

## JUDGMENT OF THE COURT (Third Chamber)

4 March 2010 (\*)

(Failure of a Member State to fulfil obligations – Directive 95/59/EC – Taxes other than turnover taxes which affect the consumption of manufactured tobacco – Article 9(1) – Free determination, by manufacturers and importers, of the maximum retail selling prices of their products – National legislation imposing a minimum retail selling price for cigarettes and a minimum retail selling price for fine-cut tobacco – Justification – Protection of public health – World Health Organisation Framework Convention on Tobacco Control)

In Case C-198/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 May 2008,

**European Commission**, represented by W. Mölls and R. Lyal, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Republic of Austria**, represented by E. Riedl, J. Bauer and C. Pesendorfer, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 18 June 2009,

after hearing the Opinion of the Advocate General at the sitting on 22 October 2009,

gives the following

### Judgment

- 1 By its action, the Commission of the European Communities requests the Court to declare that, by adopting and maintaining in force legislation by which the public authorities fix minimum prices for the retail sale of cigarettes and fine-cut tobacco for the rolling of cigarettes, the Republic of Austria 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 (OJ 1995 L 291, p. 40), as amended by Council Directive 2002/10/EC of 12 February 2002 (OJ 2002 L 46, p. 26) ('Directive 95/59').

## Legal framework

### *Community legislation*

2 Recitals 2, 3 and 7 in the preamble to Directive 95/59 read as follows:

‘(2) Whereas the objective of the [EC] Treaty is to establish an economic union within which there is healthy competition and whose characteristics are similar to those of a domestic market; and, as regards manufactured tobacco, achievement of this aim presupposes that the application in the Member States of taxes affecting the consumption of products in this sector does not distort conditions of competition and does not impede their free movement within the Community;

(3) Whereas, as far as excise duties are concerned, harmonisation of structures must, in particular, result in competition in the different categories of manufactured tobacco belonging to the same group not being distorted by the effects of the charging of the tax and, consequently, in the opening of the national markets of the Member States;

...

(7) Whereas the imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco’.

3 Under Article 2(1) of that directive:

‘The following shall be considered to be manufactured tobacco:

- (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.’

4 Article 8 of Directive 95/59 provides:

‘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 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.

...’

5 Under Article 9(1) of the directive:

‘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.’

6 Article 16 of the directive provides:

‘1. The amount of the specific excise duty on cigarettes shall be established by reference to cigarettes in the most popular price category according to the information available at 1 January each year, beginning 1 January 1978.

2. The specific component of the excise duty may not be less than 5% or more than 55% of the amount of the total tax burden resulting from the aggregation of the proportional excise duty, the specific excise duty and the turnover tax levied on these cigarettes.

...

5. Member States may levy a minimum excise duty on cigarettes sold at a price lower than the retail selling price for cigarettes of the price category most in demand, provided that such excise duty does not exceed the amount of the excise duty levied on cigarettes of the price category most in demand.’

7 Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8) and Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10), as amended by Council Directive 2003/117/EC of 5 December 2003 (OJ 2003 L 333, p. 49), lay down the rates and/or minimum amounts of the overall excise duty on cigarettes and manufactured tobacco other than cigarettes. Directive 92/80 also contains certain rules on the structure of the excise duty on cigarettes.

8 By Council Decision 2004/513/EC of 2 June 2004 (OJ 2004 L 213, p. 8), the World Health Organisation Framework Convention on Tobacco Control, signed at Geneva on 21 May 2003 (‘the WHO Convention’), was approved on behalf of the Community. Article 6 of that Convention, headed ‘Price and tax measures to reduce the demand for tobacco’, states:

‘1. The Parties recognise that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.

2. Without prejudice to the sovereign right of the Parties to determine and establish their taxation policies, each Party should take account of its national health objectives concerning tobacco control and adopt or maintain, as appropriate, measures which may include:

a) implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption, ...

...’

#### *National legislation*

9 Paragraph 2(4) of the Federal law on the manufacture and placing on the market of tobacco products and the advertising of tobacco products and the protection of non-smokers (‘Law on tobacco’) (Bundesgesetz über das Herstellen und das Inverkehrbringen von Tabakerzeugnissen sowie die Werbung für Tabakerzeugnisse und den Nichtraucherchutz (‘Tabakgesetz’)) of 30 June 1995 (BGBl. 431/1995), as amended by the Federal law of 30 March 2006 (BGBl. I, 47/2006), provides:

‘The Federal Minister for Health and Women is authorised, in agreement with the Federal Minister of Finance, to lay down by regulation, with a view to the prevention of smoking, the minimum retail selling price for tobacco products, in order to ensure a minimum level of prices. Tobacco products may not be sold at a price below that minimum retail selling price.’

- 10 Paragraph 1 of the Regulation of the Federal Minister for Health and Women establishing a system of minimum retail selling prices for tobacco products in order to ensure a minimum level of prices (Verordnung der Bundesministerin für Gesundheit und Frauen über die Festsetzung des Mindestkleinverkaufspreises für Tabakerzeugnisse zur Sicherstellung eines Mindestpreisniveaus) of 27 April 2006 (BGBl. II, 171/2006), provides:

‘For the purposes of the present regulation, the minimum retail selling price is the price below which tobacco products may not be sold to consumers.’

- 11 According to Paragraph 2 of that regulation:

‘1. With regard to cigarettes, the minimum retail selling price shall amount, per cigarette, to at least 92.75% of the weighted average price of all cigarettes sold during the previous calendar year.

2. With regard to fine-cut tobacco, the minimum retail selling price shall amount, per gram of fine-cut tobacco, to at least 90% of the weighted average price per gram of all fine-cut tobacco sold during the previous calendar year.’

- 12 Under Paragraph 4 of that regulation, the minimum retail selling prices are to apply from 15 May 2006.

### **Pre-litigation procedure**

- 13 After giving the Republic of Austria an opportunity to present its observations with regard to the alleged incompatibility of the Austrian legislation on the fixing of minimum prices for the retail sale of cigarettes and of fine-cut tobacco with Article 9(1) of Directive 95/59, the Commission sent it a reasoned opinion, by letter of 27 June 2007, inviting it to comply with its obligations under that provision within a period of two months from receipt of the opinion. Taking the view, in the light of the Republic of Austria’s reply, that the situation remained unsatisfactory, the Commission brought the present action.

### **The action**

#### *Arguments of the parties*

- 14 According to the Commission, Article 9(1) of Directive 95/59 establishes the principle that producers and importers have the right freely to determine the maximum retail selling prices for manufactured tobacco. The Austrian legislation in question, by establishing a system of minimum prices fixed indirectly for the retail sale of cigarettes and fine-cut tobacco, prohibits producers and importers of those products from selling them at a price lower than those minimum prices and thus restricts their freedom with regard to the fixing of prices. That legislation is therefore contrary to Article 9(1) of Directive 95/59.
- 15 The national legislation in question is not justified by public health considerations. They were already taken into account by the Community legislature when the directives on excise duties on tobacco were adopted. Since there are no maximum rates of excise duty, the Community rules on the taxation of tobacco products allow Member States to increase the level of that taxation and thus to maintain prices sufficiently high to discourage tobacco consumption. Fiscal policy is therefore sufficient to guarantee the desired level of public health protection.
- 16 According to the Commission, the weighted average prices imposed in Austria as minimum prices for the retail sale of the tobacco products concerned result not from market processes but from State action

intended precisely to thwart those processes. The fact that those minimum prices are arithmetically calculated on the basis of the average prices observed on the market does not put that analysis into question. Furthermore, it is not clear that that system of minimum prices affects competition less than the systems adopted by other Member States examined in earlier judgments of the Court. In any event, the prohibition on the establishment of systems of minimum prices for manufactured tobacco stemming from Article 9(1) of Directive 95/59 does not require the impact of each system to be assessed in the light of its underlying rationale.

- 17 The Commission also considers that Article 93 EC constitutes a sufficient legal basis for Article 9 of Directive 95/59. The fiscal character of the directive does not mean that the Member States may ignore its provisions because they are pursuing other objectives, in particular the protection of public health. Moreover, Member States may not rely on Article 30 EC, since the matter at issue has been harmonised by legislation.
- 18 The Commission is also of the view that Article 9(1) of Directive 95/59 is compatible with the WHO Convention, since that Convention does not oblige the Contracting States to fix minimum prices for tobacco products. If that were not the case, the directive would, according to the Commission, have been amended, but no amendment was made. Also, that convention does not confer on the Member States a right, enforceable against the Community, to choose between the application of tax measures or the application of price measures, since that is a matter for the internal functioning of the Community.
- 19 Finally, the provisions of Council Recommendation 2003/54/EC of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control (OJ 2003 L 22, p. 31), to which the Republic of Austria refers, are not binding and, in any case, cannot be interpreted as encouraging an infringement of Article 9(1) of Directive 95/59.
- 20 According to the Republic of Austria, a system of minimum prices is the only effective and sure way rapidly to counter the fall in the price of the tobacco products affected by the legislation in question in a price war. Fiscal measures can be thwarted by economic operators active in the tobacco sector, since they do not prevent dumping prices being applied in order to reach new categories of consumers, at the cost of temporary financial losses. Article 9(1) of Directive 95/59 does not confer an unrestricted right to fix prices freely. In particular, that provision does not deny Member States the power to adopt appropriate and necessary measures in order to guarantee the protection of public health within the meaning of Article 30 EC.
- 21 The Republic of Austria also maintains that the system of minimum prices in question is not capable of distorting competition, because those prices are in reality fixed by the market, the competent ministry merely taking the average price on the market as a point of reference. Consequently, that system has a lesser impact than the provisions of the Member States examined, inter alia, in Case C-216/98 *Commission v Greece* [2000] ECR I-8921 and Case C-302/00 *Commission v France* [2002] ECR I-2055), which provided, for example, for a price increase of at least 20% compared to the prices in force. The degree of the impact of a national measure is also important in order to assess whether it is proportionate, since it must be determined whether less restrictive measures could not be employed to attain the desired objective.
- 22 In the view of the Republic of Austria, Article 9(1) of Directive 95/59 must be interpreted restrictively in the light of its legal basis, that is Article 93 EC, which neither permits nor restricts the pursuit of objectives other than those based on fiscal law. The Member States are therefore entitled to determine the level of public health protection which they deem appropriate and the measures suitable and necessary to attain that level, which may include the imposition of minimum prices for tobacco products. Consequently, the freedom of manufacturers and importers to determine the price of manufactured tobacco may be exercised only within the limits set by Member States' public health policies.
- 23 In addition, Directive 95/59 should be interpreted in the light of new legal developments, that is, first, Article 6(2)(a) of the WHO Convention and, second, paragraph 7 of Recommendation 2003/54. They

allow minimum price mechanisms but have not been taken into account in the case-law of the Court in the field.

- 24 The Republic of Austria argues, finally, that the mechanisms provided for by the directives concerning excise duties on manufactured tobacco do not allow the Member States to use excise duty as an instrument to ensure a price level sufficiently high to discourage tobacco consumption. First, those directives limit the possibility of increasing the excise duty only on cigarettes with the lowest retail selling prices, without at the same time affecting the tax on other classes of cigarettes. Second, manufacturers and importers may decide not to pass on the tax increase in the price. In addition, such an increase is likely to cause an increase in illegal cross-border trade.

### *Findings of the Court*

- 25 It must be recalled as a preliminary point that, as recital 3 in the preamble to Directive 95/59 makes clear, the directive is part of a policy of harmonisation of the structures of excise duty on manufactured tobacco, the objective of which is to prevent the distortion of competition between different categories of manufactured tobacco belonging to the same group and, consequently, to open the national markets of the Member States.
- 26 In that regard, Article 8(1) of the directive provides that cigarettes manufactured in the Community and those imported from non-member countries are to be subject in each Member State to a proportional excise duty calculated on the maximum retail selling price, including customs duties, and also to a specific excise duty calculated per unit of the product (*Commission v Greece*, paragraph 19).
- 27 It is, furthermore, apparent from recital 7 in the preamble to Directive 95/59 that the imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco.
- 28 In that regard, Article 9(1) of Directive 95/59 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 (*Commission v Greece*, paragraph 20). That provision seeks to ensure that the determination of the tax base of the proportional excise duty on tobacco products, that is the maximum retail selling price of those products, is subject to the same rules in all the Member States. It also aims, as the Advocate General states in point 40 of her Opinion, to maintain the freedom of the abovementioned economic operators, by which they may make genuine use of the competitive advantage resulting from any lower cost prices.
- 29 The imposition of a minimum retail selling price by the public authorities thus means that the maximum retail selling price determined by manufacturers and importers cannot, in any event, be lower than that obligatory minimum price. Legislation imposing such a minimum price is therefore capable of undermining competition by preventing some of those producers or importers from taking advantage of lower cost prices so as to offer more attractive retail selling prices.
- 30 Consequently, a system of minimum retail selling prices for tobacco products cannot be considered 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 producers and importers of those products from lower cost prices is not impaired and, thus, competition is not distorted (see judgments in Case C-197/08 *Commission v France* [2010] ECR I-0000, paragraph 38, and Case C-221/08 *Commission v Ireland* [2010] ECR I-0000, paragraph 41).
- 31 The national legislation which is the subject of the present action must be examined in the light of those principles.
- 32 That legislation imposes on producers and importers active on the Austrian market a minimum retail selling price for cigarettes, fixed at 92.75% of the weighted average price of all cigarettes sold during the

previous calendar year, and for fine-cut tobacco, fixed at 90% of the weighted average price per gram of all fine-cut tobacco sold during the previous calendar year.

- 33 That system does not make it possible to ensure, in any event, that the minimum prices imposed do not impair the competitive advantage which could result for some producers and importers of tobacco products from lower cost prices. On the contrary, as the Commission pointed out at the hearing, without being contradicted by the Republic of Austria, such a system, which furthermore fixes the minimum price by reference to the average price on the market, is likely to eliminate price differences between competing products and to cause prices to converge around the price of the most expensive product. That system therefore undermines the freedom of producers and importers to determine their maximum retail selling price, guaranteed by the second paragraph of Article 9(1) of Directive 95/59.
- 34 With regard to the WHO Convention, as the Advocate General stated in points 50 and 51 of her Opinion, that convention imposes no actual obligation on the Contracting Parties with regard to price policies for tobacco products, and merely describes possible approaches by which to take account of national health objectives concerning tobacco control. Article 6(2) of the convention provides only that the Contracting Parties are to adopt or maintain measures which ‘may include’ implementing tax policies and, ‘where appropriate’, price policies, concerning tobacco products.
- 35 Equally, no specific conclusions concerning the recourse to systems of minimum prices can be drawn from Recommendation 2003/54, which, furthermore, is not binding. The section to which the Republic of Austria refers merely expresses the idea that high prices for tobacco products discourage tobacco consumption.
- 36 In any event, as is clear from paragraph 30 of the present judgment, Directive 95/59 does not preclude a pricing policy provided that it does not run counter to the objectives of that directive, in particular that of ensuring that competition between the different categories of manufactured tobacco belonging to the same group is not distorted.
- 37 The Republic of Austria also contends that the system of minimum prices in question is justified by the objective of protection of health and life of humans under Article 30 EC. It argues that an increase in the level of taxation cannot guarantee sufficiently high prices of tobacco products, because that increase could be absorbed by producers or importers by sacrificing part of their profit margins, or even by selling at a loss.
- 38 It should be pointed out, in that regard, that Article 30 EC cannot be understood as authorising measures other than the quantitative restrictions on imports and exports and the measures having equivalent effect envisaged by Articles 28 EC and 29 EC (see, to that effect Case C-302/00 *Commission v France* [2002] ECR I-2055, paragraph 33). In the present case, the Commission has not alleged any infringement of Articles 28 EC or 29 EC.
- 39 The fact remains that Directive 95/59 does not prevent the Republic of Austria from taking measures to combat smoking, which forms part of the objective of protecting public health.
- 40 Equally, it cannot be maintained that that objective is not taken into account in the context of that directive, because it was adopted on the basis of Article 93 EC.
- 41 As noted in recital 7 in the preamble to Directive 2002/10, which was the last directive to amend Directive 95/59 but which left Article 9 unchanged, the EC Treaty, and in particular the first paragraph of Article 152(1) EC, requires a high level of human health protection in the definition and implementation of all Community policies and activities.
- 42 That recital also explains that the level of taxation is a major factor in the price of tobacco products, which in turn influences consumers’ smoking habits. Equally, the Court has already held that fiscal legislation is an important and effective instrument for discouraging consumption of tobacco products and, therefore, for

the protection of public health (Case C-140/05 *Valeško* [2006] ECR I-10025, paragraph 58), and that 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 (see, to that effect, *Commission v Greece*, paragraph 31).

43 Moreover, if the Member States wish to exclude once and for all any possibility for producers or importers to absorb, even temporarily, the impact of taxes on the retail selling price of manufactured tobacco products by selling them at a loss, it is *inter alia* open to them, while allowing those producers and importers to make effective use of the competitive advantage resulting from any lower cost prices, to prohibit the sale of manufactured tobacco products at a price below the sum of the cost price and all taxes (see Case C-197/08 *Commission v France*, paragraph 53, and *Commission v Ireland*, paragraph 55).

44 It follows from all of the above considerations that the Commission's action should be upheld.

45 It must, therefore, be held that, by adopting and maintaining in force legislation by which the public authorities fix minimum prices for the retail sale of cigarettes and fine-cut tobacco for the rolling of cigarettes, the Republic of Austria has failed to fulfil its obligations under Article 9(1) of Council Directive 95/59.

### Costs

46 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 Republic of Austria has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Declares that, by adopting and maintaining in force legislation by which the public authorities fix minimum prices for the retail sale of cigarettes and fine-cut tobacco for the rolling of cigarettes, the Republic of Austria 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, as amended by Council Directive 2002/10/EC of 12 February 2002;**
- 2. Orders the Republic of Austria to pay the costs.**

[Signatures]

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\* Language of the case: German.