OPINION OF ADVOCATE GENERAL GULMANN
delivered on 10 March 1993 *

Mr President,
Members of the Court,

1. The Commission has brought an action against the Italian Republic pursuant to Article 169 of the EEC Treaty for a declaration that, by fixing, by decrees of the Minister of Finance, retail selling prices for manufactured tobacco at a level which, by reason also of the considerable delays in the adoption of the said decrees, does not correspond to that which is requested by importers or manufacturers, the Italian Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty and Article 5 of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco. [1]

2. The purpose of the directive is to prevent taxes on the consumption of manufactured tobacco from having the effect of distorting competition and impeding the free movement of manufactured tobacco products in the Community. [2]

Article 5(1) of the directive provides that, in order to attain this objective, 'manufacturers and importers shall be free to determine the maximum retail selling price for each of their products'.

By way of exception to that principle, Article 5(1) goes on to provide that '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'.

That principle is also modified by Article 5(2), which provides as follows:

'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 undertakings or of any other criterion.'

3. It appears from the case file that, following complaints received in particular in the mid-1980s from various groupings of

* Original language: Danish.

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

2 — The Court has had to take cognizance on various occasions of this directive, which has been the subject of several judgments. See, in particular, the judgments in Case C-287/89 *Commission* v *Belgium* [1991] ECR I-2233, Case 90/82 *Commission* v *France* [1983] ECR 2011, Case 78/82 *Commission* v *Italy* [1983] ECR 1955 and Case 13/77 *GB-Inno-BM* v *Vereniging van de Kleinhandelaars in Tabak* [1977] ECR 2115.

manufacturers of tobacco products in other Member States, the Commission's attention was drawn to the fact that importers of tobacco products were having difficulties in Italy in arranging to set prices for new products and to change the prices of existing products.

Those complaints prompted the Commission to send a letter before action and, subsequently, a reasoned opinion to the Italian Government, in which it stated that the Italian provision concerning the inclusion of imported tobacco products in the scales of retail selling prices was contrary to Article 5 of the directive.

It is clear from the application that, by bringing this action, the Commission seeks principally to obtain a declaration that the Italian provision in question is contrary to the directive.

4. The contested provision is contained in Law No 825 of 13 July 1965, which forms part of the legislation concerning the Italian State monopoly in the sector of tobacco products. Under this system, the marketing of tobacco products is prohibited unless they are shown in one of the existing scales. The rule contested by the Commission is set out in Article 2 of the Law, which provides as follows:

'The inclusion of each product subject to the State monopoly in the tariffs referred to by Article 1 and changes in that regard shall be effected by decree of the Minister of Finance in relation to ("in relazione ai") the prices requested by suppliers for imported goods, after obtaining the opinion of the Administrative Board for State Monopolies ...'.

5. It is common ground between the Commission and the Italian Government that traders must be free to choose for each of their products one of the prices laid down in the scales and that they may propose a different price which is then included in a scale, and the Commission does not deny that the Italian scales in force satisfy the requirements of Article 5(2) of the directive.

6. For its part, the Commission argues that Article 2 of the Italian Law may be construed as meaning that the Minister of Finance has a discretion when approving prices for manufactured tobacco. In that connection the Commission maintains, *inter alia*, that the phrase 'in relation to' is ambiguous, and claims that such a discretion is contrary to importers' right to fix their prices themselves in accordance with Article 5(1) of the directive.

7. The Italian Government denies that the contested provision gives the Minister of Finance a discretion and argues, *inter alia*, that the phrase 'in relation to' is not ambiguous because it merely expresses, 'by using the resources and variety of the Italian language', the link which exists between the price chosen by manufacturers and importers and its inclusion in the scale. The Italian Government further argues that, in the judgment in Case 78/82 *Commission* v *Italy*, [3] the

3 — See footnote 2.

Court held that the contested provision did not affect the freedom of importers to fix their prices themselves.

8. It is appropriate to refer *in limine* that which the Court has consistently held, namely that it is contrary to Community law, in particular on grounds of legal certainty, for national provisions to be worded in such a way that individuals are left uncertain as to the rights they have under Community law. [4]

9. To my mind, the provision in question does not fulfil the requirements of Community law from this viewpoint. Its wording is such that it appears reasonable to interpret it as meaning that the Minister of Finance has a right not to approve prices which importers have asked to be included in the scales. There is manifestly no justification for such a discretion in the exception provided for in the second sentence of Article 5(1) concerning general legislation on price controls: in this connection, see the judgment in Case 90/82 *Commission* v *France*. [5] It is also clear, to my mind, that the Minister's powers, which are not specified, for the purpose of authorizing the prices requested cannot find justification in Article 5(2) of the directive, which provides that each scale must have sufficient scope and variety to correspond in fact with the variety of Community products.

10. It is also significant in this connection that the contested provision requires an opinion to be obtained from the Administrative Board for State Monopolies. The Commission rightly considers that the obligation to consult that board confirms that Article 2 of the Law is not consistent with Article 5 of the directive. First, a general obligation to obtain an opinion cannot be grounded in the need to obtain technical assistance with a view to the correct inclusion of tobacco products in the scales, since the Administrative Board must also be consulted when it is merely a question of altering prices already included in the scales. Secondly, there is nothing in the wording of the provision to support the argument that the Administrative Board is precluded from expressing its opinion as to the prices requested by importers. The Italian Government has therefore not given a satisfactory explanation of the purpose of that consultation and the Commission has doubtless right to maintain that the procedure entails prior information of the national producer, which is in competition with importers, regarding the price policy which the importers intend to follow. In that connection, it is immaterial that, according to the Italian Government, all importers submit their requests to the Minister of Finance through the Administrative Board. That they use the Board in this context may be due to the fact that they are certain that the Board will in any event have cognizance of their requests. It can therefore be held that the obligation of consultation

4 — See the judgment in Case 116/86 *Commission* v *Italy* [1988] ECR 1323, of which paragraph 21 reads as follows: 'ambiguous legislation which leaves those subject thereto in a state of uncertainty as to the extent to which they may rely on Community law does not fulfil the obligation to transport a directive into national law'.

5 — [1983] ECR 2011, paragraphs 22 and 23.

constitutes indirect interference with the freedom with regard to pricing policy which the directive seeks to secure.

11. Lastly, it must be held that the Italian Government cannot rely on the Court's judgment in Case 78/82 *Commission* v *Italy*, cited above, in support of this head of claim. In that judgment the Court did not rule on the question of the compatibility of Article 2 of the Italian law with Article 5 of the directive from the viewpoint which concerns us here.

Article 2 of the Italian Law must therefore be held to be contrary to Article 5 of the directive.

12. The Commission also argues, as appears from the form of order sought, that the Italian authorities applied Article 2 of the Law in a manner contrary both to Article 5 of the directive and to Article 30 of the Treaty. In that connection, the Commission refers to the abovementioned complaints from groupings of manufacturers of manufactured tobacco in other Member States, according to which the Italian authorities have on occasions rejected requests for price changes or granted such requests while fixing lower amounts than those requested or granted requests after a delay of years.

13. The Italian Government contends that that complaint is inadmissible. It argues that neither the letter before action nor the reasoned opinion treats the administrative practice as an independent objection and that the abovementioned complaints, which allegedly prove the illegality of the administrative practice, were moreover not produced during the actual procedure. During the pre-litigation procedure only the content of the national law was apparently criticized and Italy submitted its observations in response to that criticism.

14. During the oral procedure, the Commission stated that it had referred to those specific cases of application contrary to Community law above all in order to show that the contested provision was contrary to the directive.

In my view, that argument is hard to square with the wording of the form of order sought and the tenor of the application, which suggest that the application of the contested provision constitutes a complaint in its own right.

15. Consequently the Italian Government's objection of inadmissibility must be considered.

The Court has held that 'in the context of proceedings for failure to fulfil an obligation ... the reasoned opinion defines the subject-matter of the proceedings and it cannot subsequently be extended' since 'the possibility for the State concerned to present its observations is an essential guarantee envisaged by the Treaty, and is an essential procedural requirement for the proper conduct of the procedure for a finding that a Member State has failed to fulfil its obligations'. [6]

16. In my opinion it must be acknowledged in favour of the Italian Government that the Commission did not inform the opposing party in a reasonably clear manner, either in the letter before action or in the reasoned

6 — See the judgment in Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3141, paragraph 9.

opinion, that that administrative practice was the subject of an independent complaint.

Consequently, the Court should reject that complaint as inadmissible.

17. The Commission states in the application that Italy failed to fulfil the obligation incumbent on Member States under Article 12(2) of the directive to communicate to the Commission the text of the main provisions of national law which they had adopted in the field covered by the directive.

However, it is hard to suppose that the Commission intended to make this an independent complaint. It is not included in the form of order sought and was not incorporated in the complaints during the pre-litigation procedure. Accordingly, the Court does not have to rule on this point.

18. As the main complaint in the Commission's application should be upheld, I consider that the Italian Republic should be ordered to pay the costs.

Conclusion

19. In view of the foregoing considerations, I propose that the Court should:

— declare that, in so far as it permitted the Minister of Finance, under Article 2 of Law No 825 of 13 July 1965, not to grant requests submitted by importers concerning the inclusion of prices in the scales, the Italian Republic has failed to fulfil its obligations under Article 5 of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco;

— dismiss the remainder of the form of order sought by the Commission as inadmissible;

— order the Italian Republic to pay the costs.