OPINION OF MR ADVOCATE GENERAL CRUZ VILAÇA
delivered on 26 May 1988 *

Mr President,
Members of the Court,

1. In this application, the Commission, supported by the Netherlands Government, asks the Court to declare that, by not fixing the retail prices of manufactured tobacco at the levels set by manufacturers or importers, the French Republic has failed to fulfil its obligations under Article 5 (1) of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco [1] and under Article 30 of the EEC Treaty.

2. Furthermore, by not taking the measures necessary to comply with the judgment of the Court of Justice of 21 June 1983, the French Republic has also failed to fulfil its obligations under Article 171 of the EEC Treaty.

3. In that judgment, given in Case 90/82, [2] the Court held that the French Republic had failed to fulfil its obligations under Community law inasmuch as the legislation in force at the time did not permit manufacturers or importers to determine freely the retail prices of manufactured tobacco.

4. The relevant French legislation was at the time contained in Law No 76-448 of 24 May 1976 on the organization of the monopoly in manufactured tobacco [3] and in Decree No 76-1324 of 31 December 1976 on the economic and tax arrangements applicable to manufactured tobacco. [4]

5. Article 10 of Decree No 76-1324 implementing Article 6 of Law No 76-448 laid down that retail prices of tobacco were to be fixed by order of the Minister for Economic Affairs and Finance.

6. In order to comply with the judgment of 21 June 1983 and to reconcile the freedom to determine retail prices with the requirements of the system of price controls which had been in force in France since 1945, the French Government, after making contact with the Commission, published on 24 January 1985 [5] a notice on the procedure for fixing retail prices of manufactured tobacco which, without amending the legislation in force, established the manner and the procedure whereby that legislation was to be applied henceforth.

7. According to that notice:

(a) the prices of products marketed in France for the first time are to be notified two months before the date on which they are to be offered for sale;

* Translated from the Portuguese.

1 — Official Journal, English Special Edition 1972 (31 December), p. 3.

2 — *Commission* v *France* [1983] ECR 2011, at p. 2032.

3 — *Journal Officiel de la République Française* of 25 May 1976, p. 3083.

4 — *Journal Officiel de la République Française* of 7 January 1977, p. 189.

5 — *Journal Officiel de la République Française* of 24 January 1985, p. 1026.

(b) the retail prices of products already marketed in France are to be fixed on the basis of scales laid down in consultation between the manufacturers and importers, on the one hand, and the French authorities on the other, and on the basis of the date on which they are to be applied, as notified to the Directorate-General for Competition and Consumer Affairs by the manufacturers and importers, and are subsequently to be published in the Official Journal of the French Republic by order of the Minister for Economic Affairs, Finance and the Budget.

8. The Commission considered that the wording of the notice was capable of satisfying the requirements of Community law as interpreted by the Court of Justice in its judgment of 21 June 1983, in so far as it seemed to follow from that notice that the French authorities would approve the retail prices notified by the manufacturers or importers.

9. However, a number of traders complained to the Commission that the competent French minister had refused to approve the new retail prices notified to him for reasons connected with a general policy designed to curb the rise in prices.

10. The Commission's attention was thus drawn to the fact that, contrary to the view it had taken, the French Government was interpreting the notice in a manner which, in the Commission's view, was not in conformity with Community law.

11. Therefore the problem raised by this case is essentially whether or not the amendments made to the French legal system after the judgment of 21 June 1983 are such that the requirements of Community law concerning the determination of the retail prices of manufactured tobacco may be regarded as fulfilled.

12. I now turn to consider the arguments put forward by the parties in support of their submissions.

1. Infringement of Article 5 (1) of Directive 72/464/EEC

13. Article 5 (1) of the directive lays down the principle that 'manufacturers and importers shall be free to determine the maximum retail selling price for each of their products', without prejudice, however, to the 'implementation of the national systems of legislation regarding the control of price levels or the observance of imposed prices'.

14. In order to assess the compatibility of the French rules with that provision, it is appropriate to bear in mind the necessary interconnection between its two component parts and, in particular, as the Court has already stated in Case 90/82, the meaning which is to be attributed to the twofold reservation set out in the second part of that provision relating to the application of national legislation on price controls or the observance of imposed prices to the wholesaler.

15. As the Court stated in its aforesaid judgment of 21 June 1983 'those reservations must be interpreted in such a way as to reconcile their content with the rule of the free determination of selling prices by the manufacturer or importer inasmuch as that rule constitutes, in the area to which the directive relates, the expression of the principle of the free movement of goods under normal conditions of competition referred to in the preamble to the directive', (paragraph 20 of the decision).

16. With regard to the expression 'observance of imposed prices', the Court

pointed out in paragraph 23 of its aforesaid judgment that, within the context of the system for taxation of tobacco, that expression '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 network, up to the sale to the consumer'.

17. Even more explicitly, the Court stated in its judgment of 16 November 1977 in Case 13/77 *Inno* v *ATAB*,[6] that the second sentence of Article 5 (1) does not prohibit the Member States from imposing a given selling price to the consumer of imported or home-produced tobacco products, provided that that price has been freely determined by the manufacturer or importer.

18. Accordingly 'in the system provided for by the directive, there is no contradiction between the rule of the free determination of prices by the manufacturer or importer and the power reserved to Member States to ensure the observance of imposed prices'. Those prices are nothing other than 'the import price determined by the manufacturer or importer invested with the approval of the State and as such compulsory for all traders' (paragraph 25 of the decision in *Commission* v *France*).

19. Whilst acknowledging that the prices of manufactured tobacco placed for the first time on the French market are fixed freely, the Commission maintains that, in view of the use made by the French authorities of the notice which they published, the prices of products already marketed cannot be freely determined by producers or importers. According to the Commission, the price to the wholesaler, which constitutes the consideration received by the producer or the importer is, in view of the system applied in France, simply a variable factor which depends on the decisions adopted by the French State: on the one hand, the retail price determined pursuant to Law No 74-448 and Decree No 76-1324, and on the other, the distributor's margin (fixed in 1976 at 8% of the retail price) and the level of taxes (special consumption tax and value-added tax). The price to the wholesaler is thus purely and simply the difference between those two figures, without producers and wholesalers being able to determine the amount thereof. That difference amounts, according to the calculations of the Netherlands Government, to approximately 18% of the retail price (as the French Government's experts acknowledged at the hearing).

20. It follows, according to the Commission, that it was impossible for producers from other Member States to obtain prices to the wholesaler enabling them to cover their production costs. The Commission bases its claim on statistics concerning changes in prices to the wholesaler and in production costs in France and the Netherlands, also taking into account the variations in exchange rates within the European Monetary System.

21. For its part, the French Government does not deny that it interferes in the fixing of the retail prices of products already marketed in France, and in the fixing of the retailer's margin and the level of taxation. However, it maintains that it does not interfere in the determination of the selling price and consequently in the fixing of the wholesaler-importer distribution margin. Within the selling price to retailers, the relative shares of the price to the wholesaler and the wholesaler-importer margin are the result of negotiations between the parties.

6 — Case 13/77 [1977] ECR 2115, at p. 2150, paragraph 64 of the decision.

On the French market, therefore, the levels of the importer's margin and of the price to the wholesaler vary according to the importer and the nature of the agreements concluded between the parties.

22. It must be stated that those explanations furnished by the French Government are quite inadequate.

23. Article 5 (1) of Directive 72/464/EEC lays down the principle that manufacturers and importers are *free to determine* the *maximum retail selling price* of manufactured tobacco products. Interference on the part of the public authorities in imposing those prices cannot — as we have seen — go beyond the mere approval of prices freely determined by manufacturers or importers after the incorporation of taxes.

24. That principle is particularly relevant — in a sector characterized by significant State intervention either through substantial taxation or as a result of the existence of manufacturing or distribution monopolies — in ensuring the operation of the common market by the removal of 'factors which are likely to hinder free movement and distort the conditions of competition, whether at national level or at Community level' (third recital in the preamble to the directive).

25. The French system does not satisfy those requirements in full.

26. Freedom of negotiation between manufacturers or importers and wholesale distributors is confined to the apportionment of a residual amount: the amount remaining after the retailer's distribution margin and taxes have been deducted from the retail price. That price is, quite simply, fixed by the competent minister.

27. As the French Government finally acknowledged at the hearing, the freedom of manufacturers and importers is therefore limited to sharing out the 'cake' and does not extend, as it should, to the determination of its size (the maximum retail price level).

28. In so fixing the selling prices of manufactured products to the public, the French authorities do not merely approve the prices freely determined by manufacturers or importers; they clearly overstep — in restricting that freedom — the bounds of the prerogatives conferred upon them by the need to ensure the 'observance of imposed prices'.

29. Is that conduct justified by the application of national legislation on the 'control of price levels'?

30. The French Government thinks it is, with the result that the transition, in the manufactured tobacco sector, from a system of imposed prices to a system in which manufacturers or importers are free to fix maximum prices cannot be accomplished abruptly without giving rise to unfavourable consequences from the point of view of controlling inflation.

31. For that reason, the French authorities have implemented a programme for the gradual liberalization of prices in that sector, taking account of its economic effects and the kind of competition prevailing in that sector.

32. That process is connected with the development of the general system of price controls which is still in force in France. At the end of 1982 there was a transition from a general price freeze in force since 1945 to a system of price restrictions which, in its turn, was gradually made more flexible and subsequently abolished in sectors where, according to the French Government, competition between undertakings was satisfactory and, as a result of its regulatory effects on price trends, made it possible to dispense with special supervisory measures.

33. The timetable for the gradual liberalization of prices in the tobacco sector was aimed at removal of all controls and the elimination of interference with regard to the setting of prices in 1989.

34. Meanwhile, on 1 January 1987, all price controls were abolished in every sector of the economy except for a few products and services including manufactured tobacco.

35. According to the French Government, the 1976 legislation merely extended to the manufactured tobacco sector the general principle of price controls laid down in 1945. For its part, the application of the notice issued on 24 January 1985 was designed to make it possible to catch up with changes in price trends and to correct certain differences which had arisen in the past.

36. In my view, the French Government's position is untenable.

37. The Court has already explained that the expression 'control of price levels' in the second part of Article 5 (1) of the directive, 'cannot be interpreted as reserving to the Member States a discretion to fix the price of tobacco, as the exercise of such extensive power would constitute the virtual denial of any effectiveness to the principle of the free determination of price set out in the first sentence of Article 5 (1)' (paragraph 21 of the decision). The Court also pointed out that 'It follows from the usual meaning of the expression "control", as well as from a comparison of the different versions of the directive in the various languages and of the reference, in many of those versions, to the "level" of prices, that the expression "control of the price levels" can refer ony to national legislation of a general nature intended to check the increase in prices' (paragraph 22 of the decision).

38. None of those conditions is fulfilled in the case of France.

39. To begin with, the French authorities have continued even after the issue of the January 1985 notice to interfere at their discretion in the determination of retail prices since they can fix them at levels different from those selected by manufacturers or importers, notwithstanding the consultation mechanism provided for in the notice. By way of illustration, the Commission refers to a number of cases in which importers were denied, either before or after the Court's judgment of 21 June 1983, the price increases which they had sought. The last of those cases referred to by the Commission occurred after the notice of 24 January 1985 had been published.

40. Secondly, it is impossible to describe such intervention as 'national legislation of a general nature intended to check the increase in prices'.

41. On the contrary, it constitutes legislation specific to the tobacco sector, which was already criticized by the Court in 1983 with reference to a period in which the price freeze was still in force in all sectors.

42. The 1985 notice did not substantially alter the situation, inasmuch as it merely permitted manufacturers and importers to determine freely the prices of new products. In the case of other products, as we have seen, those traders can only discuss the relative level of the price to the wholesaler and the distributor's margin but they cannot fix the retail prices, any changes in which, notwithstanding the consultation provided for, are still a matter for the authorities.

43. As the Commission has emphasized, that control mechanism does not apply to imported products in general. Even before its abolition on 1 December 1986, the system of general price controls applied only to the importation and marketing margins for imported products, and not to the price of the imported products themselves. That is not the case with regard to tobacco since, even after the issue of the 1985 notice, the system applicable to tobacco continued to lack the degree of general applicability required in order to be permissible under Article 5 (1) of the directive.

44. In those circumstances, as the Commission emphasizes, not only was the tobacco sector shielded from the effects of adjustments in the exchange rates within the European Monetary System but also the rise in prices in that sector was substantially lower than the general price index. At the time when these proceedings were instituted, there was a difference of approximately 10% between manufactured tobacco prices and other prices, notwithstanding the fact that tobacco prices had been raised on two occasions by derogation from the general system of controls and without manufacturers or importers having been able to benefit from the margin released by the abolition in July 1984 of the social security contributions which had previously been established and incorporated in the retail prices.

45. On 1 December 1986 the general system of price controls was abolished in France. However, the intervention system in force for tobacco was retained by the French authorities who intended to abolish it in stages by 1989.

46. The December 1986 deregulation occurred after the issue of the reasoned opinion which preceded the bringing of this action. It would not therefore need to be taken into account for the purpose of substantiating a declaration that France has failed to fulfil its obligations.

47. It can still be said, however, that that innovation regarding the general system of prices has brought into even better focus the infringement of Community law in the tobacco sector, without there being any objective justification for the adoption in that sector of a type of price control mechanism which had already been abandoned in other sectors.

48. That conclusion cannot be invalidated by any of the reasons relied upon by the French Government.

49. The difficulty involved in repealing old rules cannot justify either a continued failure to fulfil the requirements laid down by a 1972 directive, which should have been transposed into national law by 1 July 1973,

or the fact that a judgment of the Court has not been fully complied with after more than two years (taking account only of the period preceding the initiation of proceedings).

50. As for the argument concerning the specific nature of the products in question, it runs counter to the requirement that legislation to curb the rise in prices must be generally applicable for its application to result in a legitimate restriction on the principle that manufacturers and importers are free to fix prices.

51. As for the defence of the State's fiscal interests and the need to combat tobacco abuse, the Court has already held that such arguments cannot justify the conduct of the French authorities (paragraph 29 of the judgment of 21 June 1983).

52. Nor can the French Government rely on any conduct on the part of undertakings which is contrary to Article 85 of the Treaty in order to avoid fulfilling all the obligations imposed upon it by Community directives.

53. Finally, there is no unequivocal justification for referring to the state of competition in the sector concerned or to alleged difficulties of supply.

54. Nor, therefore, can the application of 'national systems of legislation regarding the control of price levels' be relied upon to justify the system of fixing manufactured tobacco prices in France.

55. Moreover, the rules in question cannot even be regarded as generally applicable to the sector concerned since they allow the prices of newly marketed products to be fixed freely.

56. In those circumstances, as the Court concluded in its judgment of 21 June 1983, 'the power reserved to the government by the French legislation on the fixing of prices for manufactured tobacco is incompatible with Community law to the extent to which that power, by altering the selling price determined by the manufacturer or importer, allows the competitive relationship between imported tobacco and tobacco distributed by the national monopoly to be adversely affected' (paragraph 26 of the decision).

57. As the Court stated in another connection, although still on the subject of the removal of barriers to intra-Community trade,[7] each Member State should implement the directives in a manner which meets the requirements of clarity and certainty in legal situations for the benefit of manufacturers established in other Member States. The notice of 24 January 1985 is not, as we have seen, capable of satisfying those requirements.

2. Infringement of Article 30 of the Treaty

58. The Commission considers that the French system of price controls for manufactured tobacco is incompatible with Article 30 of the Treaty in so far as it discourages the disposal of imported products because it takes account only of the state of the French market and does not permit producers from other Member States

7 — Judgment of 6 May 1980 in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, at p. 1486, paragraph 11 of the decision.

to pass on increases in production costs in their import prices in France.

59. In that regard the Commission recalls the Court's judgment in *Dassonville*,[8] according to which any measure capable of hindering, directly or indirectly, actually or potentially, imports between Member States constitutes a measure having an effect equivalent to a quantitative restriction prohibited by Article 30.

60. The Court has already made it clear that even national rules on prices which apply without distinction to domestic and imported products may, in certain circumstances, constitute a barrier to imports, in particular, when a national authority fixes prices or profit margins at such a level that imported products are placed at a disadvantage in relation to identical domestic products either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out.[9] In those circumstances, the sale of imported products may become, if not impossible, more difficult than that of domestic products.[10]

61. In this case the Commission has, in my view, furnished sufficient proof that such a situation exists.

62. Apart from referring to cases in which requests for price increases submitted by importers have been refused, the Commission has produced statistics showing that, in view of the fluctuations in the value of the French franc and the Netherlands florin:

(a) between 1980 and 1987 the prices of Marlboro cigarettes to the wholesaler in France (expressed in florins) increased by 20%, whereas production costs in the Netherlands increased by 39% — a difference of 19 percentage points;

(b) between February 1982 and 30 March 1987, when prices to the wholesaler remained fairly stable (minus 1%), production costs rose by 16%;

(c) in the case of another two brands, an imported brand (Rothmans King Size) and another brand manufactured by the French tobacco monopoly (Pall Mall), both sold at the same retail price, the French producer received in March 1987 125% of the February 1982 price to the wholesaler, whilst the Netherlands producer received, at the same date, over 99% of the February 1982 price to the wholesaler.

63. However, prices to the wholesaler in French francs were not in step with the retail price trend since it is clear that between 1982 and 1987 they were 10 percentage points behind notwithstanding the effort made since 1985 to catch up.

64. The French Government challenges those figures on the basis of other, somewhat different figures, whilst expressing reservations at the same time as to whether they are representative.

8 — Judgment of 11 July 1974 in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5 of the decision.

9 — Judgment of 24 January 1978 in Case 82/77 *Van Tiggele* [1978] ECR 25, at pp. 39 to 40, paragraphs 10 to 21 of the decision; judgment of 7 June 1983 in Case 78/82 *Commission* v *Italy* [1983] ECR 1955, at p. 1969, paragraph 16 of the decision.

10 — Judgment of 26 February 1976 in Case 65/75 *Tasca* [1976] ECR 291, at p. 309, paragraphs 12 to 14 of the decision.

65. In my view, however, its arguments are not sufficient to deny the distortion of international trade resulting from the French system of fixing tobacco prices. Moreover, the source of the tables submitted by both of the parties is the same — the Netherlands Central Statistical Office — and the Netherlands Government, which is responsible for those statistics, expressly stated when it intervened in the proceedings that it endorsed the information given by the Commission in its allegations, including the figures.

66. However, the consultations between the Commission and the French Government concerning the trend with regard to imports of manufactured tobacco into France are of little relevance. The system of fixing prices which is applied in that country undoubtedly imposes a restriction on the commercial freedom of foreign traders who, in view of the fluctuations in their currencies and the refusal to approve the prices proposed, may be compelled to reduce their margins or abandon sales, without being able to choose whether to pass on the increase in their costs in the form of higher retail prices.

67. Moreover, the existence of a merely potential obstacle to trade between Member States may be a sufficient ground for concluding that it constitutes a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 of the EEC Treaty. In any event, the Court has already emphasized [11] that 'Article 30 of the Treaty does not distinguish between measures having an effect equivalent to quantitative restrictions according to the degree to which trade between Member States is affected. If a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantitative restriction, even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways'.

68. In any case the figures put forward confirm the Court's finding in paragraph 27 of its judgment of 21 June 1983 in Case 90/82 *Commission* v *France*, to the effect that the exercise of the power reserved to the government by the French legislation on the fixing of prices for manufactured tobacco is 'contrary to Article 30 of the Treaty, inasmuch as it allows the public authority, by a selective intervention as regards tobacco prices, to restrict the freedom of importation of tobacco originating in other Member States'.

69. The effects of that system are, in addition, aggravated by the existence of a special relationship between the French State and the sole French tobacco producer — Seita — a public company which has, as is well known, been able for a number of years to sustain losses at least partially attributable to the inadequacy of fixed prices.

3. Infringement of Article 171 of the Treaty

70. It follows from the conclusions I have reached with regard to the previous charges that the third charge is also well founded.

71. Since the first two charges are well founded, it follows that the French Republic has failed to transpose into its national law, after the Court's judgment of 21 June 1983 and in compliance therewith, the amendments needed in order to fulfil its obligations under Article 5 of Directive 72/464/EEC and Article 30 of the Treaty

11 — Judgment of 5 April 1985 in Joined Cases 177 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 1797, at p. 1812, paragraph 13 of the decision.

with regard to the fixing of manufactured tobacco prices.

72. The publication of the notice of 24 January 1985 did not bring the infringement to an end since the wording of that notice permitted the French Republic to apply it in a manner that was contrary to the aforesaid provisions of Community law.

73. Neither the price increases authorized in the mean time by the French authorities (which, moreover, were inadequate for the purpose of making up for the overall delay) nor the announcement of total liberalization by 1989 are, notwithstanding their undoubtedly positive character from the point of view of the objectives of Community law, capable of bringing the infringement to an end forthwith since they do not in themselves alter the system whereby the authorities interfere in the fixing of prices. The decisions taken by the French authorities merely make it possible to foresee an end to the delay in transposing the directive. Compliance with the time-limits set by the directive is not, however, a matter in which the Member States have a discretion.

4. Conclusion

74. In the light of the foregoing considerations, I suggest that the Court uphold the Commission's application and consequently declare that the French Republic has failed to fulfil its obligations and should be ordered to pay the costs, including those of the intervener, since, although the latter did not expressly ask for them, it intervened in the case 'in support of the conclusions of the Commission', which, for its part, asked for the French Republic to be ordered to pay the costs. [12]

12 — See also the judgment of 6 March 1979 in Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, at pp. 783 and 813. Contrast (apparently) the judgment of 2 February 1988 in Joined Cases 67, 68 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219.