I — Introduction

1. In these proceedings for failure to fulfil Treaty obligations, the Commission claims that since 1998 the French Republic has, firstly, imposed a minimum reference price for cigarettes instead of allowing the price to be freely determined by manufacturers, and, secondly, taxed light-tobacco cigarettes more heavily than dark-tobacco cigarettes.

II — Legal framework

A — Community law


3. Directive 95/59 contains the following provisions:

‘Article 8

(1) Cigarettes manufactured in the Community and those imported from non-member countries shall be subject to a proportional excise duty calculated on the maximum retail selling price, including

\(^{1}\) Original language: German.
customs duties, and also to a specific excise duty calculated per unit of the product.

(2) The rate of the proportional excise duty and the amount of the specific excise duty must be the same for all cigarettes.

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.

(2) ...'

(3) (4) ...'

'Article 9

(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) Member States may levy a minimum excise duty on cigarettes and on fine-cut tobacco for the rolling of cigarettes, provided that this does not have the effect of raising the total tax to more than 90% of the total tax on the most popular price category of cigarettes or the most popular price category of fine-cut tobacco for the rolling of cigarettes respectively.'

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.

4. With effect from 1 January 1999, Directive 1999/81 of 29 July 1999 amended Article 16(5) to read as follows:
"Member States may levy a minimum excise duty on cigarettes, provided that this does not have the effect of raising the total tax to more than 90% of the total tax on the most popular price category of cigarettes." 4

5. The Commission based the application, but not the reasoned opinion of 26 January 1999, on the new version that was in force as of 1 January 1999. At the time of the letter of formal notice of 29 July 1998, the old version was in any case still in force. As, however, the passages of the old version that are relevant here were not changed fundamentally, as to the content it is of no consequence whether the old or new version of Article 16(5) of Directive 95/59 is applied.

(2) Directive 92/79

6. Article 2 of Directive 92/79 provides:

"Not later than 1 January 1993, each Member State shall apply an overall minimum excise duty (specific duty plus ad valorem duty excluding VAT) the incidence of which shall be set at 57% of the retail selling price (inclusive of all taxes) for cigarettes of the price category most in demand."

The overall minimum excise duty on cigarettes shall be determined on the basis of cigarettes of the price category most in demand according to data established as at 1 January of each year, beginning on 1 January 1993."

B — French law


4 — Firstly, the new version no longer refers to "fine-cut tobacco" which is not the object of the present case. Secondly, the new German version no longer uses the wording "Zigaretten der am meisten gefragten Preisklasse" but refers to "Zigaretten der gängigsten Preisklasse". This appears to be merely an editorial amendment, designed to bring Article 16(5) of Directive 95/59 into line with the German version of Article 2 of Directive 92/79 which already referred to the "gängigsten Preisklasse". The French language version of Article 16(5) of Directive 95/59, which was not amended by Directive 1999/81, already corresponded to Article 2 of Directive 92/79. Therefore, the revised version does not affect the contents of the provision in so far as is relevant here.
8. Article 572(2):

'For the category of dark-tobacco cigarettes defined by the final paragraph of Article 575A and in respect of the category of other cigarettes, the price for 1 000 units of a category of products sold under the same brand, regardless of the other components registered with the brand may not be less, independently of the method or the unit of packaging used, than that applied to the product with the highest sales of that brand.'

9. The following was inserted in place of the former last paragraph of Article 575A:

'The lowest rate of tax mentioned by Article 575 is fixed at FRF 500 for cigarettes. Nevertheless, for dark-tobacco cigarettes, that rate of tax is fixed at FRF 400, and at FRF 420 from 1 January 1999.

10. The tax rates for light-tobacco cigarettes and dark-tobacco cigarettes provided in the first sentence were increased for 1999 to FRF 515 and FRF 435, for 2000 to FRF 530 and FRF 470, and for 2001 to FRF 540 and FRF 510.

III — Procedure and forms of order sought

11. The Commission was of the opinion that Article 572(2) of the Code général des impôts introduced an inadmissible minimum reference price, and that the amendment of Article 575A created different tax rates for light-tobacco cigarettes and dark-tobacco cigarettes, both of which are incompatible with Directives 95/59 and 92/79, as well as Article 95 of the EC Treaty. It therefore sent the French Republic a letter of formal notice on 29 July 1998 and, after the deadline set therein had expired without answer, a reasoned opinion on 26 January 1999. The French Republic answered by letters of 6 April 1999 and 22 February 2000. The Commis-

5 — The common customs tariff defines this as tobacco, not stemmed/stripped, partly or wholly stripped/stemmed of the finish fire-cured or dark air-cured.
sion subsequently submitted the present application which was lodged at the Court of Justice on 7 August 2000.

12. The Commission of European Communities claims that the Court should

— declare that

by maintaining in force a system imposing a minimum reference price on all cigarettes, the French Republic has failed to fulfil its obligations under Article 9(1) of Council Directive 95/59 of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco,

and that

by maintaining in force a system imposing different tax rates on dark-tobacco and light-tobacco cigarettes, to the disadvantage of the latter, the French Republic has failed to fulfil its obligations under Article 8(2) and 16(5) of Directive 95/59/EC, under Article 2 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes and under the first paragraph of Article 95 EC, or in the alternative the second paragraph of Article 95 EC;

— order the French Republic to pay the costs.

13. The French Republic claims that the Court should,

— dismiss the application as unfounded and

— order the Commission to pay the costs.

14. It admits that the fixing of different minimum excise duties for light and dark tobacco is incompatible with Directive 92/79, but takes the view that there is no infringement of Article 95 of the EC Treaty due to the lack of similarity between these cigarette types. Nor does it consider that imposing a minimum reference price based on a brand’s highest selling product infringes Directive 95/59.
IV — Analysis

A — Minimum reference price

15. The Commission refers to Article 9 of Directive 95/59 under which manufacturers or, where appropriate, importers, are free to determine the maximum retail selling price of cigarettes. Article 572 of the Code général des impôts, however, requires that the price for 1 000 units of a product sold under the same brand may not be lower than that applied to the highest selling product of that brand. As the price of the most popular product with that brand must be used as the minimum price, the manufacturer's freedom to fix the price if the product is presented differently, for example as to size of packaging, size or quality of the cigarettes, is restricted.

16. Referring to the case-law of the Court of Justice, the Commission states that neither would the reservations under Article 9(1)(iii) of Directive 95/59 authorise

17. The Court of Justice has held in its most recent decision that the fixing of a minimum price is also incompatible with free pricing under Article 9(1) of Directive 95/59.

18. Competitive pricing to which France objects is the objective of Article 9(1) of Directive 95/59. The French measures aim to protect dark-tobacco cigarettes. Such an economic objective cannot justify infringements of Community law.

19. Directive 92/79 and Directive 95/59 accorded the Member States considerable leeway to influence the cigarette market by uniform taxation. France, however, is seeking to grant tax concessions for cigarettes with a low sales price.


20. The French Republic considers that the Commission has a mistaken view of the effect of Article 572 of the Code général des impôts.

21. This provision is only intended to hinder manufacturers from changing the price of a cigarette based purely on its packaging, be it the sort of packaging used or the quantity sold. It does not restrict the manufacturer’s right to fix the price for other cigarettes of the same brand.

22. Article 9(1)(ii) of Directive 95/59 provides that in principle it is the manufacturer or importer who fixes the final maximum retail selling price for cigarettes. Although paragraph (iii) of the provision could be understood as allowing the Member States to influence the price fixing even so, it is clear from the case-law of the Court of Justice that it is for the manufacturer or importer to determine prices. 8

23. Both parties agree that Article 572 of the Code général des impôts introduces a minimum price for the sale of cigarettes of a particular brand, which is determined according to the price obtained per cigarette of the highest-selling product under that brand. The provision therefore precludes the manufacturer or importer from bringing these cigarettes onto the market in different packaging or other quantities at a lower price. The provision thus restricts the freedom of manufacturers and importers of cigarettes to set a final maximum retail selling price by which the price of the individual cigarette would fall below the price obtained for the highest selling product under that brand.

24. Consequently, Article 572 of the Code général des impôts impedes the freedom to determine prices and is inconsistent with Article 9(1) of Directive 95/59.

25. There is no discernible justification for the infringement of Article 9(1) of Directive 95/59. In so far as France refers to pricing competition that led to a fall in the price of cigarettes, and which is undesirable on health policy grounds, it must be pointed out that the possibility of pricing competition is the logical consequence of pricing freedom and that health policy considerations are, under Directives 95/59 and

8 — Case C-216/98 (cited in footnote 7, paragraph 20 et seq. and further references therein).
92/79, to be achieved primarily through the imposition of taxes. The fixing of a minimum price, on the other hand, is explicitly excluded. If France wishes to use such means then it must first seek amendment of Article 9 of Directive 95/59.

26. In view of these findings, it is not necessary to decide here whether, contrary to its wording, Article 572 of the Code général des impôts does not influence the pricing of other products within a brand depending on their size, quality or individual characteristics.

27. At all events, this provision infringes Article 9(1) of Directive 95/59.

29. Article 575A of the Code général des impôts does not, however, fix this minimum tax rate as the minimum taxes it introduces do not depend on the most popular price category of cigarettes. However, in terms of their effect, these taxes correspond to a minimum excise duty, as they exclude a price-proportionate tax rate that falls below a certain final retail selling price. The final retail selling price is lower for dark-tobacco cigarettes than for light-tobacco cigarettes.

(1) Directives 92/79 and 95/59

B — Different tax rates

28. The effect of the minimum excise duty under Article 2 of Directive 92/79 is that every cigarette is burdened with at least one absolute tax amount (without turnover tax) that is 57% of the retail selling price including all taxes on the most popular price category of cigarettes. More expensive cigarettes are subject to a higher tax rate, in absolute terms, as the tax is then determined according to a fixed amount per unit and to a proportional excise duty calculated according to the maximum retail selling price. When a manufacturer or importer offers cigarettes at a price below that of the most popular price category of cigarettes, however, the minimum excise duty applies.

30. According to the Commission, under Article 2 of Directive 92/79 and Article 16(5) of Directive 95/59, which only refer to a uniform minimum excise duty, the Member States may only fix a uniform minimum excise duty. Article 8(2) of Directive 95/59, according to which the rate of proportional excise duty and the amount of specific excise duty must be the
same for all cigarettes, also supports this. The fact that France is gradually closing the gap between the different minimum excise duties cannot justify the infringement of this provision.

31. France is not disputing this argument in so far as is based on Directives 92/79 and 95/59.

Arguments of the Parties

34. The Commission stresses first that notwithstanding that finding of infringement of the directives, it is necessary to make an assessment on the basis of Article 95 of the EC Treaty. While the legal basis for the directives — Article 99 of the EC Treaty (now Article 93 EC) — seeks to eliminate trade restrictions through harmonised tax rules, Article 95 of the Treaty addresses discrimination and protectionist taxes.9

35. It has been consistently held that an infringement of the first paragraph of Article 95 of the Treaty occurs when the tax on the imported product and the tax on the similar domestic product are calculated in a different way and under different conditions so that the imported product, even if only in certain cases, is more heavily taxed.10

32. I endorse the view shared by the parties. Article 2 of Directive 92/79 and Article 16(5) of Directive 95/59 cite only one minimum excise duty which, under Article 2, must be an overall duty. Different tax rates cannot operate ‘overall’. Moreover the second recital in the preamble to Directive 95/59 states that excise duties levied on cigarettes in the Member States may not distort conditions of competition. But that is exactly the result of Member States levying differing minimum excise duties.

33. Therefore, the revised version of Article 575A of the Code général des impôts is incompatible with Directives 92/79 and 95/59.

36. In the present case, the minimum excise duty for light-tobacco cigarettes is, at FRF 500 per 1,000 units, higher than that for dark cigarettes which is FRF 400 per 1,000 units.

37. The two types of cigarettes are similar within the meaning of Article 95 (1) of the Treaty. According to the case-law of the Court of Justice, the similarity test is to be interpreted widely. To this end, regard must firstly be had to all objectively typical characteristics, such as the raw material, manufacturing procedure, organoleptic properties, in particular taste, tar and nicotine content and, secondly, to the extent to which the two products serve the same needs. On this criterion there is similarity. The two types of cigarettes are interchangeable in exactly the same way as light and dark beer or white and red wine. The two types of cigarettes are also treated equally for tax law purposes under Directive 95/59. They are furthermore categorised under the same heading in the common customs tariff.

38. The differences in taste between light-tobacco and dark-tobacco cigarettes alone cannot rule out similarity, as all the aforementioned criteria must be taken into account.

39. Nor does the fact that there are distinct separate groups of consumers of light-tobacco and dark-tobacco cigarettes mean there is no similarity, because, according to the Court of Justice, national tax regulations may not entrench existing habits.

40. Nor, finally, do the findings in the Seita/Tabacalera merger control decision affect similarity. In that decision the Commission expressly left open the question whether there is a single market for dark-tobacco and light-tobacco cigarettes. Moreover, the Court of Justice recognised that two products within the meaning of the second paragraph of Article 95 of the Treaty can be competing without constituting a single market.

41. On no account does the first paragraph of Article 95 of the Treaty require evidence that imports are dwindling.

42. Even if dark-tobacco and light-tobacco cigarettes do not constitute similar prod-

11 — Commission Decision of 3 December 1999 declaring a concentration to be compatible with the common market (Case IV/M.1735 — Seita/Tabacalera) according to Council Directive (EEC) No 4064/89, OJ 2000 C 32, p. 4. Only the English version of the text is authentic and can be obtained via the English version of CELEX, via the website of the Competition Directorate General http://europa.eu.int/comm/competition/mergers/cases/decisions/m1735_en.pdf or a hard copy can be obtained separately.

products within the meaning of the first paragraph of Article 95 of the Treaty, there is still a competitive relationship between them, which is sufficient for the second paragraph of Article 95 of the Treaty to apply.  

43. The discriminatory effect of different tax rates on products from other Member States is the result of the fact that almost all dark-tobacco cigarettes consumed in France are also manufactured there. The Commission says that between 95% and 99.57% of consumption is domestically manufactured. It is indisputable that the French measures give preference to dark-tobacco cigarettes, which are produced in France, over light-tobacco cigarettes, which are almost exclusively imported.

44. The amendment of the tax rate has also affected this competition. According to the Commission, it was merely the result of a strategic decision of the manufacturers and importers not to raise the price of light-tobacco cigarettes in 1998. Before the new rules came into force manufacturers were able to fix a price of FRF 630 per 1,000 units. After they came into force, however, they had to demand a price of FRF 850 per 1,000 units. Manufacturers of dark-tobacco cigarettes, by contrast, were able to content themselves with a price of FRF 666.50 per 1,000 units, or to take advantage of the total difference between FRF 666.50 and FRF 850, in order to position themselves on the market. The protectionist effect of this tax rule is therefore clear.

45. France first explains that Rothmans introduced the Winfield cigarette brand onto the French market in 1996. In packets of 30 units, these (light-tobacco) cigarettes were sold significantly more cheaply than in the usual packets of 20 units (FRF 667 for 1,000 units compared to FRF 850 for 1,000 units). As a result, the Winfield brand quickly acquired a large share of the market. Since other tools of competition — in particular cigarette advertising — were strictly limited by law, Rothman’s competitors also considered lowering their prices by 15%. A drop in price levels would, however, have called into question French strategy for promoting public health by combating tobacco consumption, which was based chiefly on high prices.

46. Directives 92/79 and 95/59 offer no means of countering an unusual price war of that kind. Fixing a single increased minimum excise duty simplifies the problem in a manner that is impermissible, as it primarily affects dark-tobacco cigarettes.

47. The French Republic also denies that light-tobacco and dark-tobacco cigarettes are similar products. According to the judgment in the *Rewe-Zentrale* case,\(^{14}\) products are only similar if they have the same characteristics and serve the same needs in the eyes of the consumer.

48. Dark-tobacco cigarettes have a different taste — the pH-value of the smoke is not sour as it is for light-tobacco cigarettes but basic. It is not these two types of cigarettes that are comparable; rather, light-tobacco cigarettes are comparable with light fine-cut tobacco for own-rolled cigarettes, as are dark-tobacco cigarettes with cigarillos.

49. Moreover, consumers of each type of cigarette are distinct. Younger consumers smoke light-tobacco cigarettes almost exclusively, whereas the majority of the smokers of dark-tobacco cigarettes are older consumers.

50. Finally, the market for the two types of cigarettes has also developed differently. Between 1990 and 2000, sales of dark-tobacco cigarettes have more than halved from 34.7 billion to 15 billion units, while sales of light-tobacco cigarettes have increased from 61.1 billion to 68 billion units.

51. In the merger control decision of *Seita/Tabacalera*, the Commission itself recognised that the two cigarette types belong to different markets. Advocate General Mischcho has already recommended that in tax cases the Court of Justice should adopt the reasoning used in competition cases as regards product comparability.\(^{15}\)

52. In addition, France considers that the differing tax rates for light-tobacco and dark-tobacco cigarettes are not based on the origin of the goods but on objective criteria. According to the case-law of the Court of Justice, tax on domestic products need not always be lower than tax on imported products.\(^{16}\)

53. The Court of Justice has in the meantime further developed its case-law on discriminatory taxes. A tax rate can only be regarded as discriminatory if it is capable of preventing the consumer from acquiring the product in question from

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16 — France refers to the case referred to in footnote 10.
other Member States to the advantage of domestic products.\textsuperscript{17} There is, however, no evidence of such discriminatory effect in the development of the markets for light-tobacco and dark-tobacco cigarettes.

54. Finally, referring to various periods of time, the French Government observes that the price of dark-tobacco cigarettes — starting from a significantly lower level — has increased more sharply than that of light-tobacco cigarettes and that at the same time sales of darker cigarettes have fallen, while sales of lighter cigarettes have increased.

(a) Discriminatory taxation

56. The Court of Justice declared recently that ‘a system of taxation may be considered compatible with Article 95 of the EC Treaty only if it is such as to exclude \textit{any possibility} \cite{19} of imported products being taxed more heavily than similar domestic products’.\textsuperscript{19}

57. It is indisputable that Article 575A of the Code général des impôts subjects the majority (around 80\%) of light-tobacco cigarettes imported into France to a higher minimum tax than dark-tobacco cigarettes which are almost exclusively (as to nearly 100\%) produced in France. France expressly admits that the differing rates are designed to lead to a lower tax burden for dark-tobacco cigarettes, as their market position is more difficult than that of light-tobacco cigarettes. For similar products, such a form of taxation would have to be regarded as discriminatory and incompatible with Article 95 of the Treaty since

\textsuperscript{17} — \textsuperscript{19} For footnotes, see the original document.
although it does not make a formal distinction based on the origin of the goods, most domestic products fall in the lowest tax category, whereas almost all imported products are subject to the highest tax rate.  

58. Were light-tobacco cigarettes and dark-tobacco cigarettes to be similar products within the meaning of the first paragraph of Article 95 of the Treaty, a situation involving such a degree of discrimination in practice could not be justified as a system of taxation based on objective distinguishing criteria. Not even the fact that differences in tax rates are based on objective criteria can justify discrimination.

59. The question remains, however, as to the two types of cigarette are to be considered similar products.

(b) The similarity of light-tobacco cigarettes and dark-tobacco cigarettes

60. The secondary legislation provides some evidence that light-tobacco cigarettes and dark-tobacco cigarette are similar. Neither the abovementioned directives on taxation nor the common customs tariff distinguish between dark-tobacco and light-tobacco cigarettes. But closer examination shows that little weight may be given to that evidence.

61. Classification under a common customs tariff heading may constitute evidence that products are similar, but it does not necessarily mean that they are.

62. More important than classification in the customs tariff, however, is assessment under the Directives discussed above. The recitals in the preamble to and Article 4 of Directive 95/59 suggest that the Community legislature assumes all types of cigarettes to belong to the same group of tobacco products and to be in competition with each other. However, this point of view is qualified by legislative practice. In principle, specifications and definitions of products subject to excise duty in harmonising provisions based on Article 99 of the EC Treaty follow the customs tariff classifications.

21 — Case 277/83 Commission v Italy (Marsala) [1985] ECR 2049, paragraphs 12 et seq.
22 — Case Rewe-Zentrale (cited in footnote 14, paragraph 12).
63. On the other hand, France's assessment of light-tobacco and dark-tobacco cigarettes for competition-law purposes can only be of limited importance. Although competition decisions can contain arguments that are also relevant in a tax context, that is not necessarily true of the findings made. Each area of law is subject to its own rules, the application of which must be examined separately.

64. Specific consideration must therefore be given to whether light-tobacco cigarettes and dark-tobacco cigarettes are to be considered to be similar. Since the judgement Hansen and Balle, the Court of Justice has stressed that similar products do not need to be 'identical' in the strict sense, but are to be determined on the basis of the criterion of similar and comparable use.

65. The case-law of the Court of Justice contains examples of how far the similarity of products can extend. In Case 168/78, the Court of Justice declared that 'at there is in the case of spirits considered as a whole, an indeterminate number of beverages which must be classified as "similar products" within the meaning of the first paragraph of Article 95' and the remaining spirits are at least within the meaning of the second paragraph of Article 95 of the Treaty partly or potentially in competition with the other spirits. In Case 106/84, similarity was found even for table wine made from fruits and wine made from grapes, and for liqueur wine made from fruit and grape wine.

66. Until now the Court of Justice has, in determining similarity, examined whether the respective products have the same characteristics and serve the same needs in the eyes of the consumer. On the other hand, the tax policies of a Member State may not serve to reinforce consumption habits in order to guarantee an acquired advantage for a domestic industry that is concerned with the satisfaction of such habits. No decisive significance can thus be attached to the subjective factor of consumer assessment as compared to objective factors. It therefore seems more appropriate objectively to examine, as has been done in the more recent cases, whether

26 — See the judgments cited in footnote 12 in Case C-184/85 (paragraph 12), and United Brands (paragraph 22 et seq.), according to which although there is for competition purposes a stand-alone market for bananas, bananas can nevertheless be similar to other fruit.
28 — Cited in footnote 23, paragraph 12.
29 — Cited in footnote 27, paragraph 13 et seq.
30 — Rew-Zentrale (cited in footnote 14, paragraph 12); see also Case 277/83 (cited in footnote 21, paragraph 13).
products have similar characteristics and serve the same needs of the consumer.  

67. According to the last paragraph of Article 575A of the Code général des impôts, dark-tobacco cigarettes are ‘cigarettes containing a minimum of 60 per cent of natural tobacco covered by Customs tariff codes NC 2401.10.41, 2401.10.70, 2401.20.41, or 2401.20.70’. All other cigarettes are considered to be light-tobacco cigarettes. The comparator group for light-tobacco cigarettes is therefore defined negatively in the sense that cigarettes are to be regarded as light-tobacco cigarettes if they contain either a low amount of natural tobacco, or completely different tobaccos. This legal differentiation shows that the differences between light-tobacco cigarettes and dark-tobacco cigarettes are only a matter of degree.

68. This impression is confirmed when one considers how the tobaccos are processed. The customs tariff headings cited for the definition of dark-tobacco cigarettes cover unprocessed, not stemmed/stripped and partly or wholly stemmed/stripped tobacco that is dried over fire (‘fire-cured’) or under a roof and is subjected to fermentation before marketing (‘dark-air cured’). In addition, tobacco can be dried in the sun, in hot air or without fermentation under a roof. Further, there are different fermentation procedures and additives can always be added to the tobacco which can considerably influence the taste of the cigarettes. Perhaps the most obvious example of this is the menthol cigarette. There are therefore many different conceivable variations although notwithstanding the different manufacturing procedures, cigarettes are always cigarettes. The fact that France distinguishes between light-tobacco and dark-tobacco cigarettes does not, against this background, seem to be dictated by necessity but is, rather, arbitrary.

69. Both types of cigarettes obviously also serve the same need, namely satisfaction of the desire for nicotine. They enable tobacco to be consumed in the manner typical for cigarettes, that is, by smoking ready-made rolls of tobacco with a paper wrapping. The fact that it is unlikely that any smoker might become a non-smoker were one of the two cigarette types no longer available alone demonstrates their substitutability.

70. Arguing against similarity, France invokes differences in taste. However, the

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32 — Case C-265/99 (cited in footnote 19, paragraph 42 — see the French version of the judgment in Case C-106/84 (cited in footnote 27, paragraph 13).


34 — Cf. definition in Article 4 of Directive 59/95.
taste of tobacco has very little effect on consumption. Only about 2% of smokers are able to recognise their brand blind.\textsuperscript{35} This also corresponds with the case-law of the Court of Justice, according to which ‘there is no question of denying the reality of the shades of difference in the flavour of the various ... products; it is necessary however to bear in mind that this criterion is too variable in time and space to supply by itself a sufficiently sound basis for distinction for the definition of categories which may be recognised throughout the Community’.\textsuperscript{36} In view of similarity of wine made from fruit and wine made from grapes, or an indeterminate number of different spirits found in other cases,\textsuperscript{37} differences in taste cannot therefore be regarded as decisive in the present case.

72. This point of view does not however offset the similarities between the two types of cigarettes. On the market for light-tobacco cigarettes, the image established through the advertising of a cigarette brand is frequently of central importance in the decision to buy. But taxing two brands of light-tobacco cigarettes at different rates would not be justified even where it demonstrably could not affect sales owning to consumers' attachment to particular brands. In any event consumer habits are, according to the case-law, only of secondary importance.

73. Consequently, light-tobacco and dark-tobacco cigarettes are to be regarded as similar products within the meaning of the first paragraph of Article 95 of the Treaty. As it has already been established that the tax regime here in issue discriminates against cigarettes from other Member States, there is an infringement of the first paragraph of Article 95 of the Treaty.

74. It should be added that light-tobacco cigarettes and dark-tobacco cigarettes are to be regarded as at least potentially competing against each other, which the application of the second paragraph of Article 95 of the Treaty allows. In applying this provision it is not however sufficient to prove that imported products are taxed at a higher rate. It is, rather, necessary to go on


\textsuperscript{36} — Case 168/78 (cited in footnote 23, paragraph 37).

\textsuperscript{37} — See above, point 65.
to determine whether the differences in the tax rates are such as to have a protectionist effect, to the advantage of domestic products. 38 Statistical data reveal factors relevant to that assessment. Although the Commission in principle has the burden of proving Treaty infringements, 39 the Court of Justice has held that the Commission is not as a rule bound to provide statistical information. 40

75. In the present case it is clear that dark-tobacco cigarettes are offered at a lower price than light-tobacco cigarettes and that they are also subject to a lower minimum tax, which is what enables them to be sold at that lower price. There is therefore prima facie evidence at least of protectionist effect. But that evidence is greatly weakened by the fact that the two types of cigarette have different consumer groups. Were the price difference between light-tobacco and dark-tobacco cigarettes of significance for today's consumers, then the choice of cigarette would not be determined by the age of the smoker in this way. This applies a fortiori since the difference between the generations appears, just like the price differences between light-tobacco and dark-tobacco cigarettes, to have been in existence for a long time and irrespective of the different taxation rates. It is therefore not proven that the different tax rates protect domestic products. This the Commission would have needed to prove in order to succeed.

(d) Conclusion regarding Article 95 of the Treaty

76. As light-tobacco and dark-tobacco cigarettes are to be regarded as similar products, by levying a higher minimum excise duty for light-tobacco cigarettes than for dark-tobacco cigarettes, the French Republic has infringed the first paragraph of Article 95 of the Treaty.

77. However, should the Court of Justice not find that light-tobacco cigarettes and dark-tobacco cigarettes are similar goods, there would be no infringement of Article 95 of the Treaty, as the Commission has failed to prove any infringement of the second paragraph of Article 95 of the Treaty.

V — Costs

78. Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay

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38 — Case 170/78 (cited in footnote 31, paragraph 9).
40 — Case C-170/78 (cited in footnote 31, paragraph 10).
the costs. Since the French Republic has been unsuccessful in its submissions, and the Commission has applied for the French Republic to be ordered to pay the costs, the French Republic is to be ordered to pay the costs.

VI — Conclusion

79. I therefore propose that the Court of Justice rule as follows:

(1) By maintaining in force a system imposing a minimum reference price on all cigarettes, the French Republic has failed to fulfil its obligations under Article 9(1) of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco.

(2) By maintaining in force a system imposing different tax rates on dark-tobacco and light-tobacco cigarettes, to the disadvantage of the latter, the French Republic has failed to fulfil its obligations under Articles 8(2) and 16(5) of Directive 92/59, under Article 2 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes and under the first paragraph of Article 95 of the EC Treaty.

(3) The French Republic is ordered to pay the costs.

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