JUDGMENT OF THE COURT (Second Chamber)
24 September 1998 *

In Case C-319/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Østre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Brinkmann Tabakfabriken GmbH

and

Skatteministeriet

on the interpretation of Articles 3(1) and 4(1) of the Second Council Directive (79/32/EEC) of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1979 L 10, p. 8), and of the principle of a State's non-contractual liability for damage caused to individuals by a breach of Community law attributable to that State,

THE COURT (Second Chamber),

composed of: R. Schintgen, President of the Chamber, G. F. Mancini and G. Hirsch (Rapporteur), Judges,

* Language of the case: Danish.

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Brinkmann Tabakfabriken GmbH, by Jeppe Skadhauge, of the Copenhagen Bar, and Alexander Böhlke, of the Brussels Bar,

— Skatteministeriet, by Karsten Hagel-Sørensen, of the Copenhagen Bar,

— the Finnish Government, by Holger Rotkirch, Ambassador, Head of Legal Affairs at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Hans Peter Hartvig, Legal Adviser, and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Brinkmann Tabakfabriken GmbH, Skatteministeriet and the Commission, at the hearing on 13 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 22 January 1998,

gives the following

Judgment

1 By an order of 4 September 1996, received at the Court on 1 October 1996, the Østre Landsret (Danish Eastern Regional Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Articles 3(1) and 4(1) of the Second Council Directive (79/32/EEC) of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1979 L 10, p. 8, hereinafter 'the Second Directive'), and of the principle of a State's liability for damage caused to individuals by a breach of Community law attributable to that State.

2 Those questions have been raised in proceedings between Brinkmann Tabakfabriken GmbH (hereinafter 'Brinkmann'), whose registered office is in Bremen (Germany), a producer of manufactured tobacco, and Skatteministeriet (the Danish Ministry of Fiscal Affairs) in relation to the levying of taxes applicable to manufactured tobaccos on a particular tobacco product manufactured by Brinkmann and sold under the designation 'Westpoint' and, more particularly, in relation to the question whether Westpoint should be taxed as a cigarette or as smoking tobacco, which would result in a lower rate.

Community legislation

3 Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1972 L 303, p. 1) sets out the general framework principles required to harmonise taxes on tobacco.

The various products covered were not defined until the Second Directive, Article 3(1) of which, at the material time, provided as follows:

'1. Rolls of tobacco capable of being smoked as they are and which are not cigars or cigarillos as defined in Article 2 shall be deemed to be cigarettes.'

Article 4(1) of the Second Directive provided:

'The following shall be deemed to be smoking tobacco:

1. tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing.'

4 Under Article 9(1) of the Second Directive, the Member States were to bring into force the laws, regulations or administrative provisions necessary to comply therewith not later than 1 January 1980.

5 Article 2(3) of Council Directive 92/78/EEC of 19 October 1992 amending Directives 72/464/EEC and 79/32/EEC (OJ 1992 L 316, p. 5) inserted a new Article 3(1) into the Second Directive which expressly provided that rolls of tobacco which, by simple non-industrial handling, are inserted into cigarette-paper tubes or wrapped in cigarette paper, are also to be deemed to be cigarettes.

Danish law

6 The Danish statute applicable at the material time was the Lov om tobaksafgifter (Law on Tobacco Duties), Consolidated Law No 614 of 1988, as most recently amended by Law No 825 of 19 December 1989 (*Lovt.* 1989, p. 3184). Paragraph 1 of the Law set out the rates of duty for cigarettes and smoking tobacco; smoking tobacco was taxed at a much lower rate than cigarettes. Paper for wrapping cigarettes was subject to a specific duty.

7 The Lov om tobaksafgifter did not itself contain a definition of the various tobacco products but Paragraph 33 empowered the Danish Minister for Fiscal Affairs to lay down the provisions necessary for its implementation, including definitions of tobacco products in conformity with Community law. At the material time, no provisions had yet been laid down by the Minister for Fiscal Affairs pursuant to that power.

Facts in the main proceedings

8 In 1988 Brinkmann acquired an exclusive licence to manufacture and sell a tobacco product called 'Westpoint' which is protected by a European patent.

9 Westpoint comes in a packet which resembles a normal packet of cigarettes and contains 25 g of fine-cut smoking tobacco divided up into 30 industrially-produced rolls of tobacco enveloped in porous cellulose. Each roll is 68.6 mm long and consists of approximately 833 mg of tobacco.

10 The tobacco rolls have to be wrapped in cigarette paper before they can be smoked. To that end, Brinkmann sells cigarette-paper tubes separately into which the tobacco rolls may be inserted. The rolls can also be wrapped in normal cigarette paper.

11 In the Danish patent, the advantages of Westpoint are summarised as follows:

'— the tobacco is measured out precisely beforehand during the industrial manufacturing process;

— the taste never alters;

— there is always a uniform smoking ratio (smoking time and draw);

— there is always a uniform, previously-determined content of harmful substances in relation to a particular cigarette-paper tube;

— it is extremely simple to make up a cigarette directly comparable to a factory-produced cigarette;

— there is no tobacco cylinder wrapping which has to be thrown away;

— it is subject to more favourable tax treatment as compared with industrially-prepared cigarettes.'

12 Brinkmann has been selling Westpoint in Germany since April 1989 where it is taxed as smoking tobacco.

13 Brinkmann launched Westpoint on the Danish market in April 1990, after being informed by a district customs office that Westpoint would be taxed as fine-cut smoking tobacco. However, at the request of one of Brinkmann's competitors, the Momsnævnet (VAT Board), which is the highest administrative authority in Denmark in tax matters, ruled, in a decision of 14 May 1990, confirmed by decision of 23 October 1990, that Westpoint tobacco rolls should be taxed at the same rate as cigarettes. In that connection, Brinkmann's requests for an order suspending the operation of the decision adopted were also dismissed.

The questions referred for a preliminary ruling

14 Brinkmann accordingly brought an action before the Østre Landsret in which it claimed that the Ministry of Fiscal Affairs should be required to accept that Westpoint ought to be taxed as smoking tobacco and to compensate Brinkmann for the loss incurred by it as a result of the Momsnævnet's decisions which had resulted in Westpoint being forced out of the Danish market.

15 Those are the circumstances in which the Østre Landsret decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Should the definitions in the Council's Second Directive (79/32/EEC) of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, in the version in force on 14 May 1990, be

interpreted to the effect that a product with the following characteristics should be classified as cigarettes or as smoking tobacco:

— there is a packet containing 25 g of fine-cut smoking tobacco divided up into 30 rolls of tobacco, industrially manufactured, each roll being of the same size, consistency and uniformity;

— each roll of tobacco is 68.6 mm long and consists of approximately 833 mg of fine-cut smoking tobacco wrapped in cellulose, and pressed out into a thin block;

— the wrapping is porous, and the roll of tobacco cannot be smoked as it is but must be inserted into a cigarette-paper tube or wrapped in ordinary cigarette paper, which in both cases can be done without the use of implements?

If the answer to Question 1 is that the product should be classified as smoking tobacco, the Court is asked to reply to the following questions:

2. Under Community law is an undertaking entitled to compensation for every loss suffered by it as a consequence of a Member State's infringement of Community law, consisting in the fact that an authority responsible for the final administrative decision as to which tax group a tobacco product should fall under has reached a decision which conflicts with Article 3(1) of Directive 79/32/EEC and, if so, what are the conditions governing such liability?

3 (a). Are the definitions of manufactured tobacco products in Directive 79/32/EEC properly implemented in a Member State if the Minister for Fiscal Affairs is, by law, empowered to lay down provisions concerning the definitions of

tobacco products in compliance with the provisions laid down by the European Communities, where no legal provisions have been adopted pursuant to the law.

If Question 3(a) is answered in the negative, the Court of Justice is asked to reply to the following question:

3 (b). Does it matter, as regards the answer to Question 2, that the definitions in the Tobacco Directive were not implemented in the Member State if the national authority, in its decision, referred to the definitions, and the parties to the case before the national court are in agreement that the definitions in the Directive are directly applicable?

4. Does it matter, as regards the answer to Question 2, that the authorities refused to suspend the operation of the authority's decision as requested by the plaintiff with a view to limiting its losses?'

The first question

16 First of all, the Second Directive, in the version in force at the material time, already contained a precise definition of cigarettes stating their three distinctive features to be as follows: (a) they are rolls of tobacco (b) which are capable of being smoked as they are and (c) which are not cigars or cigarillos.

17 It is common ground that a product such as Westpoint exhibits the first and third characteristics. It does not, however, exhibit the second because the roll of tobacco at issue cannot be smoked as it is but must first be inserted into a cigarette-paper tube or wrapped in normal cigarette paper.

18 A product of the kind at issue in the main proceedings thus falls within the scope of Article 4(1) of the Second Directive, which defines smoking tobacco. The rolls of tobacco at issue here in fact consist of tobacco which has been cut and is capable of being smoked without further industrial processing.

19 The Ministry of Fiscal Affairs and the Finnish Government, however, contend that Westpoint should be deemed to be smoking tobacco, relying on the definition of cigars in Article 2 of the Second Directive, which provides that they must also be rolls of tobacco which can be smoked as they are. Some cigars have to be cut by the consumer before they can be smoked. None the less, it is unarguable that such cigars are still cigars within the meaning of Article 2 of the Second Directive. It follows that the expression 'as they are' in the Second Directive cannot be construed literally.

20 That argument cannot be accepted. The fact is that the expression 'rolls of tobacco capable of being smoked as they are' describes a finished product. A cigar, even one which has to be cut in order to be smoked, is a finished product. But the same is not true of a roll of tobacco which, as in the main proceedings, has to be assembled with another product, namely a separately-marketed cigarette-paper tube, to yield a product capable of being smoked as it is.

21 Admittedly, as the Finnish Government and the Commission have pointed out, it is apparent from the patent set out at paragraph 11 of this judgment that the product at issue in the main proceedings seeks to combine the favourable tax treatment enjoyed by smoking tobacco with the advantages of cigarettes to the con-

sumer. However, that cannot constitute a reason for extending the scope of Article 3(1) of the Second Directive beyond the confines of its wording to rolls of tobacco which are not finished products.

22 The answer to the first question must therefore be that Articles 3(1) and 4(1) of the Second Directive, in the version in force in May 1990, are to be interpreted as meaning that rolls of tobacco wrapped in porous cellulose which have to be inserted into cigarette-paper tubes to be smoked must be deemed to be smoking tobacco within the meaning of Article 4(1) of that directive.

The second, third and fourth questions

23 By its second, third and fourth questions, which it is appropriate to examine together, the Østre Landsret is essentially asking whether a Member State whose authorities, in interpreting Articles 3(1) and 4(1) of the Second Directive, erroneously classified a product such as that at issue in these proceedings as a cigarette and did not suspend the operation of the decision adopted, is required under Community law to compensate the manufacturer for the damage sustained by the latter as a result of the erroneous decision.

24 First of all, it is settled case-law that the principle that a State may incur liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty (see, in particular, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20; and Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, paragraph 47).

25 In those judgments, the Court, having regard to the circumstances in each case, held that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (judgments cited above in *Brasserie du Pêcheur and Factortame*, paragraph 51; *Dillenkofer and Others*, paragraphs 21 and 23; and *Denkavit and Others*, paragraph 48).

26 While it is, in principle, for national courts to determine whether the conditions for State liability for breach of Community law are met, it must be held that in this instance the Court has all the information necessary in order to judge whether the facts presented are to be characterised as a sufficiently serious breach of Community law and, if appropriate, whether there is a causal link between the breach of the State's obligation and the damage sustained.

27 In this case, there is no disputing that Articles 3(1) and 4(1) of the Second Directive which contain the definitions of cigarettes and smoking tobacco were not properly transposed into national law, as the competent Minister authorised by the relevant law to lay down the necessary provisions has not adopted any rule of law in implementation thereof.

28 It is true that failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes *per se* a serious breach of Community law (see *Dillenkofer and Others*, cited above, paragraph 29).

29 However, it must be emphasised that there is no direct causal link in this case between the breach of Community law and the damage allegedly suffered by Brinkmann. Indeed, the Danish authorities gave immediate effect to the relevant provisions of the Second Directive containing precise definitions of tobacco products. Accordingly, the fact that the definitions in the Second Directive were not imple-

mented by ministerial decree does not in itself give rise to liability on the part of the State.

30 It remains to be determined whether the Danish authorities committed a sufficiently serious breach of the relevant provisions of the Second Directive, having regard to the degree of clarity and precision of those provisions.

31 In this case, they did not. Indeed, as the Advocate General emphasises at paragraph 31 of his Opinion, Westpoint does not correspond exactly to either of the definitions in the directive. Rather, the product is one which did not exist at the time when the Second Directive was adopted and which sought to give consumers the advantages of a cigarette while benefiting from the lower tax applicable to smoking tobacco. In those circumstances, the interpretation given by the Danish authorities to the relevant definitions was not manifestly contrary to the wording of the Second Directive or in particular to the aim pursued by it, all the more so as both the Finnish Government and the Commission have argued in favour of that interpretation.

32 That being so, it is of little importance that the authorities refused to suspend the decision, since Community law does not require that, in a case such as this, the national authorities should suspend the operation of a decision adopted in application of a provision which was open to a number of perfectly tenable interpretations.

33 The answer to the second, third and fourth questions must therefore be that a Member State whose authorities, in interpreting Articles 3(1) and 4(1) of the Second Directive, erroneously classified a product such as that at issue in this case as a

cigarette and did not suspend the operation of the decision adopted, is not bound by Community law to compensate the manufacturer for the damage sustained by the latter as a result of that erroneous decision.

Costs

34 The costs incurred by the Finnish Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Østre Landsret by order of 4 September 1996, hereby rules:

1. Articles 3(1) and 4(1) of the Second Council Directive (79/32/EEC) of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, in the version in force in May 1990, are to be interpreted as meaning that rolls of tobacco wrapped in porous cellulose which have to be inserted into cigarette-paper tubes to be smoked must be deemed to be smoking tobacco within the meaning of Article 4(1) of that directive.

2. **A Member State whose authorities, in interpreting Articles 3(1) and 4(1) of the Second Directive 79/32/EEC, erroneously classified a product such as that at issue in this case as a cigarette and did not suspend the operation of the decision adopted, is not bound by Community law to compensate the manufacturer for the damage sustained by the latter as a result of that erroneous decision.**

Schintgen Mancini Hirsch

Delivered in open court in Luxembourg on 24 September 1998.

R. Grass

Registrar

R. Schintgen

President of the Second Chamber