32), Council Directive 82/2/EEC of 21 December 1981 (Official Journal 1982 L 5, p. 11), Council Directive 82/877/EEC of 21 December 1982 (Official Journal L 369, p. 36), Council Directive 84/217/EEC of 10 April 1984 (Official Journal L 104, p. 18), and Council Directive 86/246/EEC of 16 June 1986 (Official Journal L 164, p. 26). That last directive, applicable as from 1 January 1986, did not fix a time-limit for the extension.

By the terms of Article 4(1) of the directive: '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'. By paragraph 4 of the same article, the excise duty on cigarettes may include a minimum tax component, the ceiling for which shall be determined for each stage by the Council on a proposal from the Commission. That minimum excise duty may not, in the second stage of harmonization, exceed 90% of the sum of the proportional excise duty and the specific excise duty which the Member State levies on cigarettes of the most popular price class (Article 10(B) of the directive). During that same stage, the Member States may exclude customs duty from the basis for calculating the excise duty.

Article 5 of the directive provides:

'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 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.'

(2) *National background*

The levying of excise duty on manufactured tobacco in Belgium is governed by a Law of 31 December 1947 on the tax system for tobacco (*Moniteur belge*, of 31 December 1947) and by a regulation annexed to a Ministerial Decree of 22 January 1948 (*Moniteur belge*, 18 February 1948).

That levying is ensured by the system known as 'tax stamps'.

Those stamps mention the retail price.

In order to facilitate the levying of the tax a scale of those retail prices, and consequently a scale of the tax stamps, is provided for each class of products.

During the relevant period, the scale was fixed by a Decree of the Minister of Finance of 26 March 1986 (*Moniteur belge*, 28 March 1986, p. 4111).

The lowest classes in that scale were as follows:

Retail price in BFR	Number of cigarettes per package
59	20
67	25
125	50
240	100

Those retail prices were respectively increased, by a Decree of the Minister of Finance of 20 December 1988 (*Moniteur belge*, 30 December 1988, p. 17 901), to:

65 BFR

74 BFR

135 BFR

270 BFR

B — *Background to the dispute*

At the origin of the dispute is the rejection by the Minister of Finance of the Kingdom of Belgium, in December 1986, of an application submitted by an importer, the Société Bene BV (hereinafter 'Bene'), for tax stamps bearing a sales price lower than that envisaged by the lowest class of the scale established by the Ministerial Decree of 26 March 1986 (Bene's application referred to a sales price of BFR 48 for a packet of 20 cigarettes and BFR 58 for a packet of 25 cigarettes).

The Commission took the view that, in those circumstances, the importers of manufactured tobacco could not fix retail selling prices for their products at levels lower than those fixed by the Belgian administration, which had the effect of cancelling out the competitive advantage resulting from lower cost prices.

A formal notice dated 15 December 1987 claiming an infringement of Article 30 of the EEC treaty was sent by the Commission

to the Kingdom of Belgium on the basis of Article 169(1) of the Treaty.

In its reply, dated 29 January 1988, the Kingdom of Belgium disputed the validity of that formal notice, arguing in particular that the disputed decision was based on the fact that the prices proposed by Bene were too far removed from the prices generally asked on the Belgian market for manufactured tobacco products by European undertakings experiencing comparable levels of productivity.

On 23 November 1988 the Commission issued a reasoned opinion, in accordance with Article 169 of the Treaty.

The Kingdom of Belgium refused to comply with that opinion, contending, in a letter of 1 February 1989 from its Permanent Representative to the European Communities, that the scale of tax stamps corresponded to the requirements of Article 5 of Directive 72/464 for the following reasons:

'1. The different classes of prices appearing in the scale reflect the retail prices which are actually practised in the whole of the Belgian market.

2. The scale has sufficient scope and variety since it has not, up to the present, raised any problem in application. Proof of that may be seen in the very weak demand for stamps for cigarettes in the lowest price classes.

3. The scale of prices appearing in the scale allows manufacturers and importers to carry on a healthy competition, within the meaning of the preamble to Directive 72/464.

4. The Belgian scale, as all other scales, necessarily includes a low class of prices, which, in an almost exclusively ad valorem system such as that practised by Belgium, constitutes an essential element of an essentially fiscal nature, necessary to ensure that a certain level of receipts of excise duty and VAT is maintained.'

The Commission, not convinced by those arguments, referred the matter to the Court by an application lodged on 18 September 1989.

C — *Procedure before the Court*

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure. In addition, it invited the Commission and the Kingdom of Belgium to answer several questions before the hearing.

II — Form of order sought by the parties

The *Commission* claims that the Court should:

— declare that the Kingdom of Belgium, by refusing to supply an importer of manufactured tobacco with tax stamps at

prices lower than the minimum prices laid down, has failed to fulfil its obligations under Article 30 of the EEC Treaty;

— order the defendant to pay the costs.

The *Kingdom of Belgium* contends that the Court should:

— dismiss the application;

— order the Commission to pay the costs.

III — Summary of the pleas in law and arguments of the parties

A — *The basis of the action*

The *Commission* acknowledges that the action is based exclusively on Article 30 of the Treaty and not on the provisions of Directive 72/464. Article 5 of that directive merely reproduces, in the context of the rules applicable to the collection of excise duty on manufactured tobacco, the principles laid down by Article 30. Consequently, it is unnecessary to put forward a specific complaint based on failure to observe the provisions of the directive.

The *Belgian Government*, while noting that the Commission restricts its application solely to the infringement of Article 30, disputes the reasoning put forward by the Commission to justify such a restriction. It takes the view that, in the instant case, the existence of an infringement of Article 30 depends on proof that the Kingdom of Belgium disregarded the provisions of Article 5 of the directive.

B — *The compatibility of a national regulation imposing minimum prices with the provisions of Article 30 of the Treaty and of Directive 72/464*

1. *Article 30 of the Treaty*

The *Belgian Government*, basing itself on the conclusions of Mr Advocate General Van Gerven in his Opinion in Case 145/88 *B & Q PLC* [1989] ECR 3851, distinguishes national measures which are discriminatory by their purpose and their objective, measures which put imported products in an unfavourable situation compared with national products (judgment in Case 120/78 *Rewe-Zentral*, known as the 'Cassis de Dijon' case, [1979] ECR 649), and finally rules which, either on their own or as part of an entire legal and economic context, can lead to a national market being screened off, access to that market being made unacceptably difficult, less profitable or less attractive for traders from other Member States (judgment in Cases 60 and 61/84 *Cinéthèque and Others* [1985] ECR 2605).

With respect to the last case, where national rules do not in themselves screen off the national market (in which case Article 30 would automatically be applicable) but are confined to making access to the national market more difficult, the Belgian

Government considers, quoting the Advocate General in his Opinion (paragraph 23), that:

'The prohibition in Article 30 is applicable only if it appears from the entire legal and economic context that the economic interweaving of national markets sought by the Treaty is therefore threatened. In such a case, the compartmentalisation of the market should be made sufficiently probable by a number of quantitative factors which show that the application of the rule makes it more difficult to penetrate the market, thereby making the market so inaccessible (expensive, unprofitable) that it must be feared that the majority of imported goods will disappear from the market'.

The Belgian Government infers therefrom that, in a case such as the instant one, the Commission, in order to prove the infringement of Article 30, must show, by means of quantitative factors, that the disputed rules have a particularly disruptive effect on the Community market by making access to the national market more difficult.

Furthermore, even in such a case, as the Advocate General acknowledged in that Opinion, Article 36 of the Treaty and the 'mandatory requirements' referred to in the 'Cassis de Dijon' case could be relied on to justify the rules in question.

According to the *Commission*, national rules imposing minimum prices, applicable without distinction to domestic products and imported products, constitute a measure having equivalent effect within the meaning of Article 30 of the Treaty when the minimum price actually hinders the flow of imported products. Such is the case, in particular, when the minimum price is set at a level which does not allow the lower cost price of the imported product to be reflected in the selling price to consumers (see judgment in Case 82/77 *Van Tiggele* [1978] ECR 25; and judgment in Case 231/83 *Cullet* [1985] ECR 305).

Only one of the reasons envisaged by Article 36 of the Treaty may, where appropriate, justify such national rules (see judgment in Case 231/83, above).

With respect to the Opinion of the Advocate General in Case 145/88, referred to by the defendant, the Commission points out that:

— that Opinion, inasmuch as it laid down the conditions in which the infringement of Article 30 of the Treaty may be established, was not followed by the Court;

— the Opinion did not relate to rules on prices. In the case envisaged by the abovementioned judgment in Case 82/77, the rules must on the contrary be regarded as having *ipso facto* the effet of hindering trade;

— in order to establish the infringement of Article 30 of the Treaty, the Commission need only prove that the national rules on prices do not allow imported products to be sold profitably or the advantage which such products afford by virtue of their low cost price

to be passed on (see judgment in Case 159/85 *Edah BV* [1985] 3359; judgment in Case 56/87 *Commission* v *Italian Republic* [1988] ECR 2919).

2. *Directive 72/464*

According to the *Belgian Government*, Article 5 of the directive allows the Member States to fix a scale of prices in order to facilitate the levying of the excise duty on manufactured tobacco. That power is accompanied by the condition that each scale must have sufficient scope and variety to take account of economic reality and to ensure that manufacturers and importers shall be free to fix their prices.

The *Commission* contends, basing itself on the first recital in the preamble to the directive, that the levying of taxes on manufactured tobacco must not distort the conditions of competition and must not hinder free movement within the Community.

C — *The application of the price scale established by the Belgian national rules*

The *Commission* puts forward the following arguments:

(a) The refusal by the Belgian authorities to make available to importers, such as Bene, tax stamps bearing a retail price lower than the minimum price fixed by the national rules leads to the fixing of a minimum selling price for cigarettes and other tobacco.

That minimum price actually prevents Bene from reflecting in its selling price to consumers the competitive advantage resulting from a lower cost price.

The infringement of the provisions of Article 30 is thereby established.

(b) The arguments put forward by the Belgian Government, during the pre-litigation procedure, to justify the application of those national rules cannot be upheld.

In the first place, contrary to the provisions of Article 5 of the directive, the various price classes on the scale do not reflect the reality of the Belgian market in cigarettes. As the case of Bene shows, a demand exists for stamps of a price class lower than the minimum price on the scale. The Commission points out that the scale is established by the Belgian authorities after consultation with the Fédération des Fabricants de Tabacs de Belgique (Belgian Tobacco Manufacturers' Federation), to which Bene does not belong. Neither the fact that Bene submitted to those rules, nor the fact that the demand for stamps corresponding to the lowest classes of the scale is very weak, enables it to be established that the scale is adequate for the market.

Moreover, when there is an increase in the prices on the scale, such as that resulting from the Ministerial Decree of 20 December 1988, undertakings are required to raise their selling prices even though there has been no corresponding increase in the cost price of their products.

In the second place, the requirements of healthy competition are not among the reasons which may legally justify the application of such a scale:

— healthy competition and fair trading are not, in fact, mentioned in Article 36 of the Treaty;

— even supposing that the interests of fair trading could be invoked, in such a case, on the basis of the 'Cassis de Dijon' case law, it would be for the Kingdom of Belgium to establish that the prices proposed by Bene are not compatible with fair competition. In the instant case, the mere observation of the Belgian Government that the prices proposed by Bene are too far removed from the prices practised by other similar European undertakings is insufficient since it is not supported by a specific analysis of the production conditions of the undertaking in question;

— the scale, on the contrary, goes against the requirements of healthy competition mentioned in the first paragraph of the preamble to Directive 72/464 and against the economic integration of the Member States envisaged in the Treaty in that it leads to the prevention of price competition on the market in cigarettes;

— the point raised by the Belgian Government that more than 60% of all stamps delivered for packets of 25 cigarettes bear the price of BFR 73 shows that competition on the market is extremely limited.

In the third place, it is not possible to plead the need to establish a scale of prices which includes a minimum price class guaranteeing a certain level of tax revenue. Such a ground is not provided by Article 36 of the Treaty. Furthermore, and in any event, purely budgetary reasons do not constitute a 'mandatory requirement' within the meaning of the 'Cassis de Dijon' case law (see judgment in Case 238/82 *Duphar* [1984] ECR 523).

The *Belgian Government*, without reiterating all the grounds of defence raised during the pre-litigation procedure, makes the following observations in reply to the arguments put forward by the Commission:

(a) since the Commission does not produce any figures likely to establish that the market is disrupted, it has failed to prove an infringement of Article 30 of the Treaty.

(b) The scale of prices established by the national rules complies with the provisions of Article 5 of Directive 72/464:

— manufacturers and importers of cigarettes may freely choose the price of their products. Different importers may thus fix different prices for one and the same product; they may freely alter the price initially chosen;

— the scale has sufficient scope and variety and corresponds to the reality of the market in cigarettes in Belgium.

On that last point, the Belgian Government contends that the demand for the lowest classes of stamps is negligible, as demonstrated by the table below:

Cigarettes	Price (in BFR)	1987 (%)	1988 (%)
25	70	1,591	1,422
	71	none	none
	72	none	none
	73	62,990	60,680
20	61	0,003	0,097
	62	2,006	1,825
	63	0,007	none
	64	none	none
	65	0,250	0,103
	66	0,954	0,972
	67	22,467	23,629

D — *Bene's practice*

The *Belgian Government* emphasizes that, while Bene has supplied the Belgian authorities with an overall outline of its price structure, it has always refused to supply details concerning, in particular, production costs and the prices of raw materials. Besides, Bene made use of the possibility under the national rules to sell five packets of 20 cigarettes in a single wrapper to which the tax stamp corresponding to the lowest price class for packets of 100 cigarettes is affixed. In that way Bene has actually been able to market its products at the prices which it had itself requested, even if its application initially referred to individual packets of 20 cigarettes.

The *Commission* considers that this last argument is irrelevant to the outcome of the action. The fact that the importer is obliged to sell in packets of 100 cigarettes leads to additional costs and alters the conditions for the marketing of the products. Thus, the requirements of Article 30 of the Treaty are not in any respect observed.

IV — Replies of the parties to questions put by the Court

A — *Answers of the Commission*

First question

The Commission is asked to specify the reasons of fact and law which led it to allege the failure to observe only the provisions of Article 30 of the Treaty, to the exclusion of the provisions of Council Directive 72/464.

Answer

The Commission points out, in the first place, that it has previously, in the context of the earlier case (Case 298/86 *Commission* v *Belgium*), pleaded that the refusal by the Belgian authorities to supply tax stamps bearing a price lower than that of the lowest classes of the price scale to a manufacturer who considered that he could import cigarettes at such a price was incompatible with the provisions of Article 30 of the Treaty.

The Commission considers that this ground, which was rejected by the Court for procedural reasons, is firmly based in fact. It is for that reason that a new action for failure to fulfil obligations, based on that ground, has been brought before the Court.

In the second place, the Commission refers exclusively in its application to the Belgian administrative practice in respect of the undertaking Bene and its incompatibility with the provisions of Article 30 of the Treaty. It does not raise the incompatibility of Belgian legislation on tax stamps for cigarettes with the provisions of Article 5 of Directive 72/464. In view of the general wording of those provisions of the directive and of the little specific evidence available to the Commission, the proof of that incompatibility would have been difficult to establish.

In the third place, a ruling on such an application may constitute a not insignificant pointer for establishing the conditions in which Article 5 of the directive is applicable.

Finally, the fact that the Commission intends, in the instant case, to concentrate on the concrete effects of the existence of a scale of tax stamps combined with the refusal to supply stamps at a price lower than the floor price of that scale, in other words on the effects of restricting competition and limiting imports to which a minimum price leads, is relevant to the issue of whether those effects may be considered incompatible with Article 5 of Directive 72/464. Article 5 recognizes the freedom for manufacturers and importers to determine the maximum retail selling prices and the 'scale of retail selling prices' could be analysed equally as a scale of maximum retail selling prices. If that were so, the scale would always be sufficiently open towards the bottom; but that is irrelevant, given the refusal to supply stamps below a determined price level. It is that refusal which is crucial in the eyes of the Commission.

Second question

The Commission is asked to supply figures on the cost price of the cigarettes imported by Bene BV during 1986.

Answer

The Commission has produced in the papers submitted to the Court a statement drawn up by a firm of accountants, Paardekooper et Hoffman, indicating the standard price, for 1986, of the product Texas HB Filter per thousand units.

B — *Answers of the Belgian Government*

First question

The Belgian Government is asked to produce copies of the application for tax stamps submitted by Bene BV, of the correspondence exchanged between the Belgian administration and that company concerning the company's justification of its proposed prices, and of the decision of the Minister of Finance of 16 December rejecting that application for stamps.

Answer

The Belgian Government produced copies of the application for tax stamps submitted by Bene BV, of the correspondence exchanged between that company and the Belgian authorities and of the decision of the Minister of Finance, dated 12 December 1986, rejecting that application.

Second question

The Belgian Government is asked to produce copies of the national laws and regulations, in force in 1986, fixing the scheme of excise duty applicable to manufactured tobacco products.

Answer

The Belgian Government produced copies of the Law of 31 December 1947 on the tax scheme for tobacco and of the Ministerial Decree of 22 January 1948 governing the levying of excise duty on manufactured tobacco.

Third question

The Belgian Government is asked to indicate precisely the procedure according to which the scale of prices for manufactured tobacco is established, as well as the principles of calculation which allow the lowest classes of that scale to be fixed.

Answer

The Belgian Government points out that the scale of prices for manufactured tobacco is not based on calculations. When a price increase is requested by the sector concerned and granted by the Minister of Economic Affairs, the Belgian authorities examine what retail price will be applied to the best-selling products. From that figure, the existing scales are adopted in such a way that a certain number of classes remain below those best-selling products, so that the scales have sufficient variety to cover the range of products coming from the Community.

At the time of the price adjustment of 1 April 1986, three classes of lower prices were thus maintained for packets of 25 units and six classes of price for packets of 20 units. There are today, respectively, four and 10 classes of lower prices.

It is the Customs and Excise authorities who propose to the Minister of Finance the new scales thus established. If the Minister accepts the proposal, the scales are reproduced in a Ministerial Decree.

F. Grévisse
Judge-Rapporteur