

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 13 April 2000 *

1. In this case the Commission seeks a declaration pursuant to Article 169 of the EC Treaty (now Article 226 EC) that Greece 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 tobacco¹ by adopting and maintaining in force legislative provisions which authorise the Greek Minister for Economic Affairs to determine by decree the minimum retail selling prices of manufactured tobacco products.

The relevant legal provisions

2. Directive 95/59/EC (hereafter ‘the Directive’) sets out the basic rules for the second stage of harmonisation of taxes other than turnover taxes (excise duties) on manufactured tobacco products. It is based on

Article 99 of the Treaty (now Article 93 EC) and consolidates Council Directive 72/464/EEC of 19 December 1972² and Council Directive 79/32/EEC of 18 December 1978³ as amended on several occasions, most recently by Council Directive 92/78/EEC.⁴

3. The overall objective of the Directive is, according to the second recital in the preamble, to facilitate the establishment of an economic union within the Community. To that end, the Directive lays down two types of rules.

4. First, there are rules concerning the structure, the level and the collection of excise duties on manufactured tobacco products. Those rules aim to ensure that excise duties levied on tobacco products in the Member States do not distort conditions of competition or impede the free movement of goods. Article 8 of the Directive provides that excise duties on cigarettes

* Original language: English.

1 — OJ 1995 L 291, p. 40.

2 — Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, OJ, English Special Edition, Series-I(72), p. 3.

3 — Second Council Directive 79/32/EEC of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, OJ 1979 L 10, p. 8.

4 — Council Directive 92/78/EEC of 19 October 1992 amending Directives 72/464/EEC and 79/32/EEC on taxes other than turnover taxes which are levied on the consumption of manufactured tobacco, OJ 1992 L 316, p. 5.

shall comprise two elements: a proportional duty calculated on the maximum retail price and a specific duty calculated per unit of the product. Under Article 16, the specific duty must not be less than 5% or more than 55% of the amount of the total tax burden levied on the cigarettes.⁵ Excise duties are, according to Article 10, in principle collected by means of tax stamps which are acquired by the manufacturers or importers from the relevant authorities in the Member State and fixed to the products prior to their sale at the retail level.

5. There are, secondly, rules about the formation of retail selling prices of all manufactured tobacco products.⁶ According to the seventh recital in the preamble 'the needs of competition imply a system of freely formed prices for all groups of manufactured tobacco'. On that basis, Article 9 of the Directive, which corresponds to Article 5 of Directive 72/464 as amended, provides:

'1. 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.

⁵ — The total tax burden is defined in Article 16(2) of the Directive as 'the aggregation of the proportional excise duty, the specific excise duty and the turnover tax levied on these cigarettes'.

⁶ — Manufactured tobacco products are defined in Article 2 of the Directive as '(a) cigarettes; (b) cigars and cigarillos; (c) smoking tobacco — fine-cut tobacco for the rolling of cigarettes, — other smoking tobacco; as defined in Articles 3 to 7.'

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 [sub]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.

2. In order to facilitate the levying of the excise duty, 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.'

6. Article 9 of the Directive has been transposed into Greek law by 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 Law No 2127 reads as follows:

equal to the price laid down by the above-mentioned 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.

‘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.

...’

7. The third paragraph of Article 45 was amended by ministerial order No F 3/2 of 7 January 1997. Consequently, the retail price of manufactured tobacco must, with effect from 20 January 1997, be at least equal to the price of those products on 31 December 1996 increased by 9%.

2. ...

Procedure and delimitation of the issues

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

8. The Commission takes the view that Article 45 of Law No 2127 is contrary to Article 9 of the Directive and Article 30 of the Treaty (now Article 28 EC). It initially communicated that view to the Greek Government by letter dated 21 February 1994.⁷ The Greek Government replied by letter of 31 March 1994 that it did not

⁷ — Article 9 of the Directive corresponds to Article 5 of Directive 72/464/EEC, and the Commission’s letter referred to the latter.

consider Law No 2127 to be contrary to the Directive or other provisions of Community law. Following a further exchange of letters in which the parties maintained their views, the Commission issued a letter of formal notice on 21 March 1996. Having found the Greek reply of 29 May 1996 unsatisfactory the Commission issued, on 16 June 1996, a reasoned opinion pursuant to Article 169(1) of the Treaty (now Article 226(1) EC) calling on Greece to take the necessary measures to comply within a period of two months. In its reply to that opinion, dated 25 March 1998, the Greek Government repeated that Law No 2127 was not contrary to Community law. In the light of that reply, the Commission lodged this application with the Court on 11 June 1998.

the subject-matter, as that would undermine the Member State's opportunity to submit observations which is an essential procedural guarantee required by the Treaty.⁸ In this case, the Commission stated both in the letter of formal notice and in the reasoned opinion that although it had referred to Article 30 of the Treaty in its previous correspondence with the Greek Government, the present procedure was limited to the fiscal aspects of Law No 2127 and without prejudice to subsequent action which the Commission might take on the basis of Article 30. It follows, as the Greek Government rightly points out, that the allegation of a breach of Article 30 of the Treaty is inadmissible.

Summary of the arguments

9. The Commission's application seeks a declaration that Greece is in breach of Article 9 of the Directive. However, in its reply to the Greek Government's defence, the Commission alleges that Law No 2127 is also contrary to Article 30 of the Treaty.

11. The Commission advances two arguments in support of its allegation of a breach of Article 9 of the Directive.

10. According to the Court's settled case-law, the pre-litigation stage defines the subject-matter of an action for failure to fulfil Community law obligations. The Commission cannot subsequently extend

12. It contends, first and foremost, that Article 9 of the Directive establishes a principle of free formation of retail prices of manufactured tobacco by the manufacturers or importers. The determination, by the authorities of a Member State, of

⁸ — See, for example, Case 7/69 *Commission v Italy* [1970] ECR 111, paragraph 5 of the judgment, Case C-306/91 *Commission v Italy* [1993] ECR I-2133, paragraph 22.

legally binding maximum or minimum retail prices is contrary to that principle and thus to the Directive. The Commission refers to the purpose of the Directive as set out in its preamble and to the Court's case-law on Article 5 of Directive 72/464.⁹

13. The Commission adds that Article 45 of Law No 2127 creates legal uncertainty and that Greece has therefore failed to implement Article 9 of the Directive correctly. That uncertainty is caused by the apparent contradiction between paragraph 1 of Article 45, which provides that manufacturers and importers can freely determine the retail prices of manufactured tobacco products, and paragraph 3 which provides that the Minister for Economic Affairs determines the minimum retail prices of those products.

14. The Greek Government replies, essentially, that the wording of Article 9 of the Directive draws a distinction between minimum and maximum retail prices. Consequently, a Member State does not act contrary to the Directive where it imposes legally binding minimum prices on manufactured tobacco products.

15. It also denies that Law No 2217 creates legal uncertainty. While paragraph 1 of Article 45 lays down the general principle that the manufacturers and importers freely determine the retail price of manufactured tobacco, paragraph 3 merely restricts the scope of that principle. There is thus no contradiction between the two paragraphs.

16. Finally, the Greek Government submits that Law No 2127 falls within the reservations, in the third subparagraph of Article 9(1), concerning national legislation intended to control price levels or imposed prices.

17. The following questions need, in my view, to be considered.

- (i) Is Article 45 of Law No 2127 contrary to the second subparagraph of Article 9(1) and thus *prima facie* in breach of the Directive?
- (ii) Is Article 45 of Law No 2127 justified under the reservations in the third subparagraph of Article 9(1) of the Directive?

⁹ — Case 13/77 *INNO v ATAB* [1977] ECR 2115, Case 90/82 *Commission v France* [1983] ECR 2011, Case C-287/89 *Commission v Belgium* [1991] ECR I-2233, Case C-306/91 *Commission v Italy* [1993] ECR I-2133.

Is Article 45 of Law No 2127 contrary to the second subparagraph of Article 9(1) and thus *prima facie* in breach of the Directive?

18. The second subparagraph of Article 9(1) provides that manufacturers and importers shall be free to determine the maximum retail selling price for each of their products. According to the Greek Government, the reference in that wording to 'maximum prices', rather than 'prices', shows that the Directive is not intended to prohibit minimum retail prices.

19. That analysis is, in my view, incorrect since the wording of Article 9 must be interpreted in the light of the system and purpose of the Directive.¹⁰

20. The Directive establishes a mechanism for the application in the Member States of excise duties to manufactured tobacco products. Under that mechanism, the duties are calculated and collected on the basis of the maximum retail prices which are determined by manufacturers or importers and printed on the tax labels. The phrase 'maximum prices' in the wording of Article 9 refers to that mechanism for calculation and collection of tax. It means the prices determined by the manufacturers or

importers on the basis of which tax is levied. As the Court stated in *INNO v ATAB*, where the basis of assessment to tax is the retail selling price, a prohibition on selling tobacco products to the consumer at a price higher than the retail selling price appearing on the tax label constitutes an essential fiscal guarantee, designed to prevent producers and importers from undervaluing their products for tax purposes.¹¹ Thus the reference to 'maximum prices' has no bearing on the question whether the Directive allows Member States to fix minimum retail prices.

21. The Greek Government's analysis is also inconsistent with the purpose of the Directive. If a Member State imposes binding minimum retail prices on manufactured tobacco products, the importers of those products may be unable to reflect lower cost prices in their retail prices. As a result, the conditions of competition between domestic and imported tobacco products may be distorted and the free movement of goods may be restricted. It is for this reason that the preamble to the Directive states that 'the needs of competition imply a system of freely formed prices for all groups of manufactured tobacco'.

22. Moreover, the issue has already been decided by the Court's case-law. The Court

¹⁰ — See *Commission v France*, cited in note 9, paragraph 16 of the judgment.

¹¹ — Case 13/77, cited in note 9, paragraph 17 of the judgment.

has held that national rules which impose binding retail prices on manufactured tobacco products are contrary to Article 5(1) of Directive 72/464, which for the purpose of these proceedings is indistinguishable from Article 9(1) of the Directive. In *Commission v France*¹² the Court of Justice examined the compatibility with Article 5(1) of French rules which authorised the administration to determine the retail prices of both domestic and imported tobacco products. The Court held that the power reserved to the French Government to fix prices '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'.¹³

23. The Court confirmed that interpretation of Article 5 in *Commission v Belgium*.¹⁴ That case concerned the Belgian authorities' refusal to deliver tax stamps to a tobacco importer showing lower prices than those laid down by a national price scale established in accordance with Article 5(2) (now Article 9(2) of the Directive). The Court held that that refusal amounted to the imposition of a minimum price on imported tobacco products which

violated Article 30 of the Treaty (now Article 28 EC). It then continued:¹⁵

'It is clear, moreover, that the Belgian authorities also committed an error of law by disregarding the principle laid down by Article 5(1) of Directive 72/464 of 19 December 1972, according to which manufacturers and importers shall be free to determine the maximum retail selling price for each of their products.'

24. Finally, in *Commission v Italy*¹⁶ the Court held that a provision of Italian law which authorised the administration of that State to determine the retail prices with regard to the maximum prices suggested to it by the manufacturers and importers was in breach of Article 5(1) of Directive 72/464 since it created uncertainty about the right of those manufacturers and importers to determine freely the maximum retail prices.

25. It follows that the Commission's interpretation of the Directive is correct: Article 9(1) establishes a principle of free formation of retail prices by manufacturers and importers which is, subject to the reservations in the third subparagraph of

12 — Case 90/82, cited in note 9.

13 — Paragraph 26 of the judgment.

14 — Case C-287/89, cited in note 9.

15 — Paragraph 22 of the judgment.

16 — Case C-306/91, cited in note 9.

that provision, incompatible with the authorities of a Member State having power to set minimum prices or other binding retail prices.

the view that the proposed amendment was not necessary since it was sufficiently clear from the system and purpose of the Directive, and the Court's rulings in the cases mentioned above, that Article 9(1) does indeed apply to minimum prices.

26. Article 45 of Law No 2127 authorises the Greek Minister for Economic Affairs to impose binding minimum retail prices on manufactured tobacco products. The existence of that power is *per se* a breach of the principle of free formation of retail selling prices enshrined in Article 9(1) of the Directive.

27. That conclusion is not, as the Greek Government contends, contradicted by the legislative history of the Directive. During the process leading to the adoption of Directive 92/78 which amended Directive 72/464, the Economic and Social Committee suggested that the phrase 'maximum prices' in Article 5(1) be changed to 'prices' to make it clear that the Directive applied also to national minimum price legislations.¹⁷ The fact that the Community legislator did not adopt that proposal does not suggest that minimum prices fall outside Article 9(1). On the contrary, it suggests that the Community legislator took

28. It should be added that the minimum prices laid down in accordance with Law No 2127 may, contrary to the Greek Government's assertions, jeopardise the aims of the Directive. According to information contained in the Commission's application, the Greek minimum prices are set in accordance with the following criteria: from December 1995, at which time the Directive entered into force,¹⁸ to 19 January 1997 the minimum prices were at least equivalent to the retail prices on 1 December 1993 increased by 20%; since 20 January 1997 the minimum prices have been at least equivalent to the retail prices on 31 December 1996 increased by 9%. Those levels appear quite high and one can therefore not exclude the possibility that the minimum prices have prevented some importers from reflecting lower cost prices in their retail prices. The minimum prices laid down in accordance with Article 45 may thus have distorted the conditions of competition between domestic and imported tobacco products and restricted

17 — Proposal for a Council Directive amending Council Directives 72/464/EEC and 79/32/EEC on taxes other than turnover taxes which are levied on the consumption of manufactured tobacco, OJ 1991 C 69, p. 25, at p. 30.

18 — Under Article 20 of the Directive, its provisions entered into force on the 20th day following its publication in the *Official Journal of the European Communities* on 6 December 1995.

the free movement of goods. Moreover, there is no upper limit, in the wording of Article 45 of Law No 2127, on the level of the minimum prices which may be determined by the Greek Minister for Economic Affairs. The Minister may therefore at any time raise the minimum prices to such a high level that the conditions of competition are indeed distorted.

29. I conclude, on those grounds, that Article 45 of Law No 2127 is contrary to the second subparagraph of Article 9(1) of the Directive and thus *prima facie* in breach of the Directive.

30. In the light of the foregoing, it is not necessary for me to express an opinion on the Commission's allegation of a breach of the requirement of legal certainty in the implementation of the Directive.

Is Article 45 of Law No 2127 justified under the reservations in the third subparagraph of Article 9(1) of the Directive?

31. The Greek Government contends that Article 45 of Law No 2127 falls within the reservations listed in the third subpara-

graph of Article 9(1) of the Directive. It claims, in support of that contention, that minimum prices are necessary to protect the fiscal interests of the Greek State and to protect public health from the dangers of smoking. In that regard, it emphasises that the fight against tobacco abuse is a lawful aim under Community law; that the Commission has encouraged the Member States to take action in this area; and that the need for action is pertinent given the high levels of tobacco consumption in Greece.

32. It may be recalled that the third subparagraph of Article 9(1) refers to 'national systems of legislation regarding the control of price levels or the observance of imposed prices'. Measures designed to protect public health or the fiscal interests of the Member State do not, in my view, fall within those terms.

33. That view is confirmed by the Court's case-law on Article 5(1) of Directive 72/464. In *Commission v France* the Court ruled that the reservations in the third subparagraph '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 ...'.¹⁹ As regards 'control of price levels', the Court held that that expression

¹⁹ — Case 90/82, cited in note 9, paragraph 20 of the judgment.

covers only national legislation of a general nature intended to check the increase in prices.²⁰ As regards 'observance of imposed prices', the Court held that that expression must be read in the light of the mechanism for determination of retail prices laid down in the second subparagraph of Article 9(1). The 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 at all stages of the distribution network, up to the sale to the consumer.²¹ The purpose of that mechanism is, as explained above, to prevent manufacturers and importers from undervaluing their products at the time they acquire the tax labels and pay excise duty on the tobacco products.

Law No 2127 is justified under the third subparagraph of Article 9(1) should therefore not be upheld.

34. It follows that the third subparagraph of Article 9(1) does not authorise the Member States to depart from the principle of free price formation, laid down in the second subparagraph, in order to protect either their fiscal interests or public health. The Greek Government's contention that

35. That does not mean, however, that Greece cannot protect its fiscal interests and public health under the Directive. As the Commission rightly points out, Greece is free to determine the total level of taxation on manufactured tobacco products under Article 16 of the Directive. It can therefore protect those interests by an increase in the level of taxation. The fear expressed by the Greek Government, that manufacturers and importers might counteract tax increases by reducing their profit margins, is unfounded. Taking into account the large tax element in the selling price of manufactured tobacco products, the profit made by manufacturers, importers and retailers is relatively small.²² The retail selling price therefore reflects the level of taxation and the Greek authorities may, in any event, respond to reductions in the profit margins by raising further the level of taxation.

20 — Paragraphs 21 and 22 of the judgment.

21 — Paragraph 23 of the judgment. See also *Commission v Belgium*, cited in note 9, paragraph 13.

22 — See *INNO v ATAB*, cited in note 9, paragraph 16 of the judgment.

Conclusion

36. On the basis of the above considerations, I am of the opinion that the Court should:

- (1) declare that 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) order the Hellenic Republic to pay the costs.