Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 19 December 2012[1]

Case C-216/11

European Commission
v

French Republic

(Action for failure to fulfil obligations — Directive 92/12/EEC — Articles 8 and 9 — Products subject to excise duty — Tobacco products acquired in one Member State and transported to another — Criteria for determining the limits applicable to the transport of products subject to excise duty — Free movement of goods — Article 34 TFEU — Relationship between the fundamental freedoms and secondary legislation — Consecutive reliance on secondary legislation and a fundamental freedom)

1. In the present action for failure to fulfil obligations, the European Commission requests the Court of Justice to declare that the French Republic has failed to fulfil the obligations incumbent on it under, first, Articles 8 and 9 of Directive 92/12/EEC[2] on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products and, second, Article 34 of the Treaty on the Functioning of the European Union (TFEU). The French Republic requests that the action brought by the Commission be dismissed.

2. This case raises an interesting question which affects, in general, actions for failure to fulfil obligations in which provisions of secondary law and fundamental freedoms are relied on consecutively. In its application, the Commission complains that the French Republic has infringed both Articles 8 and 9 of Directive 92/12 and the free movement of goods laid down in Article 34 TFEU. In accordance with the settled case-law of the Court, the secondary legislation which implements the freedoms of movement *supersedes* those freedoms *for the purposes of proceedings* and, in principle, becomes the sole criterion for assessment. The fact that the Commission's complaint has been put forward in an action for failure to fulfil obligations raises a rather difficult procedural problem, which I shall address in this Opinion.

1 — Original language: Spanish.

2 — Council Directive of 25 February 1992 (OJ 1992 L 76, p. 1), repealed by Council Directive 2008/118/EC **of 16 December 2008 concerning the general arrangements for excise duty** (OJ 2009 L 9, p. 12).

I – Legislative framework

A – *European Union law*

3. Articles 34 TFEU and 36 TFEU read as follows:

'Article 34

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

…

Article 36

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

4. Directive 92/12 harmonises the general arrangements for the holding, movement and monitoring of products subject to excise duties, including tobacco and alcoholic beverages.

5. In the seventh recital in its preamble, the directive states that 'to establish that products subject to excise duty are not held for private but for commercial purposes, Member States must take account of a number of criteria'.

6. The criteria to which that recital refers are set out in Articles 8 and 9 of the directive, which read as follows:

'Article 8

As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the Member State in which they are acquired.

Article 9

1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purposes in another Member State.

In this case, the duty shall be due in the Member State in whose territory the products are and shall become chargeable to the holder of the products.

2. To establish that the products referred to in Article 8 are intended for commercial purposes, Member States must take account, inter alia, of the following:

— the commercial status of the holder of the products and his reasons for holding them,

— the place where the products are located or, if appropriate, the mode of transport used,

— any document relating to the products,

— the nature of the products,

— the quantity of the products.

For the purposes of applying the content of the fifth indent of the first subparagraph, Member States may lay down guide levels, solely as a form of evidence. These guide levels may not be lower than:

(a) Tobacco products

cigarettes 800 items

cigarillos (cigars weighing not more than 3 g each) 400 items

cigars 200 items

smoking tobacco 1.0 kg;

…'

7. Directive 92/12 was repealed and replaced by Directive 2008/118/EC with effect from 1 April 2010. However, the date of the deadline set in the Commission's reasoned opinion was 23 January 2010. Accordingly, for the purposes of these proceedings, the provision to be interpreted is Directive 92/12, the subject-matter of which is not, in truth, substantially different as far as the criteria for determining personal consumption are concerned.

B – *National law*

8. For the purposes of these proceedings, the General Tax Code ('GTC') contains a number of provisions relating to the applicability of excise duty to certain products, including tobacco, of which the following are worth highlighting:

Article 302 D I

'Excise duty shall become chargeable: …

4. Without prejudice to the provisions of point 9 of Article 458 and Articles 575 G and 575 H, when possession is established, in France, of alcohol, alcoholic beverages and manufactured tobacco products for commercial purposes, and the holder is unable to prove, by means of an accompanying document, an invoice or a till receipt, as the case may be, that the products are moving under duty-suspension arrangements, or that duty has been paid in France or has been guaranteed in France under Article 302 U.

In order to determine whether the holding in France of those products is for commercial purposes, the administration shall take the following factors into account:

a. The professional activity of the holder of the products.

b. The place where the products are located, the mode of transport used and the documents relating to the products.

c. The nature of the products.

d. The quantities of the products, in particular where those quantities exceed the guide thresholds set in Article 9(2) of Directive 92/12/EEC ...

…'

Article 575 G

'After its retail sale, manufactured tobacco in quantities greater than 1 kilogram may not be moved without the document referred to in Article II of Article 302 M.'

Article 575 H

'With the exception of suppliers in warehouses, retail tobacconists, the persons referred to in point 3 of Article 565, the re-sellers referred to in the fourth paragraph of Article 568 and, in relation to the quantities fixed by decree of the minister with responsibility for the budget, the retailers referred to in the first paragraph of that article, no one may hold more than 2 kilograms of manufactured tobacco in warehouses, commercial premises or on board modes of transport.'

9. At the time of expiry of the deadline contained in the reasoned opinion, the website of the French Ministry of Finance included a variety of practical information aimed at purchasers of products subject to exercise duty exercising freedom of movement in France and other Member States. According to the Commission's application, the information provided by the Ministry of Finance included the following:

'General matters

If, when you travel to other countries of the European Union, you buy goods for your personal use, you will not be required to submit a declaration or to pay duties or taxes at the time of departure from or arrival in France.

You must pay value added tax (VAT) directly in the country where you make your purchases and in accordance with the tax rate in force in that country. If you buy alcoholic beverages and tobacco, Community legislation has provided for guide thresholds relating to purchases by private individuals.

Above the thresholds applicable to tobacco and alcohol, which are set out below, and on the basis of other criteria, your purchases may be deemed to be commercial by the French customs services. In that case, you must pay the duties and taxes applicable in France in respect of each product. These thresholds also apply in the case of departures from France to another Member State of the European Union.

Tobacco

Pursuant to Articles 575 G and 575 H of the General Tax Code, as amended by the Law on the financing of social security for 2006, the following provisions will apply with effect from 1 January 2006 to purchases of tobacco by private individuals in another Member State of the European Union, with the exception of the 10 new Member States:

— You may bring back five cartons of cigarettes (in other words, 1 kilogram of tobacco) without holding a movement document.

  Warning: the threshold applies per individual mode of transport or per person over the age of 17 in the case of public transport (the latter meaning any mode of transport carrying more than nine people, including the driver).

— Where between 6 and 10 cartons are brought back, you must present a simplified accompanying document (SAD). In the absence of a SAD, a traveller who undergoes checks risks seizure of the tobacco and a penalty. The individual may abandon these quantities. In that case, no penalty will be imposed.

— To obtain this document, you simply need to go to the first French customs office after the border.

— It is prohibited to bring in more than 10 cartons of cigarettes (or 2 kilograms of tobacco) in all cases. A person who undergoes checks risks the sanctions (seizure of the tobacco and a penalty) referred to above.

In the case of public modes of transport (aircraft, ship, bus, train), these provisions apply per passenger.'

II – Prior administrative procedure

10. On 20 November 2006, the Commission sent the French Republic a request for information relating to the provisions and administrative practices applicable to the importation of tobacco from other Member States. In the light of the information provided by the French authorities, the Commission sent those authorities a letter of formal notice, dated 23 October 2007, in which it complained that the French Republic had infringed Articles 8 and 9 of Directive 92/12 and what was then Article 28 EC (now Article 34 TFEU).

11. Following a request for additional information sent to the French authorities on 4 June 2008, the Commission sent its reasoned opinion on 23 November 2009, inviting the French Republic to take all the measures necessary to adapt their legislation and internal practices within a period of two months from the date of receipt of the reasoned opinion. Subsequently, the Commission and the French authorities held two meetings aimed at establishing the timetable and practical arrangements for the transposition of European Union law into French legislation and practices. By a letter dated 15 July 2010, the French authorities notified to the Commission the draft provisions amending the national legislative framework, which were intended to bring domestic law into line with European Union law.

12. In November 2010, the draft finance law amending the provisions to which the Commission objects reached the National Assembly. However, on 21 December 2010, the National Assembly refused to approve the draft law and retained in force the provisions which the Commission claims are unlawful.

13. In the light of the rejection of the draft law in the National Assembly, the Commission brought the present action for failure to fulfil obligations.

III – The action

A – *Arguments of the parties*

14. The Commission claims, first, that the French Republic is in breach of Articles 8 and 9 of Directive 92/12. In support of its claim the Commission submits that:

— The French legislation incorrectly provides for *objective and inflexible* criteria for determining whether the purchase of tobacco in another Member State is for personal or commercial use.

— The French legislation applies the objective and inflexible criteria to *all* products acquired and not to each type of product considered individually.

— Where the person liable to excise duty travels in a vehicle, the French legislation applies the objective and inflexible criteria on the basis of *each vehicle*, and not each person considered individually.

— Once the criteria have been applied and it has been established that use is commercial, the French legislation provides for *disproportionate penalties*, in that 'systematic' confiscation is required where the quantity of tobacco exceeds 2 kilograms per vehicle. The application of this measure is excluded only in cases where 'good faith' is identified, a concept which, according to the Commission, is not defined in the national legislation and creates legal uncertainty. Further, the Commission also calls into question the arrangements for relinquishing goods, which, in its view, are not differentiated at all from the powers of confiscation.

15. The Commission claims, second, that the French Republic has infringed Article 34 TFEU, by providing that quantities exceeding 2 kilograms of tobacco, or 10 cartons of cigarettes, are automatically subject to excise duty, regardless of whether it is proven that they are intended for personal consumption. In support of that complaint, the Commission points out primarily that, although Article 575 H GTC refers to the possession of tobacco independently of the place of purchase, it has the effect of obstructing the purchase of tobacco in other Member States and, therefore, restricts the free movement of goods. As proof of this, the Commission points out that the checks intended to ensure the application of the article are directed exclusively at border crossings. Further, the Commission submits that the French authorities have not concealed at any moment the fact that the provisions concerned are aimed at the purchase of tobacco products not on French territory but in other Member States, with a view to suppressing what they have described as 'tax tourism'.

16. The French Government submits, in response to the first plea of infringement put forward by the Commission, that national law and administrative practice do not lead to any infringement of Directive 92/12, for the following reasons:

— Articles 575 G and 575 H are not provisions governing excise duty on tobacco but rather provisions relating to the possession of tobacco. Accordingly, the provisions called into question by the Commission are outside the scope of Directive 92/12 and cannot be considered in the light of that directive.

— In the event that Directive 92/12 does apply to the disputed legislation, this legislation also provides for other factors to be taken into account, such as the purchaser's professional activity, the mode of transport used and the nature of the product. The fact that the administrative practice involves the application of a single criterion does not render Articles 575 G and 575 H incompatible with Directive 92/12.

— As concerns the criterion which takes account of all the products in a person's possession, rather than each type of product considered individually, Article 9 of Directive 92/12 does not add anything in that regard. Since nothing is specified in this connection, the French legislation cannot be deemed to infringe that article.

— With regard to the claim that the legislation is disproportionate, the French Government observes that the penalties are not applied 'systematically' and that nor does it regard them as disproportionate.

17. The French Government also contests the second plea of infringement relating to Article 34 TFEU and puts forward the following arguments in its defence:

— Although the French Government openly acknowledges that the restriction laid down in Article 575 H constitutes a quantitative restriction on imports, it also claims that the measure is justified in so far as its objective is the protection of health and life of humans, as provided for in Article 36 TFEU.

— The protection of health and life of humans, as provided for in the provisions of national law, does not create an arbitrary difference in treatment or constitute a disproportionate measure.

B – *Analysis*

1. The first plea of infringement, alleging the breach of Articles 8 and 9 of Directive 92/12

18. Articles 8 and 9 of Directive 92/12 provide for an exception pursuant to which private individuals who acquire products subject to excise duty 'for their own use' are exempt from payment of the duty. Article 9 lists a number of criteria of which Member States 'must take account', including commercial status, the place where the products are located, the mode of transport used, the nature of the products and the quantity of the products.

19. As regards the last of those criteria, relating to quantity, Article 9 confers on Member States the power to lay down 'guide levels, solely as a form of evidence'. The article then goes on to list, for each tobacco product, the minimum quantities which Member States must observe if they use a quantitative criterion as a form of evidence.

20. In short, Directive 92/12 has harmonised the criteria which a Member State must assess when determining whether the acquisition of a product subject to excise duty is intended for personal use or commercial use. Accordingly, although the directive is an instrument of harmonisation which grants Member States a wide discretion, as the Court of Justice has had the opportunity to point out on a number of occasions,[3] it is also the case that such minimum criteria can, from time to time, become exhaustive requirements.[4] Accordingly, Member States have a measure of discretion when it comes to assessing whether a product is intended for personal use or commercial use, but that assessment takes place within boundaries defined by Article 9 of Directive 92/12. Those boundaries restrict the scope of the discretion of Member States by imposing on them, absolutely and definitively, a number of restrictions which act as a dividing line.

21. The first absolute and definitive restriction is the obligation to take more than one criterion into account for the purpose of determining the type of use of a product. Article 9(2) of Directive 92/12 is particularly informative in this regard, since it states that Member States '*must* take account, *inter alia*,' of the criteria set out above.[5] Any national provision or practice which only takes into account, for example, a quantitative criterion, goes beyond the boundaries laid down by Article 9(2).

3 — See, for example, Case C-494/04 *Heintz* ***Van Landewijck*** [2006] ECR I-5381, paragraph 41, and Case C-374/06 *BATIG* [2007] ECR I-11271, paragraph 38.

4 — See, inter alia, Case C-517/07 *Afton Chemical* [2008] ECR I-10427, paragraphs 36 and 37, and Case C-550/08 *British American Tobacco (Germany)* [2010] ECR I-5515, paragraph 38.

5 — Emphasis added.

22. The second absolute and definitive restriction appears when the guide levels applicable to the quantitative criterion are stipulated. In that connection, the second subparagraph of Article 9(2) of Directive 92/12 provides that Member States may lay down quantitative guide levels but goes on to state that they may do so ‘solely as a form of evidence’. Accordingly, if a Member State precludes the individual concerned from presenting evidence to corroborate his version, contrary to what the lawfully used criterion may indicate, that Member State will also have gone beyond what is provided for in Article 9(2).

23. Next, a third absolute and definitive restriction is clear from a systematic and teleological interpretation of Articles 8 and 9 of Directive 92/12, according to which Member States are required, when using quantitative criteria, to apply minimum thresholds in order to establish whether use is for commercial purposes. Those minimum thresholds are set out in Article 9(2) and are divided and subdivided by product (tobacco products and alcoholic beverages, together with their respective subcategories). The quantitative thresholds do not refer explicitly to the holder of the products but it is clear that, by mentioning, for example, a minimum threshold of 800 cigarettes, the directive refers to the number of cigarettes *per person*. That interpretation is confirmed by the wording of Article 8, which refers to products acquired ‘by private individuals’. In addition, Article 9(1) of the directive determines who is liable to pay excise duty when use of the products is for commercial purposes, such liability resting with ‘the holder of the products’. Accordingly, the minimum thresholds set out in Article 9 of the directive are applicable to *each* holder; in other words, they are minimum criteria which apply to each person individually.

24. Lastly, the fourth and final absolute and definitive restriction is found in the list of categories of products and in the stipulation of the minimum quantitative thresholds. Article 9(2) of Directive 92/12 sets limits for each category of product, and, in the case of tobacco products, these limits apply to cigarettes, cigarillos, cigars and smoking tobacco. Each category has a minimum quantitative limit. Although Directive 92/12 does not explicitly state as much, a systematic interpretation on the same lines as that carried out in the previous point of this Opinion must lead to the application of those limits to each category of product. Thus, an individual may possess 799 cigarettes *and* 399 cigarillos, without the total amount of all the goods leading to the conclusion that their use is for commercial purposes. Accordingly, to recapitulate, the minimum quantitative thresholds apply *per person* and *per category of product*.

25. In the light of the foregoing, it is clear that the legislation and practice developed by the French Republic do not satisfy the criteria laid down by Directive 92/12.

26. First, the argument put forward by the French Republic, to the effect that Articles 575 G and 575 H GTC are not provisions governing excise duty on tobacco but rather provisions relating to the possession of tobacco, does not stand up to a reading of Directive 92/12. Whatever the formally stated objective of the disputed provision, the Court of Justice must take account of the subject-matter and effects of that provision, which, as stated above, are the legal basis for administrative action implemented by the French Government. Moreover, Article 575 H GTC lays down not a criterion but a minimum quantitative threshold of 2 kilograms of manufactured tobacco per mode of transport, after which excise duty becomes chargeable. Accordingly, it is absolutely clear that both provisions of the GTC contain essential rules for the management of excise duty on tobacco, the tax which Directive 92/12 seeks to harmonise.

27. The French Republic claims, second, that it is lawful to rely on only one criterion to establish the purpose of acquisition of a product. However, as stated in point 21 of this Opinion, Article 9(2), the wording of which is extremely informative, provides that Member States ‘*must* take account, *inter alia*,’ of a number of factors, including the commercial status of the holder of the product, the nature

of the product, and the quantity of the product.[6] National rules, like the French rules, which have a quantitative criterion as their sole criterion for determining the purpose of an acquisition, clearly fail to comply with the requirements of Article 9(2) of Directive 92/12. The French Republic has admitted on several occasions that the French authorities exclusively use a single criterion in administrative practice: the quantitative criterion. As the Court of Justice has acknowledged in settled case-law, even where administrative practices that are contrary to European Union law are implemented within a national legal framework which formally complies with European Union law, such practices constitute sufficient grounds for a finding of a failure to fulfil obligations.[7] Since the French Republic has admitted the existence of an administrative practice which is incompatible with Article 9(2) of Directive 92/12, the second argument put forward by the defendant must also be rejected.

28. Third, the French Republic defends a method of calculation based on the mode of transport used (and not on the individual holder of the product) and on an overall quantity of product by weight (and not on the number of items of each type of product). In points 23 and 24 of this Opinion, I pointed out, in the light of a literal and systematic interpretation of Directive 92/12, that the directive has laid down minimum quantitative thresholds per person and per category of product specifically to preclude the establishment of national criteria which have the effect, ultimately, of restricting excessively the free movement of goods, in this case, tobacco and alcoholic beverages. The use of a criterion provided for in both legislation and administrative practice, based on vehicles and not on the number of people, and on the total weight of the product and not on the number of items of each category, is incompatible with Articles 8 and 9 of Directive 92/12.

29. In relation to the rules on penalties, it is sufficient to note that the provisions seeking to guarantee the penalties are unlawful in order to conclude that, in adopting the rules on penalties described above, the French Republic has also infringed Articles 8 and 9 of Directive 92/12.

30. For all those reasons, I propose that the Court should declare that the first plea of infringement put forward by the Commission is well founded.

2. The second plea of infringement, alleging the breach of Article 34 TFEU

31. The Commission also submits that, by adopting a provision like Article 575 H GTC and applying it in such a way that it restricts the free movement of goods, the French Republic has failed to fulfil the obligations derived from Article 34 TFEU. Although the French provision concerned refers to the possession of tobacco independently of the place of its purchase, the Commission submits that this has the effect of obstructing the purchase of tobacco in other Member States and, therefore, restricts the free movement of goods. As proof of this, the Commission observes that the checks carried out by the French authorities in order to ensure the application of the article take place exclusively at border crossings between France and neighbouring Member States.

32. For its part, the French Republic, while not denying that the disputed measures are restrictive, submits that Article 36 TFEU is applicable and, more specifically, the justification based on the protection of public health. In the defendant's opinion, the measures are consistent with the objective of protecting public health, do not constitute arbitrary discrimination and are not disproportionate in the light of the aim pursued.

6 — Emphasis added.

7 — See, inter alia, Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraph 14; Case C-358/98 *Commission* v *Italy* [2000] ECR I-1255, paragraph 17; and Case C-33/03 *Commission* v *United Kingdom* [2005] ECR I-1865, paragraph 25.

33. As stated above, after complaining that the French Republic has failed to comply with the directive, the Commission claims, by means of this second plea of infringement, that there is an infringement of Article 34 TFEU. Although the first plea is concerned with a greater number of national provisions and administrative practices, the second is concerned with one of the same provisions — Article 575 H GTC — and a number of the administrative practices referred to above.

34. In any event, the Commission assumes that Articles 8 and 9 of Directive 91/12 and Article 34 TFEU may be relied on consecutively in relation to those aspects of the subject-matter of the action where both pleas of infringement coincide. However, as I will explain below, an approach of that kind is faced with a number of difficulties.

35. According to the settled case-law of the Court of Justice, 'where a sphere has been the subject of exhaustive harmonisation at [European Union] level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty'.[8] In other words, as a result of the adoption of a legislative act of the European Union, there is a kind of procedural supersession or 'attraction', such that, for the purposes of disposing of a case, the Treaty is superseded as a necessary criterion for assessment in favour of the act of secondary European Union legislation. Logically, that effect occurs only when the European Union legislative act governs a subject exhaustively, whether in general terms for a whole sector or specifically in relation only to particular aspects.

36. For the reasons which I shall set out below, it is important to point out that the effect of supersession is strictly *procedural*, since, from the viewpoint of the coexistence of provisions, the Treaty and the directive fully retain their effectiveness and general applicability.

37. However, the case-law has not always referred to the relationship between the fundamental freedoms and legislative acts of secondary law in terms which are as clear as would have been desirable. An initial examination of that case-law suggests that this relationship is based on applicability, meaning that the existence of a legislative act of secondary law requires that the fundamental freedom provided for in the Treaty should not be applied. That appears to be confirmed by some of the language used by the Court of Justice, in statements which could give the impression that there is a *substantive* criterion for determining whether provisions of European Union law — in this case, legislative acts implementing the freedoms and the provisions of the Treaty relating to those freedoms — are applicable.[9]

38. However, this is not, nor can it, under any circumstances, be, the case.

39. To my mind, the procedural situation created in situations like the present one cannot be understood in terms of 'applicability' since, on the contrary, a form of reverse hierarchy would arise in the system of sources of European Union law. The secondary legislation of the European Union cannot have the effect of excluding the application of the fundamental freedoms guaranteed by the Treaty.

40. Further, exclusion of the application of primary law, which appears to follow from a number of formulations of the kind referred to, would run directly counter to the review of the validity of legislative acts of secondary law in the light of European Union law. Acts implementing the fundamental freedoms, including acts providing for exhaustive harmonisation, always make it possible, in the appropriate context, for their formal and substantive compatibility with the Treaties, including

8 — This formulation was already implied in case-law but it was articulated in Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9, and was consolidated in a long list of judgments of the Court of Justice, including, inter alia, Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32; Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64; and Case C-309/02 *Radlberger* [2004] ECR I-11763, paragraph 53.

9 — See, for example, Case C-319/05 *Commission* v *Germany* [2007] ECR I-9811, paragraph 35, in which the Court held that where a national measure comes within the scope of a directive, that 'cannot *in any event* constitute a restriction on trade between Member States prohibited by Article 28 EC' (emphasis added).

the fundamental freedoms, to be reviewed. As the Court of Justice has emphasised on many occasions, ‘the prohibition of quantitative restrictions and measures having equivalent effect laid down by Article [34 TFEU] applies not only to national measures but also to measures adopted by the [European Union] institutions’,[10] including, obviously, the harmonisation directives.

41. In the same way, this alleged effect of excluding the application of the fundamental freedoms also runs counter to the requirement that secondary law must be interpreted in the light of primary law. That requirement, the result of the binding and also inspirational nature of the provisions of the Treaty and other provisions of primary law, notably the Charter of Fundamental Rights of the European Union, precludes any attempt to render inapplicable the freedoms of movement.

42. In short, although the case-law may provide some indications pointing to a kind of exclusion or even suspension of the application of primary law, the fact is that the supersession by secondary law of the provisions of the Treaty relating to freedom of movement, in the present case, is strictly procedural.

43. When the European Union legislature implements a freedom of movement by means of secondary legislation, it weighs up the interests of the Member States, the individuals concerned and the objectives of the integration. Thus, the provision of secondary law delimits in legislative terms the legal framework relating to a specific European market. It is not the case that the provision of secondary law replaces the freedom but rather that it simply transfers to the legal framework for a particular market the requirements flowing from the freedom guaranteed by the Treaty. Accordingly, the provision of secondary legislation benefits from a presumption not only that it complies with the Treaty but also that it is faithful to the objectives of integration applied to a particular market. Under no circumstances is application of the fundamental freedom excluded, since, as explained previously, the provision of secondary legislation continues to be closely bound by the subject-matter of the Treaties, including the fundamental freedoms.

44. The effect produced by the provision of secondary legislation vis-à-vis the freedom concerned is, therefore, that it *supersedes* it *for the purposes of proceedings* since the freedom is rendered irrelevant only for the purposes of assessing whether a particular national measure complies with European Union law. Thus, the verb ‘to assess’ appears repeatedly in the case-law of the Court of Justice in relation to this effect[11] and it reflects clearly the procedural nature of the way in which the fundamental freedom is superseded by the legislative act of secondary law. The Court of Justice does not declare that the fundamental freedom is inapplicable to the case in question but rather, on the contrary, confines itself to holding that it is not necessary to carry out an assessment of the freedom in order to dispose of the case, whether, as will be demonstrated below, in preliminary-ruling proceedings or in an action for failure to fulfil obligations.

45. In *Parfumerie-Fabrik 4711*,[12] a national court asked the Court of Justice whether national legislation was compatible with an exhaustive harmonisation directive and with Article 34 TFEU. In holding that that directive was applicable, the Court added that ‘it is not necessary to give a ruling on the interpretation of Article [34 TFEU] as requested by the national court.’[13] The Court of Justice

10 — See, inter alia, Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 15; Case C-51/93 *Meyhui* [1994] ECR I-3879, paragraph 11; and Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, paragraph 27.

11 — See, inter alia, *DaimlerChrysler*, paragraph 32; Case C-99/01 *Linhart and Biffl* [2002] ECR I-9375, paragraph 18; Case C-221/00 *Commission* v *Austria* [2003] ECR I-1007, paragraph 42; and Joined Cases C-421/00, C-426/00 and C-16/01 *Sterbenz and Haug* [2003] ECR I-1065, paragraph 24.

12 — Case 150/88 [1989] ECR 3891.

13 — Ibid., paragraph 28.

reached the same conclusion in *DaimlerChrysler*,[14] also a reference for a preliminary ruling, declaring in the operative part of the judgment that, once it has been confirmed that a regulation is applicable, 'it is not necessary for [the] national measure to be subject to a further and separate review of its compatibility with Articles 34 and 36 [TFEU]'.[15]

46. In other words, in the context of a reference for a preliminary ruling, it is not necessary to carry out a further examination once it has been established that the disputed national measure infringes secondary European Union legislation. From the perspective of its jurisdiction to hear the case, the Court may or even must 'confine itself' to interpreting the implementing legislation.[16] This is a limitation which operates at a procedural level for the purposes of defining the powers of assessment of the Court, since, as pointed out above, the coexistence and even the hierarchical relationship between the fundamental freedom and the implementing legislation are maintained, as far as all their effects are concerned, in cases such as the present one. The interpretative function of the Court is complete when it has ruled on the alleged infringement of the implementing legislation.

47. In the context of an action for failure to fulfil obligations, the Court has adapted the formulation in order to emphasise further the procedural nature of the supersession. Thus, in *Commission* v *Germany*,[17] the Court declared that the existence of a breach of an implementing measure '*precludes* the compatibility of the national rules in question with Article [34 TFEU] *from being examined*'.[18] That reference to the examination of the plea confirms, therefore, that there is a limitation which affects only the judicial dimension of the case but not the substance.

48. In summary, it is for the person alleging consecutively the infringement of an act of secondary legislation and a fundamental freedom to prove that the contested national measure is not subject exclusively to the scope of the act of secondary legislation and that instead it also applies to a sphere outside the scope of the act and covered by the fundamental freedom. Otherwise, a court 'must confine itself' to assessing the national measure 'in the light of the provisions of the harmonising measure and not those of the Treaty', as the Court of Justice requires.

49. Turning now to the specific facts of the present case, it should be noted at this juncture that whilst Directive 92/12 has carried out a minimum harmonisation in the sphere of taxation, it has nevertheless placed a number of insuperable restrictions on the Member States. Since those restrictions delimit an area in which action at national level is prohibited, they may be defined as specific aspects of exhaustive harmonisation. That is the case of Articles 8 and 9 of Directive 92/12, in particular the matters described in points 21 and 24 of this Opinion, in which the framework for assessing whether possession of tobacco is for commercial or private purposes is set out in detail. In that connection, it is apparent from the articles concerned that Member States may not establish objective criteria which deprive a private individual of the possibility to prove otherwise. In addition, those criteria must be applied per person and, in the case of quantitative criteria, with regard to the minimum thresholds set out in the second subparagraph of Article 9(2).

50. Accordingly, since, as proposed in points 26 to 29 of this Opinion, the French Republic has infringed the exhaustive harmonising provisions laid down in Directive 92/12, it is not necessary to examine whether there has also been an infringement of Article 34 TFEU, in view of the fact that, as regards the facts and measures specifically analysed in these proceedings, it is a provision which is superseded by the operation of Articles 8 and 9 of Directive 92/12.

14 — Cited above.

15 — Ibid., paragraph 46. On the same lines, referring to the *lack of need* for a ruling, Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 83.

16 — Expression used in, for example, *Linhart and Biffl*, paragraph 21; *Sternbenz and Haug*, paragraph 26; Case C-257/06 *Roby Profumi* [2008] ECR I-189, paragraph 15; and Case C-569/07 *HSBC Holdings and Vidacos Nominees* [2009] ECR I-9047, paragraph 27.

17 — Case C-463/01 *Commission* v *Germany* [2004] ECR I-11705.

18 — Ibid., paragraph 36.

51. Throughout the pleadings it has lodged in these proceedings, the Commission has confined itself to asserting that Article 575 H and the national administrative practices are incompatible with Article 34 TFEU. The purpose of this second plea is the same as that of the first plea but at no point has the applicant explained the extent to which the conduct complained of goes beyond the scope of Directive 92/12. Since Articles 8 and 9 provide for exhaustive harmonisation in the sphere concerned, the only way in which the Court might carry out an examination of the second plea would be if the French authorities had acted outside the material scope of the directive. However, the Commission has not adduced any evidence to prove the existence of conduct on the part of the French Republic which is outside the scope of Directive 92/12 and, therefore, subject to Article 34 TFEU.

52. Accordingly, reliance on the Treaty in a context in which there is what I have been referring to as a procedural supersession of the Treaty can lead only to the inadmissibility of the second plea in this case. In other words, reliance on the Treaty as an autonomous but consecutive plea of infringement cannot be regarded in any other way than as a ground for inadmissibility. Finally, by its second plea of infringement, the Commission has put forward an allegation of a breach which is redundant and incapable of acting with minimum autonomy as a criterion for assessment of the national measures at issue in the present proceedings.

53. Therefore, in accordance with Article 120(c) of the Rules of Procedure, I propose that the Court should rule that the second plea is inadmissible.

IV – Costs

54. In accordance with Article 138(3) of the Rules of Procedure, where an action is partially successful, each party must bear its own costs.

V – Conclusion

55. Consequently, I propose that the Court:

(1) declare that, by implementing the measures provided for in Articles 575 G and 575 H of the General Tax Code, and a settled administrative practice, pursuant to which the quantitative criteria for determining the use of tobacco, which are the sole criteria provided for by the national authorities, are calculated by vehicle and by general categories of products and not by person and by specific categories of products, the French Republic has failed to fulfil the obligations incumbent on it under Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products;

(2) rule that the second plea of infringement is inadmissible;

(3) order each of the parties to bear its own costs.