JUDGMENT OF THE COURT (Sixth Chamber)

19 October 2000 *

In Case C-216/98,

Commission of the European Communities, represented by M. Condou-Durande and E. Traversa, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by P. Mylonopoulos, Deputy Legal Adviser in the Community Law Department of the Ministry of Foreign Affairs, and N. Dafniou, a Lawyer in the same department, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

* Language of the case: Greek.

APPLICATION for a declaration that, by adopting and maintaining in force legislative provisions which require minimum retail selling prices for manufactured tobacco to be determined by ministerial decree, the Hellenic Republic has failed to fulfil its obligations under Article 9 of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40),

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, acting as President of the Sixth Chamber, R. Schintgen and F. Macken (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 13 April 2000,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 11 June 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by adopting and maintaining in force legislative provisions which require minimum retail selling prices for manufactured tobacco to be determined by ministerial decree, the Hellenic Republic has failed to fulfil its obligations under Article 9 of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40).

2 Directive 95/59 consolidated Council Directive 72/464/EEC of 19 December 1972 (Official Journal, English Special Edition 1972 (31 December)), as amended by Council Directive 92/78/EEC of 19 October 1992 (OJ 1992 L 316, p. 5).

3 Article 9(1) of Directive 95/59, which corresponds to Article 5(1) of Directive 72/464, provides:

'A natural or legal person established in the Community who converts tobacco into manufactured products prepared for retail sale shall be deemed to be a manufacturer.

Manufacturers, or, where appropriate, their representatives or authorised agents in the Community and importers of tobacco from non-member countries shall be free to determine the maximum retail selling price for each of their products for each Member State for which the products in question are to be released for consumption.

The second paragraph may not, however, hinder implementation of national systems of legislation regarding the control of price levels or the observance of imposed prices, provided that they are compatible with Community legislation.'

4 Retail selling prices of manufactured tobacco in Greece are set in accordance with Law No 2127 of 5 April 1993 on harmonisation with Community law of the fiscal rules applicable to oil products, ethyl alcohol, alcoholic beverages and manufactured tobacco, as amended by Article 2 of Law No 2187 of 8 February 1994, Article 45 of which provides:

'1. The retail selling price of manufactured tobacco consumed within Greece shall, subject to paragraph 3, be freely determined by the manufacturers or by the agents of manufacturers of the other Member States who are established in Greece, and by their importers, who shall give, in drachmas, the retail selling price on packets, or the smallest item of packaging, offered for retail sale or on the fiscal stamps affixed to the packets or packaging.

2. ...

3. The Minister for Economic Affairs shall set by decree published in the Official Gazette minimum retail selling prices for the products covered by paragraph 1, which shall be at least equal to the prices of those products on 1 December 1993, in accordance with paragraph 2, increased by 20%. Other minimum prices may be determined by like decrees of the Minister for Economic Affairs. Where new types of manufactured tobacco are placed on the market, their minimum retail price shall be equal to the price laid down by the abovementioned ministerial decree for the type closest in qualitative terms. By the same decree of the Minister

for Economic Affairs, minimum retail prices shall be set for cigars and cigarillos, for fine-cut tobacco for the rolling of cigarettes, and for other smoking tobacco.

...'

5 Taking the view that the latter provision was contrary to Community law, in particular Article 5 of Directive 72/464, the Commission sent a letter to that effect to the Greek authorities on 21 February 1994.

6 On 31 March 1994 the Greek authorities replied that Law No 2127/1993 did not affect the right of manufacturers and importers freely to determine the retail prices of their products, for the following reasons:

— determination of minimum retail selling prices — on the basis of prices freely determined by the manufacturers — could not be regarded as contrary to Article 5 of Directive 72/464, which does not require minimum retail selling prices to be determined freely but only provides that maximum prices are to be determined freely;

— Directive 72/464 allows the application of national legislation for the control of price levels or the observance of imposed prices;

— determination of the minimum price can be criticised only if an infringement of Article 30 of the EC Treaty (now, after amendment, Article 28 EC) is alleged, not an infringement of Directive 72/464.

7 On 15 July 1994 the Commission sent a further letter to the Greek authorities in which it stated that minimum retail selling prices for manufactured tobacco could not be determined by ministerial decree and, at the same time, be freely determined by manufacturers or importers.

8 The Commission also drew attention to the fact that the Court had repeatedly held that Article 5 of Directive 72/464 established a principle of free formation of tobacco prices by manufacturers or importers and that no national system of price control could be permitted to detract from that principle.

9 Finally, the Commission observed that, even though Directive 72/464 constituted secondary legislation, it provided a sufficient legal basis for a finding that a national provision making the determination of retail selling prices for tobacco compulsory was illegal.

10 By letter of 14 September 1994 the Greek authorities repeated the arguments they had advanced earlier.

11 Considering that reply unsatisfactory, on 22 March 1996 the Commission decided to initiate the procedure under Article 169 of the Treaty and sent a letter of formal notice to the Greek Government calling on it to submit its observations.

12 By letter of 29 May 1996 the Greek Government replied to that letter, reiterating its earlier arguments.

13 On 17 June 1997 the Commission sent a reasoned opinion to the Greek Government. After setting out the reasons for rejecting its arguments, the Commission stated that, by keeping in force Article 45 of Law No 2127/1993, the Hellenic Republic had failed to fulfil its obligations under Article 5 of Directive 72/464 — which had in the meantime become Article 9 of Directive 95/59 — and called on the Hellenic Republic to take the necessary measures to comply with the reasoned opinion within a period of two months as from the date of its notification.

14 By letter of 25 March 1998 the Greek Government reiterated its position and also indicated that it was exercising the right to control price levels conferred on it by the third subparagraph of Article 9(1) of Directive 95/59 by setting a minimum price in order to ensure a minimum level of tax revenue from the sale of tobacco on the Greek market. It also relied on the right of a Member State to take action to reduce the consumption of such products on grounds of public health, stating that Article 45 of Law No 2127/1993 applied to all manufacturers and importers regardless of whether they possessed Greek or any other Community nationality.

15 Dissatisfied with that response, the Commission decided to institute the present proceedings.

16 The Commission considers that the Greek legislation prevents producers and importers from freely determining the selling prices of their products since a minimum price is imposed by the Minister for Economic Affairs and must be observed.

17 The Greek Government contends, on the other hand, that Article 9 of Directive 95/59 does no more than provide that a manufacturer must be free to determine the maximum, but not the minimum, retail selling price. It observes that the Economic and Social Committee, in its opinion on the Commission proposal (OJ 1991 C 69, p. 25), which led to the adoption of Directive 92/78, had

proposed indicating that the manufacturer or importer of manufactured tobacco should determine the 'retail selling price' and, therefore, removing any reference to maximum prices. However, that proposal was not adopted, which means, in the Greek Government's view, that the freedom to determine prices is limited to maximum prices.

18 It must be borne in mind, as a preliminary point, that it is clear from the third and seventh recitals in its preamble that Directive 95/59 was adopted as part of a policy designed to harmonise the structures of excise duty on manufactured tobacco, to ensure that competition in the different categories of manufactured tobacco belonging to the same group was not distorted, and thereby to open up the national markets of the Member States.

19 To that end, the first paragraph of Article 8 of Directive 95/59 provides that cigarettes manufactured in the Community and those imported from non-member countries are to be subject to a proportional excise duty in each Member State calculated on the maximum retail selling price, including customs duties, and also to a specific excise duty calculated per unit of the product.

20 The first paragraph of Article 9 of that directive provides that manufacturers or, where appropriate, their representatives or authorised agents in the Community and importers of tobacco from non-member countries are to be free to determine the maximum retail selling price for each of their products, the aim being to ensure effective competition between them.

21 However, the setting of a minimum selling price by public authorities inevitably has the effect of limiting the freedom of producers and importers to determine their maximum retail selling prices since, in any event, such prices cannot be any lower than the compulsory minimum price.

22 Moreover, the failure to adopt the proposal made by the Economic and Social Committee suggesting removal of the adjective 'maximum' cannot be interpreted as indicating that the Community legislature intended to grant the Member States freedom to impose a minimum retail selling price. Such an amendment would in fact have been pointless since, first, Directive 95/59 is concerned, as regards the calculation of proportional excise duties, only with the maximum retail selling price and, second, the setting by the Member States of a retail selling price, albeit a minimum price, inherently undermines the freedom of operators to set their own maximum retail selling prices.

23 The Greek Government observes next that, in any event, the freedom to determine the maximum retail selling price may be limited by national legislation on the control of price levels or observance of imposed prices, provided that it is compatible with Community law.

24 It considers that, by providing at the outset for totally free determination of the prices of manufactured tobacco by manufacturers and importers and by subsequently limiting that freedom in a uniform and proportionate manner only as regards minimum prices and without drawing any distinction between Greek products and Community products and in general without infringing any other provision of Community law, Article 45 of Law No 2127/1993 has not contravened Directive 95/59.

25 In that regard, it must first be observed that it is clear from Case 90/82 *Commission* v *France* [1983] ECR 2011, paragraph 22, that the expression 'control of the price levels' cannot be interpreted as reserving to the Member States a discretion to lay down anything other than national legislation of a general nature intended to check the increase in prices.

26 It is also clear from Case 13/77 *GB-Inno-BM* [1977] ECR 2155, paragraph 64, that, in relation to the machinery for the taxation of tobacco, the expression 'observance of imposed prices' must be understood as referring to a price which,

once determined by the manufacturer or the importer and approved by the public authorities, is binding as a maximum price and must be observed as such at every stage of the distribution chain until it is sold to the consumer. That price-fixing machinery performs the function of ensuring that the integrity of tax revenue is not undermined by the exceeding of imposed prices.

27 In this case, it is clear that the contested legislation cannot be regarded as relating to general price control or observance of imposed prices since, first, its purpose — a fact, moreover, not disputed by the Greek Government — is not to check price rises and, second, the price imposed by the Minister for Economic Affairs was not previously determined by a manufacturer or importer and, furthermore, it is a minimum price.

28 The Greek Government also asserts that the principle of free determination of prices by manufacturers or importers may be limited for the purpose of public health protection referred to in Article 36 of the EC Treaty (now, after amendment, Article 30 EC).

29 In its view, the setting of a minimum price is necessary in order to discourage tobacco consumption and, if excise duty is increased, manufacturers and importers may choose, by reducing their profit margin, not to pass the increase on to consumers.

30 It must be observed that Article 36 of the Treaty enables the Member States to apply national provisions that restrict intra-Community trade in order to protect the health and life of humans. However, measures based on Article 36 of the Treaty cannot be justified unless they are necessary in order to attain the objective pursued by that article and that objective is not capable of being attained by measures which are less restrictive of intra-Community trade (see, in particular, Case 72/83 *Campus Oil and Others* v *Minister for Industry and Energy and*

Others [1984] ECR 2727, paragraph 37; Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 7; and Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 58).

31 In this case it must be observed that the objective of protecting public health may be adequately attained by increased taxation of manufactured tobacco products, which would safeguard the principle of free formation of prices.

32 The ability of manufacturers and importers not to pass on increases in excise duty on their products is in any event limited by the extent of their profit margin, with the result that excise duty increases are sooner or later incorporated in retail selling prices.

33 It follows that, by adopting and maintaining in force legislative provisions which require minimum retail selling prices for manufactured tobacco to be determined by ministerial decree, the Hellenic Republic has failed to fulfil its obligations under Article 9 of Directive 95/59.

Costs

34 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by adopting and maintaining in force legislative provisions which require minimum retail selling prices for manufactured tobacco to be determined by ministerial decree, the Hellenic Republic has failed to fulfil its obligations under Article 9 of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco;**

2. **Orders the Hellenic Republic to pay the costs.**

Puissochet Schintgen Macken

Delivered in open court in Luxembourg on 19 October 2000.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber