JUDGMENT OF THE COURT
7 DECEMBER 1982 [1]

# Commission of the European Communities v Italian Republic

(Failure of a State to fulfil an obligation — Directive on the excise duty on manufactured tobacco)

**Case 41/82**

*Member States — Obligations — Implementation of directives — Failure to fulfil — Justification based on internal legal system — Not possible*
*(EEC Treaty, Arts 169 and 189, third paragraph)*

A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives.

In Case 41/82

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by David Gilmour, Legal Adviser, acting as Agent, assisted by Guido Berardis, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

ITALIAN REPUBLIC, represented by the Avvocatura dello Stato [Office of the State Advocate], in the person of Oscar Fiumara, with an address for service in Luxembourg at the Italian Embassy,

defendant,

1 — Language of the Case: Italian.

APPLICATION for a declaration that by not adopting within the prescribed period the provisions needed to comply with Council Directive 72/464 of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (Official Journal, English Special Edition, L 303 and 306, 31. 12. 1972, p. 1) — and Council Directive 77/805 of 19 December 1977 amending Directive 72/464 (Official Journal 1977, L 388, p. 22), the Italian Republic has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: J. Mertens de Wilmars, President, A. O'Keeffe (President of Chamber), Lord Mackenzie Stuart, G. Bosco, T. Koopmans, O. Due and K. Bahlmann, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following:

## JUDGMENT

## Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

### I — Facts and written procedure

As is stated in the third recital in the preamble thereto, the aim of Council Directive 72/464 is the harmonization of the tax structures affecting the consumption of manufactured tobacco in order progressively to eliminate from the various national systems those factors which are likely to hinder free movement and distort the conditions of competition, whether at national level or at Community level.

To attain those objectives, the Community legislature created a system which provides for a degression in the incidence of the tax and which, for the tax affecting the consumption of cigarettes (excise duty), consists of a

proportional excise duty combined with a specific duty, the amount of which is fixed by each Member State in accordance with Community criteria.

Under Article 4 of the directive, the proportional excise duty is to be calculated on the maximum retail selling price, including customs duties, whilst the specific excise duty is to be calculated per unit of the product. The rate of the proportional excise duty and the amount of the specific excise duty must be the same for all cigarettes.

Article 8 of the above-mentioned directive required Member States to fix the amount of the specific excise duty levied on cigarettes under common rules and for the first time by reference to cigarettes in the most popular price category according to the date available on 1 January 1973.

Article 8 (2) provided that the amount should not be lower than 5% or higher than 75% of the aggregate amount of the excise duty (the specific and proportional *ad valorem* components) levied on those cigarettes.

Article 8 (3) of the directive provided expressly as follows:

"If the excise duty on the price class referred to above is amended after 1 January 1973, the amount of the specific excise duty shall be established by reference to the new tax burden on the cigarettes referred to in paragraph (1)."

Since, following the increase in the price of cigarettes which took place in Italy on 2 October 1976 and which entailed an increase in the revenue derived from the *ad valorem* component of the excise duty, it was established that the specific tax in that country represented only 3.96% of the aggregate revenue instead of the prescribed minimum of 5%, the Commission, by letter of 8 July 1977, asked the Italian Government to submit its observations on this matter and in doing so initiated the procedure provided for in Article 169 of the Treaty. The Italian authorities submitted their observations to the Commission by letter of 27 September 1977; subsequently, by telex message of 23 October, the Italian Government informed the Commission that it had presented a draft law to Parliament.

The entry into force of Directive 77/805 marked the beginning of the second stage of harmonization, which involved the reduction of the upper limit of the bracket and at the same time the incorporation of turnover tax into the basis for calculating the excise duty. In Italy the percentage of the specific component in relation to the total revenue from the tax fell from 3.96% to 2.36%, although the prescribed minimum remained at 5%. By letter of 11 February 1980, the Commission again formally drew the attention of the Italian Republic to its failure to observe the provisions of Directive 77/805. That letter received no reply from the Italian Government.

On 31 October 1980, the Commission delivered a reasoned opinion to the Italian Government. By letter of 2 February 1981, the Italian Government informed the Commission that it had:

"presented to Parliament on 16 May 1980 a new draft law restructuring the system of tax on manufactured tobacco, ensuring complete conformity of the national legislation with the Community regulations in force."

As the Italian Parliament had still not adopted any legislative provisions, the Commission brought this action by an

application dated 22 January 1982 which was lodged at the Court Registry on 4 February 1982.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

## II — Conclusions of the parties

The *Commission* claims that the Court should:

(a) declare that, by not adopting the provisions necessary to comply with Council Directives 72/464 and 77/805 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, the Italian Republic has failed to fulfil its obligations under the Treaty;

(b) Order the Italian Republic to pay the costs.

The *Government of the Italian Republic* did not put forward any conclusions.

## III — Submissions and arguments of the parties

In its application the *Commission* points out that each Member State was placed under an obligation to ensure that the ratio between the revenue derived from the specific component and the aggregate amount of the excise duty was maintained within the bracket of 5% to 75%. Since the Member States are obliged to maintain this ratio and in view of the fact that the original reference date was 1 January 1973 (Article 8 (1)), any change in one or more of the components in the system necessitates a re-adjustment of the ratio between the various components so as to ensure that the minimum and maximum percentages are adhered to. In particular, as the proportional component of the excise duty is expressed as a percentage, any increase in the price of cigarettes causes that component to increase, with the result that, if the specific component is not re-adjusted, it may fall below the minimum of 5% of the total excise duty, as occurred in Italy.

The Italian authorities sought to interpret Article 8 (3) of Directive 74/464 erroneously to the effect that it established machinery for adjusting the proportions of the tax components only when the rates were altered, thus excluding any obligation to make any re-adjustment when the price was changed.

This interpretation is unacceptable. In the first place, the wording of Article 8 (3) does not impose any limitation regarding the circumstances in which a re-adjustment is necessary. A change in the total amount of the excise duty may result from a variation in the rates of tax but it may equally result from a variation in the basis of calculation and therefore from a variation of prices. In any case, if the view put forward by Italy were accepted, the directive would become meaningless as its practical effect would be negated merely by variations of prices.

The effect of the transition to the second stage of harmonization (Directive 77/805) is that, where no appropriate national provisions for the implementation of the directive have been adopted, any price rise, which increases the total amount of the excise duty, entails progressive reductions of the specific component, the level of which becomes progressively further removed from the threshold of 5%.

Secondly, Article 10 (b) (1), which was inserted in Directive 72/464 by Directive 77/805, clearly states that:

"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."

This means that each Member State is under a duty as from 1 January of each year to review its calculations and, if necessary to change the amount of the specific component of the excise duty, which Italy has yet to do.

In reply the *Italian Government* states that, in order to ensure that the internal provisions conform fully to the directive in question, it presented a draft law to Parliament on 2 November 1978. However, that draft law was not subsequently adopted as a result of the early dissolution on Parliament.

A similar draft law was placed before Parliament on 16 May 1980. The new draft law, which provides for the complete adaptation of the Italian system of taxation of manufactured tobacco to the principles contained in the directives, has already been approved by the Commissione Affari Costituzionali [Constitutional Affairs Committee] and by the Commissione Bilancio [Budget Committee] of the Chamber of Deputies and is at present being examined in the Commissione Finanze e Tesoro [Finance and Treasuty Committee].

The Italian Government expresses the hope that the legislative process will be completed very soon, so that this action will become devoid of purpose.

The *Commission* states in its reply that the draft law which was presented to Parliament on 16 May 1980 has not yet been adopted and that the Italian Government gives no indication as to the expected duration of the legislative process.

In its rejoinder, the Italian Government declares that it is unable to estimate with any certainty the duration of that process.

IV — Oral procedure

The parties presented oral argument at the sitting on 17 November 1982. The Advocate General delivered his opinion at the same sitting.

## Decision

1 By application lodged at the Court Registry on 4 February 1982 the Commission brought an action under Article 169 of the EEC Treaty for a declaration that by not adopting the provisions needed to comply with Council Directives 72/464 of 19 December 1972 and 77/805 of 19 December 1977 on taxes other than turnover taxes which affect the

consumption of manufactured tobacco (Official Journal, English Special Edition, L 303 and 306, 31. 12. 1972, p. 1 and Official Journal 1977, L 338, p. 22) the Italian Republic had failed to fulfil its obligations under the third paragraph of Article 189 of the EEC Treaty.

2 The aim of Council Directive 72/464 is the harmonization of the tax structures affecting the consumption of manufactured tobacco in order progressively to eliminate from the various national systems those factors which are likely to hinder free movement and distort the conditions of competition. To accomplish this, the Community legislature created a system which provides for a degression in the incidence of the tax and which, for the tax affecting the consumption of cigarettes (excise duty), consists of a proportional excise duty combined with a specific excise duty, the amount of which is fixed by each Member State in accordance with Community criteria. Under Article 4 of the directive the proportional excise duty is to be calculated on the maximum retail selling price, including customs duties, whilst the specific excise duty is calculated per unit of the product. The rate of the proportional excise duty and the amount of the specifc excise duty must be the same for all cigarettes.

3 Article 8 of the above-mentioned directive requires Member States to fix the amount of the specific excise duty levied on the cigarettes under common rules and for the first time by reference to cigarettes in the most popular price category according to the data available on 1 January 1973. Article 8 (2) provides that the amount must not be lower than 5% or higher than 75% of the aggregate amount of the excise duty (the specific and proportional *ad valorem* components) levied on those cigarettes.

4 Article 12 of the directive provides that the Member States are to bring into force the provisions laid down by law, regulation or administrative action necessary to comply with the provisions of the directive not later than 1 July 1973 and are to inform the Commission immediately that they have done so.

5 It appears that until October 1976, the Commission raised no objection regarding Italy's failure to comply with Article 8 (2) of the directive concerning the specific component of the excise duty on cigarettes.

6 Following the increase of 2 October 1976 in the price of cigarettes in Italy and consequently in the basic amount subject to the *ad valorem* excise duty, the Commission noted that the specific tax represented only 3.96% of the aggregate amount of the excise duties, instead of the prescribed minimum of 5%. The Commission, therefore, by letter of 8 July 1977 gave notice of that fact to the Italian Government.

7 The Italian Government, by letter of 27 September 1977, stated that the price of the best-selling cigarettes on the Italian market had already been increased by Ministerial Order of 4 March 1976 from LIT 250 to LIT 400 per packet of 20 cigarettes. This had the effect of raising the percentage of the specific component to 4.5% (in relation to the aggregate amount of the excise duty) and the Commission had made no objection to this. In the view of the Italian Government, Directive 72/464 did not envisage the automatic adaptation of the system to variations in the economic and commercial components of the various prices which are not related to tax.

8 In the meantime Directive 77/805 of 19 November 1977 entered into force and thereby initiated the second stage of harmonization of the structures of excise duty on manufactured tobacco covering the period from 1 July 1978 to 31 December 1980. That directive supplemented Directive 72/464, by adding *inter alia* Article 10 (b). Pursuant to Article 10 (b) (1), the amount of the specific excise duty is to be established by reference to cigarettes in the most popular price category according to the information available at 1 January each year, beginning on 1 January 1978.

9 Paragraph (2) of the same article provides that 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 those cigarettes.

10 This produced the result that in Italy the percentage of the specific component in relation to the total revenue from the tax fell from 3.96% to 2.36%.

11 By telex message of 23 October 1978, the Italian Government informed the Commission that the draft law implementing the second phase of harmonization envisaged in Directive 77/805 had been approved by the Consiglio dei Ministri [Italian Council of Ministers] and was before Parliament. It stated that that measure also provided "a solution to the problem raised by the Commission in its letter No 7295 of 8 July 1977 concerning calculation of the ratio between the specific component and the *ad valorem* component of the tax".

12 As the draft law was not subsequently adopted by Parliament, the Commission, by letter of 11 February 1980, again gave the Italian Government an opportunity to submit its observations. That letter received no reply.

13 On 31 October 1980, the Commission delivered a reasoned opinion to the Italian Republic. The Italian Government replied by letter of 2 February 1981 in which it stated that a new draft law had been placed before Parliament on 16 May 1980 which provided for reorganization of the tax system and thereby ensured complete conformity of the national legislation with the Community regulations in force. The Italian Parliament has not yet enacted any legislative measure on this matter.

14 The Italian Government does not dispute that it has failed to fulfil its obligations. It states that the delay in adapting its legislation to the directives results from the need to resort to the legislative process in order to implement them. That leads to delays resulting from the exigencies and incidents of parliamentary business. As a result of the early dissolution of

Parliament, the first draft law presented by the government was not adopted; as regards the second draft law, it was still being examined by the relevant committees of the Chamber of Deputies.

15 These circumanstances cannot expunge the failure to fulfil its obligations, with which the Italian Republic is charged. According to well-established case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives.

16 It must therefore be declared that by not adopting the provisions needed in order to comply with the directives in question, the Italian Republic has failed to fulfil its obligations under the Treaty.

## Costs

17 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

18 Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds

## THE COURT

hereby:

1. **Declares that by not adopting the provisions needed in order to comply with Council Directives 72/464 of 19 December 1972 and 77/805 of 19 December 1977 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (Official Journal, English Special Edition, L 303 and 306, 31. 12. 1972, p. 1,**

**and Official Journal 1977, L 338, p. 22), the Italian Republic has failed to fulfil its obligations under the Treaty;**

**2. Orders the defendant to pay the costs.**

Mertens de Wilmars O'Keeffe Mackenzie Stuart

Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 7 December 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

## OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 17 NOVEMBER 1982

*My Lords,*

This is an application by the Commission, pursuant to Article 169 of the EEC Treaty, for a declaration that the Republic of Italy has failed to fulfil its obligations under the Treaty in that it has not adopted the measures which are necessary to implement Council Directive 72/464 of 19 December 1972 (OJ L 303, 31. 12. 1972, p. 1), as amended by Council Directive 77/805 of 19 December 1977 (OJ L 338, 28. 12. 1977, p. 22). These measures provide for the harmonization of the structure of the excise duty on manufactured tobacco in several stages.

The Member States, other than the United Kingdom and Ireland, were to have implemented the former by 1 July 1973, but in 1977 the Commission observed, in a letter to the Italian Government, that Article 8 of the directive was not being complied with. That article required that the amount of the specific excise duty levied on cigarettes should be established for the first time by reference to cigarettes in the most popular price category according to