



Press and Information

Court of Justice of the European Union

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Judgments in Cases C-197/08

Commission v France, C-198/08 Commission v Austria and C-221/08

Commission v Ireland

Legislation in France, Austria and Ireland fixing minimum retail prices for cigarettes infringes European Union law

Public health objectives can be attained by an increase in excise duty

The Commission brought infringement actions before the Court of Justice against France, Austria and Ireland, because it considers that the legislation of those Member States concerning the fixing of minimum prices for some manufactured tobacco products, namely cigarettes and other tobacco products in the case of France, cigarettes and fine-cut tobacco for the rolling of cigarettes in the case of Austria and cigarettes in the case of Ireland, are contrary to Directive 95/59¹ which lays down rules on excise duty affecting the consumption of those products. The directive obliges Member States to impose excise duty on cigarettes consisting in a proportional element (*ad valorem*), calculated on the maximum retail selling price, and a specific element, the amount of which is fixed by reference to cigarettes in the most popular price category but which may not be less than 5 % or more than 55 % of the amount of the total tax burden. The rate of the proportional excise duty and the amount of the specific excise duty must be the same for all cigarettes. The directive also provides that the manufacturers and importers of manufactured tobacco are to be free to determine the maximum retail selling price for each of their products (Article 9(1)).

According to the Commission, the legislation of those three Member States, which imposes minimum prices corresponding to a certain percentage of the average prices of the manufactured tobacco concerned (95 % in the case of France, 92.75 % for cigarettes and 90 % for fine-cut tobacco in the case of Austria and 97 % in the case of Ireland) undermines the freedom of manufacturers and importers to determine the maximum retail selling prices of their products and, correspondingly, free competition. That legislation is therefore contrary to the directive.

The Court recalls, first, that the directive seeks to ensure that the determination of the tax base of the proportional excise duty on tobacco products is subject to the same rules in all the Member States but also to maintain the freedom of manufacturers and importers to make effective use of the competitive advantage resulting from any lower cost prices.

It considers that the imposition of a minimum retail selling price means that the maximum retail selling price determined by manufacturers and importers cannot, in any event, be lower than that obligatory minimum price, and is therefore capable of undermining competition by preventing some of those manufacturers or importers from taking advantage of lower cost prices so as to offer more attractive retail selling prices.

The Court therefore holds that **a system of minimum retail selling prices for tobacco products cannot be regarded as compatible with Article 9(1) of Directive 95/59 unless it is structured in such a way as to ensure, in any event, that the competitive advantage which could result for some manufacturers and importers of those products from lower cost prices is not impaired.**

¹ 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), as amended by Council Directive 2002/10/EC of 12 February 2002 (OJ 2002 L 46, p. 26).

The Court's examination of the national legislation leads it to conclude that that legislation does not make it possible to ensure, in any event, that the minimum prices imposed by it do not impair the competitive advantage which could result for some manufacturers and importers of tobacco products from lower cost prices.

Second, the Court then rejects the arguments advanced by each Member State in order to justify its legislation.

In the first place, **the Court's conclusion is not affected by the Framework Convention on Tobacco Control of the World Health Organisation (WHO)**², since it does not impose any actual obligation on the Contracting Parties with regard to the price of tobacco products which would allow them to act contrary to the provisions of the directive. Furthermore, the directive does not preclude a pricing policy provided that it does not run counter to the directive's objectives.

In the second place, the health protection objective laid down in Article 30 EC can be relied upon only to justify the quantitative restrictions on imports and exports and the measures having equivalent effect envisaged by Articles 28 EC and 29 EC. However, the Commission did not base its action on those provisions of the EC Treaty.

Finally, the Court considers that **Directive 95/59 ensures health protection and does not prevent the Member States from combating smoking**. It points out that fiscal legislation is an important and effective instrument for discouraging consumption of tobacco products and, therefore, for the protection of public health, since the objective of ensuring that a high price level is fixed for those products may adequately be attained by increased taxation of those products, the excise duty increases sooner or later being reflected in an increase in the retail selling price, without undermining the freedom to determine prices.

The Court adds that the prohibition on fixing minimum prices does not prevent Member States from prohibiting the sale of manufactured tobacco at a loss, so long as the freedom of manufacturers or importers to determine the maximum retail selling prices for their products is not undermined. Those economic actors will not be able, in that case, to absorb the impact of the taxes on those prices by selling their products at a price below the sum of the cost price and all taxes.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The full texts of the judgments ([C-197/08](#), [C-198/08](#) & [C-221/08](#)) is published on the CURIA website on the day of delivery.

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² WHO Framework Convention on Tobacco Control, approved on behalf of the Community by Council Decision of 2 June 2004 (OJ 2004 L 213, p. 8).