OPINION OF MR ADVOCATE GENERAL CRUZ VILAÇA
delivered on 19 May 1988 *

Mr President,
Members of the Court,

1. Article 2 of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco [1] provides that the Member States are to refrain from subjecting manufactured tobacco to any tax other than excise duty, for whose harmonization the directive lays down the general principles, and value-added tax.

2. In Belgium, as in other Member States, the taxes in question are collected by means of a system of tax stamps. The stamps are purchased by the manufacturer or importer and affixed to the manufactured tobacco products. They state the retail selling price and vary according to the type of product concerned.

3. In order to facilitate the collection of the taxes, a scale of retail selling prices and thus a scale of tax stamps is provided for each category of products: each scale is valid for all the products belonging to the group concerned, without distinction on the basis of quality, presentation, the origin of the products or of any other criterion.

4. The retail selling price which manufacturers or importers display on every product by means of the tax stamp is a maximum price. Since it is impossible to charge a price higher than that indicated on the tax stamp, there is no danger of tax evasion resulting from the affixing of a lower retail price on products which in fact belong to more expensive groups.

5. The applicable provisions of the Belgian legislation are contained, as regards excise duty, in the regulation annexed to the Ministerial Decree of 22 January 1948, and in particular Articles 12 and 15 thereof, and as regards VAT in Article 58 of the Law of 3 July 1969.

6. The Commission ascertained that the Belgian tax authorities were interpreting this legislation as entitling them to fix a uniform retail selling price applicable to each product of the same category and the same trade mark. This price, which was used to calculate VAT and excise duty, was the highest of the prices submitted by the manufacturers or importers. Consequently, traders who wished to fix a retail selling price lower than that of their competitors were none the less obliged to pay the taxes on the basis of the higher uniform price.

7. Since the Commission considered that the Kingdom of Belgium was thereby failing to comply with Community law, it initiated the procedure laid down in Article 169 of

* Translated from the Portuguese.

1 — Official Journal, English Special Edition [1972] (31 December), L 303, p. 1).

the Treaty. Since it does not consider that the explanations provided in the pre-litigation procedure were satisfactory, the Commission now claims that the Court should declare that, by fixing retail selling prices for certain categories of manufactured tobacco at a level different from the price 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 Directive 72/464/EEC.

8. Article 5 (1) provides as follows: 'Manufacturers and importers shall be free to determine the maximum retail selling price for each of their products', without prejudice to the national legislation regarding the control of price levels or the observance of imposed prices.

9. However, the subject-matter of the action was not entirely clear from the position adopted by the Commission in the written procedure; consequently, the Court requested the applicant to clarify the complaints contained in the application.

10. In its reply to the Court, as referred to in the Report for the Hearing, the Commission stated that its main complaint was 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, as was shown by the following actions on their part:

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

(b) The refusal to issue tax stamps corresponding to retail selling prices higher 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 product;

(c) The refusal to issue tax stamps corresponding to retail selling prices lower than those provided for in the fixed scale.

11. The Commission stated that it considered that the Belgian legislation was also in breach of Community law in so far as it did not inform the persons concerned that Directive 72/464/EEC, and in particular Article 5 (1) thereof, entitled domestic manufacturers and importers to determine the maximum retail selling prices of each of their manufactured tobacco products.

12. As the defendant contested the admissibility of some of these complaints, I shall begin by examining this issue.

I — Admissibility

13. In its defence, the Kingdom of Belgium objected to the admissibility of the last of the complaints set out above, concerning the failure to provide information on the provisions of the directive.

14. The Belgian Government contends that that complaint was not mentioned in the pre-litigation procedure but appeared for the first time in the application.

15. It is true that that complaint — which is referred to in paragraphs 6 and 11 of the application but is not even mentioned in the claim itself — does not appear, directly or indirectly, expressly or by implication, in the letter of formal notice or the reasoned opinion.

16. The Court has consistently held that the scope of the administrative procedure and the scope of the contentious procedure must be identical, and that any issues not raised in the reasoned opinion are inadmissible.[2]

17. Moreover, the complaint is formulated in terms that are vague and imprecise, confusing the obligation to inform traders of the provisions applicable with the obligation to inform the Commission that the directive has been complied with, and without its being clear whether such an obligation to provide information concerns the content of the directive itself, the rules laid down by the Belgian legislation or the way in which they are interpreted by the national authorities.

18. In my view, the aforesaid complaint should therefore be regarded as manifestly inadmissible.

19. The Court has held that 'even if the Member State concerned does not consider it necessary to avail itself of the opportunity to submit its observations, such an opportunity constitutes an essential guarantee required by the Treaty and amounts to an essential procedural requirement in proceedings relating to the finding of a failure on the part of a Member State'.[3]

20. I also consider that there can be no serious doubt as to the inadmissibility of another of the complaints, concerning the scope of the scale of tax stamps provided for by the Belgian legislation (referred to above under (c) and referred to in the Report for the Hearing under 1 (c)).

21. This complaint cannot be considered even to have appeared in the application in a form sufficiently clear to enable the defendant to understand it and to defend itself.

22. So far as the actual claim in the application is concerned, the vague and general terms used — 'by fixing retail selling prices for certain categories of manufactured tobacco at a level different from the price freely determined by manufacturers and importers . . . ' — do not permit the conclusion to be drawn that this complaint is covered.

23. Throughout the text of the application it would only be possible by showing considerable good faith to discover an implicit reference to that complaint in the allegation mentioned, on page 2 (a), for example, since, as became clear at a later stage (in the reply), that allegation referred to a case of refusal to supply a tax stamp below the prescribed scale to an undertaking importing tobacco into Belgium

2 — See, for example, judgment of 9 December 1981 in Case 193/80 *Commission* v *Italy* [1981] ECR 3019, at p. 3032.

3 — Judgment of 17 February 1970 in Case 31/69 *Commission* v *Italy* [1970] ECR 25, at p. 33. See, also, judgments of 11 July 1984 in Case 51/83 *Commission* v *Italy* [1984] ECR 2793, and of 28 March 1985 in Case 274/83 *Commission* v *Italy* [1985] ECR 1077.

which was a subsidiary of a manufacturer established in the Netherlands, Cigarettenen Tabakfabriek Bene BV (hereinafter referred to as 'the Bene case').

24. But, even so, that would be too great a concession to good faith.

25. That is because the example given in the application was expressly linked by the Commission to the fixing by the Belgian authorities of a uniform selling price for every product of the same category and the same trade mark, so as to oblige traders who had decided to fix a selling price below that of their competitors to pay tax on a price which had not been truly fixed by them. Nor is there the slightest indication that, in citing the Bene case in the application, the Commission was criticizing the scope of the scale of tax stamps laid down in the Belgian legislation.

26. It is therefore hardly surprising that the Belgian Government only objected to the admissibility of this complaint in its rejoinder. The reason is the same as that for which, in spite of its excellent attempt to arrange the arguments methodically in its defence, this was not included among the complaints into which the Belgian Government subdivided the position adopted by the Commission: because, at that time, the complaint purely and simply did not exist.

27. The complaint first appears in the reply, in response to 'spontaneous' references made by Belgium to the scope of the scale. In particular, the Commission has therefore apparently reformulated its main original complaint: it is no longer the freedom to fix prices at a level below that of competitors that is at issue, but the fact that the level must be fixed within the limits of the scale, which would apparently be too restrictive, in breach of Article 5 (2) of the directive. In other words, according to the Commission, Belgium would be excluding under Article 5 (2) what had been admitted under Article 5 (1).

28. But in reality, the complaint only clearly appears in the reply to the written questions asked by the Court.

29. Under those circumstances — and unless the application is to be turned into a charade — the complaint in question cannot be considered to have been stated in it, as required by Article 38 of the Rules of Procedure. Consequently, it must be considered inadmissible.

30. But even if a different conclusion were drawn, it is also necessary, as is clear from the aforesaid judgments of the Court, for the complaint to have been raised in the course of the administrative procedure. When questioned on this point at the hearing, the Commission stated that the complaint was included, regard being had to the system of tax stamps, in the complaint concerning 'the refusal of the Belgian authorities to issue to parallel importers tax stamps corresponding to retail selling prices lower than those fixed by the exclusive importer of the product in question', which appeared on page 4 of the letter of formal notice and in point 5, *in fine*, of the reasoned opinion.

31. However, the reference on page 2 (a) of the application concerns the fixing of the

retail selling price of a product not yet put on the Belgian market or the case of a product marketed for the first time, whereas both the letter of formal notice and the reasoned opinion concern the fixing by different traders of the price of the same product, already put on the Belgian market.

32. Furthermore, the provision of Directive 72/464/EEC whose infringement was alleged in the complaint that the Belgian scale of tax stamps had not been extended and amended sufficiently to correspond to the variety of Community products is Article 5 (2). However, no reference whatsoever to any infringement of that provision appears in the letter of formal notice or the reasoned opinion.

33. It therefore seems to me that such a complaint did not merely provide a further explanation or further details of a complaint which had already been set out in general or collective terms in the administrative procedure. Consequently, the Kingdom of Belgium could not have obtained any idea of the content of the complaint in question from the complaints expressly referred to in the course of the administrative procedure, and was deprived of an essential guarantee provided for by the Treaty. As regards that complaint, the pre-litigation procedure did not fulfil its purpose, which is to give the Member State concerned an opportunity, on the one hand, of remedying the position before the matter is brought before the Court and, on the other hand, of putting forward its defence to the Commission's complaints.[4] The lack of precision of the application cannot be permitted to widen the scope of the action to include an issue which was not considered during the administrative procedure.[5]

4 — Judgment of 31 January 1984 in Case 74/82 *Commission* v *Ireland* [1984] ECR 317.

5 — See judgment of 9 December 1981 in Case 193/80 *Commission* v *Italy* [1981] ECR 3019, at p. 3032.

34. I therefore consider that the subject-matter of the administrative procedure and the subject-matter of the proceedings before Court are not defined 'in similar and sufficiently specific terms', as has been held by the Court to be a pre-condition for the admissibility of an action against a State for failure to fulfil its obligations.[6]

35. For those reasons I propose that the Court should also declare inadmissible the complaint concerning the scope of the scale of tax stamps, pulled out of a hat, as it were, by the Commission at a very advanced stage in the procedure.

II — Substance

36. Since it is possible as regards the latter complaint that the Court will take a view different from that which I have adopted and will therefore consider that complaint admissible on the basis that it is included in the other issues raised by the Commission at the appropriate time, it is necessary to decide on the substance of the complaint.

37. The question which then arises is whether in that case there is sufficient evidence before the Court to enable the complaint to be considered well founded.

38. In that regard, it is clear that the documentary evidence submitted by the

6 — See judgment of 15 December 1982 in Case 211/81 *Commission* v *Denmark* [1982] ECR 4547. An explanation of the Court's strict interpretation of the requirement that the scope of the administrative procedure and the contentious procedure must be identical is provided in the judgment of 20 February 1986 in Case 309/84 *Commission* v *Italy* [1986] ECR 599 (see the opposite view adopted by Mr Advocate General Verloren van Themaat in his Opinion).

Commission in annex to the reply show that in the Bene case, referred to above, the Belgian authorities were requested to supply tax stamps corresponding to prices below those fixed in the scale, and that request was refused.

39. At that time, before the application was finally refused, the Belgian Government asked the undertaking concerned for certain information on its cost structure and had that information examined to determine whether it complied with the legislation on commercial practices.

40. Ultimately, the Belgian Government rejected the application on the ground that the scale of tax stamps was sufficiently wide to permit proper competition among manufacturers and importers.

41. It has reiterated that contention in the course of these proceedings, and has also alleged that the scale of tax stamps had posed no other problem up to that time, as is confirmed by the very low demand for stamps for cigarettes in the lower price groups.

42. In that context, the Bene case is in its contention wholly exceptional, since it concerned a price significantly lower than the lowest price group in the scale.

43. The Belgian Government also stated that to reduce the lower limit of the scale would, in order to maintain the level of tax revenue, necessitate increasing the proportionate amount of excise duty, and that would place better quality products at a disadvantage by accentuating price differences; on the other hand, an increase in excise duty would be inconsistent with the legislature's objective (Article 4 (3) of Directive 72/464/EEC), which was that, at the final stage of harmonization, the range of retail selling prices should reflect fairly the difference in the manufacturers' prices, which could only be achieved by taxation which was essentially payable *ad valorem*.

44. In the general context of its first complaint (the 'main complaint', as it is called), the Commission cited the judgment in *Tasca*,[7] in which the Court stated that although price control systems applicable to domestic products and imported products alike did not in themselves constitute measures having an effect equivalent to a quantitative restriction, they might have such an effect, however, when the prices were fixed at a level such that the sale of imported products became either impossible or more difficult than that of domestic products.

45. In the same context the Commission also cited the judgment in *Van Tiggele*,[8] in which the Court stated that a minimum price, fixed 'at a specific amount which, although applicable without distinction to domestic products and imported products, is capable of having an adverse affect on the marketing of the latter in so far as it prevents the lower cost price from being reflected in the retail selling price', constituted a measure having an effect equivalent to a quantitative restriction on

7 — Judgment of 26 February 1976 in Case 65/75 *Tasca* [1976] ECR 291, at p. 309. See, more recently, judgment of 29 November 1983 in Case 181/82 *Roussel Laboratoria* v *Netherlands* [1983] ECR 3849, at p. 3869, paragraph 17.

8 — Judgment of 24 January 1978 in Case 82/77 *Openbaar Ministerie of the Netherlands* v *Van Tiggele* [1978] ECR 25, at p. 39, paragraph 18.

imports which was prohibited under Article 30 of the Treaty.

46. In the present proceedings, our attention is drawn to the abovementioned case of Cigaretten — en Tabakfabriek Bene BV, whose application for tax stamps for a price below those fixed in the scale was rejected. In the course of correspondence with the Belgian authorities, the undertaking in question claimed that price competition was almost the only way in which it could acquire or maintain part of the market and that under those conditions it was virtually unable to sell its products.

47. At the hearing reference was made to the existence of similar cases, in which the refusal to supply stamps for prices below the scale had been raised before the domestic Belgian courts.

48. The Commission has invited the Court — albeit in the context of another complaint (concerning the fixing of prices by parallel importers) — to interpret Article 5 of the directive in the framework of Article 30 of the Treaty.

49. In that connection, it should be recalled that, according to the well-established case-law of the Court,[9] 'any measures which are capable of hindering either directly or indirectly, actually or potentially, trade between Member States' are to be regarded as measures having an effect equivalent to quantitative restrictions in trade between Member States, prohibited by Article 30 of the Treaty.

50. However, as the Court emphasized in the judgment in *Inno* v *ATAB*,[10] measures which are likely to affect intra-Community trade but which are referred to by the Treaty under a separate heading, in particular as fiscal measures, must be considered in the framework of the relevant provisions. Thus the Court stated (in paragraph 50 of *Inno* v *ATAB*) that 'Article 99 of the Treaty, which imposes on the Commission the duty to look for ways of harmonizing the legislation of the Member States on this point in the interest of the common market in conjunction with Article 100 on the approximation of laws, relates to the obstacles to trade resulting from indirect taxes'.

51. It was precisely on the basis of those articles that the Council adopted Directive 72/464/EEC, considering that it was in the interest of the common market that the rules for taxes affecting manufactured tobacco should be harmonized, in order progressively to eliminate from the national systems those factors which were likely to hinder free movement and distort the conditions of competition (*Inno* v *ATAB*, paragraph 51).

52. It is therefore in the context of Article 5 (2) of the directive that the Commission's complaint concerning the scope of the scale of tax stamps must be assessed.

53. In that regard, account should be taken of the fact that the Commission has throughout the proceedings failed to examine the scale in force in Belgium and its relationship both with the prices and real costs of products and with the 'variety of

9 — Since the judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, at p. 851.

10 — Judgment of 16 November 1977 in Case 13/77 *Inno* v *ATAB* [1977] ECR 2115, at p. 2147, paragraphs 49 to 51.

Community products', to which Article 5 (2) of Directive 72/464/EEC refers.

54. Moreover, the cases of refusal to supply tax stamps for prices below the scale (other than the Bene case) have not been examined or properly described by the Commission; in practice their existence was not mentioned until the hearing, and was never previously raised with the defendant.

55. That being so, the conclusion which in my view is to be drawn on this complaint, as it has been formulated and substantiated by the Commission, is that, although the facts established in the proceedings do not rule out the possibility of an infringement, neither do they enable it to be considered unequivocally established so as to justify a declaration that, in the present state of affairs, the Kingdom of Belgium has failed to fulfil its obligations, especially in circumstances likely seriously to affect the Belgium's rights to defend itself.

56. Finally, I shall consider the substance of the two complaints whose admissibility was not challenged.

57. I would begin by emphasizing that the Commission itself acknowledges, in the reply to the questions put by the Court, that neither Article 58 of the Belgian Law of 3 July 1969 on VAT nor Article 12 of the regulation annexed to the Ministerial Decree of 22 January 1948 excludes the application of the provisions of Directive 72/464/EEC. Moreover, the Court has already had an opportunity of stating, with regard to Article 58 (1) of the Law of 3 July 1969, that 'the fiscal system in question leaves the manufacturer or importer free to fix for his products a retail selling price lower than the selling price of competing products of the same kind and quality and which have the same characteristics' (judgment in *Inno* v *ATAB*, paragraph 40).

58. In the Commission's submission, it is only the administrative practice or the interpretation of those provisions by the Belgian authorities that is contrary to Community law. The terms used by the Commission display the ambiguities which characterize its position in these proceedings: 'the action brought by the Commission before the Court of Justice seeks a declaration that the Belgian legislation laying down the rules on the retail selling price of certain categories of manufactured tobacco is contrary to Community law, *since the tax authorities in Belgium infer from it that they are entitled to fix a uniform imposed selling price for each product of the same group and of the same trade mark*' (emphasis added).

59. It is therefore the practice of the Belgian authorities that is challenged by the Commission.

60. As regards the legislation, the Commission has not stated clearly in what respect it is incompatible with Community law and, as we have seen, has even recognized that the text does not infringe Community law; ultimately, the only criticism made is its alleged lack of clarity in so far as it does not properly inform the persons concerned of the rights conferred upon them by Directive 72/464/EEC. But, as has already been seen, that complaint must be regarded as inadmissible.

61. So far as the practice of the authorities is concerned, two separate complaints must be distinguished.

62. As regards the alleged refusal on the part of the Belgian authorities to issue to parallel importers tax stamps corresponding to retail selling prices below those fixed by the exclusive importer, the Belgium Government had already informed the Commission, by letter of 13 December 1984 (Annex 3 to the application) that, once parallel imports became a reality, it would be prepared to permit the importers concerned to fix retail selling prices below those of their competitors, thus accepting the existence on the market of different maximum prices for identical products imported by different importers.

63. The Commission has not adduced any evidence capable of establishing the existence of any practice contrary to that declaration.

64. Furthermore, the only requirement laid down in Directive 72/464/EEC is that manufacturers and importers should be free to fix the maximum retail selling price for each of their products, and these proceedings do not concern any effects on intra-Community trade of a national legislative measure which turns a system whereby prices are freely chosen by the manufacturer or the importer into a system whereby prices are imposed on the consumer, on the basis that such a system generally has exclusively internal effects since it does not distinguish between domestic products and imported products. [11] As regards Article 5 (1) of the directive, in particular, the Court has in any event already stated that it does not prohibit the Member States from introducing or maintaining in force 'a legislative measure whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the consumer of imported or home-produced tobacco products, always provided that that price has been freely determined by the manufacturer or importer'. [12]

65. As regards the complaint on the alleged refusal to issue tax stamps corresponding to retail selling prices above those fixed when the product was first put on the market, in the case of an importer or manufacturer wishing to increase the prices of his products, the Belgian Government has stated that it had already informed the Commission by letter of 23 May 1979 that both the importer and the manufacturer may alter a price fixed when the product was first put on the market, either by increasing it or decreasing it.

66. Once again, the Commission has not established either in the written procedure or at the hearing that the practice adopted by the Belgian authorities was contrary to that alleged by them.

67. Under those circumstances, it would seem that the last two complaints should not be regarded as well founded.

11 — See judgment in *Inno* v *ATAB* paragraphs 53 to 56; see also judgment of 5 April 1984 in Joined Cases 177 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 1797, at p. 1814, paragraphs 20 to 22.

12 — *Inno* v *ATAB* paragraph 64. See, also, judgment of 21 June 1983 in Case 90/82 *Commission* v *France* [1983] ECR 2011, at p. 2030, paragraphs 23 to 25.

III — Conclusion

68. In the light of the foregoing, I propose that the Court should:

(1) Declare inadmissible the complaints referred to in the Report for the Hearing under 1 (c) and 2;

(2) Declare unfounded the complaints referred to under 1 (a) and (b);

(3) Alternatively, in the event that the Court considers complaint 1 (c) admissible, declare it unfounded, on the basis that insufficient evidence has been adduced to justify a declaration that the Kingdom of Belgium has failed to fulfil its obligations.

The applicant should be ordered to bear the costs.