OPINION OF ADVOCATE GENERAL MISCHO

delivered on 16 December 1999 *

I — Facts, regulatory framework and main proceedings

1. Brinkmann Tabakfabriken GmbH (hereinafter 'Brinkmann'), which has its registered office in Bremen (Germany), produces manufactured tobacco including, *inter alia*, semi-finished cigarillos known as 'Steckzigarillos'.

2. In 1996 and 1997, Brinkmann lodged several tax declarations with the Hauptzollamt Bielefeld (Principal Customs Office, Bielefeld).

3. In those tax declarations, the tobacco tax on the manufacture of the abovementioned cigarillos was calculated in accordance with Paragraph 4.1.2 of the Tabaksteuergesetz (the German law on tobacco tax, hereinafter 'TabStG'), in the version in force at the time. [1] That provision read as follows:

'Paragraph 4

The tax shall be:

1. ...

2. for cigars and cigarillos: 5% of the retail selling price, but not less than 3.1 Pfennig per item.

...'

1 — That is to say, the version current as from 1 January 1993 (*BGBl.* 1992 I, p. 2150), since amended by a law of 26 May 1998 known as the 'Zweites Gesetz zur Änderung der Verbrauchsteuergesetze' (*BGBl.* 1998 I, p. 1121).

* Original language: French.

4. However, each of the tax declarations lodged by Brinkmann was accompanied by an administrative complaint requesting that, in determining the tobacco tax payable, the Hauptzollamt should take into account Article 3(1) of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes. [2]

5. The purpose of Directive 92/80, as expressed in the third recital of the preamble thereto, is 'to establish minimum excise duties for manufactured tobacco other than cigarettes'.

6. The scope of Directive 92/80 is defined in Article 1 which specifies, in particular, that:

'The following groups of manufactured tobacco produced in the Community and imported from non-member countries shall be subject, in each Member State, to a minimum excise duty as laid down in Article 3:

(a) cigars and cigarillos;

...'

2 — OJ 1992 L 316, p. 10.

7. Article 3(1) of Directive 92/80 reads as follows:

'Not later than 1 January 1993, Member States shall apply an excise duty which may be:

— either an *ad valorem* duty calculated on the basis of the maximum retail selling price of each product, freely determined by manufacturers established in the Community and by importers from non-member countries in accordance with Article 5 of Directive 72/464/EEC,

— or a specific duty, by quantity,

— or a mixture of both, combining an *ad valorem* element and a specific element, provided that the overall excise duty expressed as a percentage, as an amount per kg or for a given number of items is at least equivalent to the rates or minimum amounts laid down for:

— cigars and cigarillos: 5% of the retail selling price inclusive of all

taxes, or ECU 7 per 1 000 items or per kilogram

...'

8. Article 3(2) of Directive 92/80 lays down the following principle:

'The rates or amounts referred to in paragraph 1 shall be effective for all products belonging to the group of manufactured tobaccos concerned, without distinction within each group as to quality, presentation, origin of the products, the materials used, the characteristics of the firms involved or any other criterion.'

9. Brinkmann argued that, by providing for a minimum rate of tax as an additional element of taxation, Paragraph 4.1.2. of the TabStG constituted an incorrect implementation of Article 3 of Directive 92/80 and, relying on that provision having direct effect, requested the court not to apply the minimum rate of tax in question.

10. Following the dismissal of its complaints by the Hauptzollamt, Brinkmann took its case to the Finanzgericht Düsseldorf which, by order of 5 October 1998, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling.

II — Questions referred for a preliminary ruling

'Does Paragraph 4.1.2. of the Tabaksteuergesetz (Law on Tobacco Tax) in the version current as at 21.12.1992 (*Bundesgesetzblatt* 1992, Part I, p. 2150) constitute an incorrect implementation of Article 3(1) of 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)?

If the Court of Justice answers that question in the affirmative:

Does Article 3(1) of that directive confer upon a person chargeable to tobacco tax a direct right to be taxed in accordance with the directive, with the result that the national courts are to set aside the minimum rate of tax which is applied to cigars or cigarillos in Germany contrary to the wording of the directive?'

III — Replies to the questions referred for a preliminary ruling

A — *First question*

11. By its first question, the Finanzgericht is seeking from the Court clarification as to whether Paragraph 4.1.2 of the TabStG is compatible with Article 3(1) of Directive 92/80.

12. In the context of the main proceedings, the Hauptzollamt contended that, although the provision at issue did not fully correspond to the structure of Directive 92/80, any lack of correspondence was 'purely formal' with no significant consequences for persons chargeable to tobacco tax, so that the German legislature could not be regarded as having transposed the directive incorrectly.

13. The Finanzgericht shared this view. It considered that '[i]ncorrect implementation normally occurs only where the national legislation conflicts with the directive in its legal substance, causing substantial prejudice to the person concerned'.

14. In the present case, in its report of 19 May 1998 on the structure and rates of tax on the consumption of cigarettes and other manufactured tobacco (which was accompanied by a proposal for the amendment of, *inter alia*, Directive 92/80), the Commission had found that, even though the German rules may have infringed Directive 92/80, the infringement was purely formal and without serious consequences. [3]

15. After examining the syntax of the provision in dispute, the Finanzgericht concluded that the formula employed did in fact combine the first two options offered by Article 3(1) of Directive 92/80. The formula '5% of the retail selling price, but not less than 3.1 Pfennig per item' meant that the tax on cigars and cigarillos with a retail selling price of less than 62 Pfennig was 3.1 Pfennig per item, whereas for the remainder, whose retail selling price exceeded that limit, it was 5% of the retail selling price. Thus, the *ad valorem* duty and the specific duty would be applied alternately. Since the provision at issue had been adopted with a view to the situation on the German cigar and cigarillo market, where nearly 90% of sales were made at a retail price of less than 62 Pfennig, the tax applicable would, in fact, be virtually a per item tax, the *ad valorem* tax being marginal.

16. Brinkmann maintains that the Finanzgericht's proposed interpretation is mista-

3 — Paragraph 2.25 of the Commission report, document COM(98) 320 final (OJ 1998 C 203, p. 16).

ken, since it would result in the infringement not only of paragraph 1 of Article 3 but of paragraph 2 as well. It points out that the purpose of Directive 92/80 is to establish 'a harmonised incidence of tax for all products belonging to the same group of manufactured tobacco'. It follows, in its view, firstly, that States should adhere to the tax structure laid down in the directive and, secondly, that they should subject all products belonging to the same group of manufactured tobacco to the same tax structure, as required by Article 3(2) of Directive 92/80. In accordance with the Finanzgericht's own interpretation, 'the tax structure adopted, by differentiating within the same group of manufactured tobacco, that is to say, by establishing an *ad valorem* duty rate for more expensive cigars and cigarillos and a specific duty rate for cheaper cigars and cigarillos, does not in fact correspond — precisely because of that differentiation — to any of the three tax options'.

17. Moreover, even a 'purely formal' infringement of Directive 92/80 would constitute an incorrect implementation, regardless of its actual consequences. Nevertheless, if it were necessary to take into account the effects of the incorrect implementation, it should be borne in mind that the Commission's remarks concerning 'serious consequences' related solely to the overall operation of the internal market and not to the individual situation of the economic operator. 'Because of the rule establishing a minimum tax', Brinkmann had paid 'more excise duty than that for which it was legally liable', which constituted a violation of the 'principle of the legality of the fiscal administration'.

18. According to the Commission, the tax formula laid down in Paragraph 4.1.2 of the TabStG does not correspond to any of the three options offered by Article 3(1) of Directive 92/80. The formula comprises an *ad valorem* element ('5% of the retail selling price') which, in a sort of ancillary provision, is subject to a minimum specific duty ('not less than 3.1 Pfennig per item').

19. Admittedly, in addition to an exclusively *ad valorem* and an exclusively specific excise duty, Directive 92/80 also provides for a mixture of the two, but this must 'combine both types of calculation, that is to say, an *ad valorem* element and a specific element'. The Commission insists that Directive 90/82 leaves no room for 'the imposition of a mixed excise duty under which the two forms of taxation are applied alternately, depending on some price threshold, thus dividing the cigar and cigarillo market into a part to which a specific duty is applied and a higher-priced part to which an *ad valorem* duty is applied'.

20. According to the Commission, Directive 92/80 is intended to establish the

minimum of harmonisation essential to the proper functioning of the internal market. Therefore its provisions should be narrowly interpreted and a formula such as that in dispute could be adopted only under a provision that expressly authorised it.

21. It should be noted that, where cigarillos are concerned, such a provision has existed only since the entry into force of Council Directive 1999/81/EC of 29 July 1999 amending Directive 92/79/EEC on the approximation of taxes on cigarettes, Directive 92/80 and Directive 95/59/EC on taxes other than turnover taxes which affect the consumption of manufactured tobacco,[4] which added to Article 3(1) of Directive 92/80 a sentence reading: 'In cases where excise duty is either *ad valorem* or mixed, Member States may establish a minimum amount of excise duty'.

22. The Commission maintains that, according to settled case-law, control of the correct implementation of a directive is a purely objective process and must be exercised independently of whether incorrect implementation might cause the interested parties prejudice that could, in particular, give rise to damages.

4 — OJ 1995 L 211, p. 47.

Opinion

23. Under the third option allowed by Article 3(1) of Directive 92/80, Member States may apply an excise duty which is 'a mixture... *combining*[5] *an ad valorem* element *and*[6] a specific element, provided that the overall excise duty expressed as a percentage, as an amount per kg or for a given number of items is at least equivalent', for cigars and cigarillos, to the following rates or minimum amounts: 5% of the retail selling price inclusive of all taxes or ECU 7 per 1 000 items or per kilogram.

24. The question of compliance with those rates or minimum amounts is not an issue in the present case.

25. It remains to be determined whether the word 'combining' and the conjunction 'and' mean that the *ad valorem* and specific elements must always be applied simultaneously, whenever the tax is collected, or whether the text allows for cigars and cigarillos sold for less than a certain price to be subjected solely to the specific element (the incidence of the tax then being greater than 5%), whereas products of the same category whose price exceeds the threshold in question are liable solely to the *ad valorem* tax (the incidence of which

5 — Emphasis added.

6 — Emphasis added.

would then exceed that of the specific duty).

26. The answer to that question is not immediately obvious and it is understandable that the German legislature should have considered that the second interpretation was also possible.

27. In my view, however, the arguments put forward by Brinkmann and the Commission in favour of the first interpretation should be accepted. There are two reasons for this.

28. First, the 'minimum duty' method employed by the German legislature is sufficiently different from a system *combining* an *ad valorem* element *and* a specific element to justify the conclusion that it is not necessarily covered by the latter definition.

29. Second, I consider that the Commission's argument based on the principle of non-extensive interpretation carries considerable weight. The Commission notes that Article 16(5) of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco[7] provides that 'Member States may levy a minimum excise duty on cigarettes and on fine-cut tobacco for the rolling of cigarettes,...'. Furthermore, Article 8(1) of the same directive, applicable to the first stage of harmonisation, provides for cigarettes to be subject to 'a proportional excise duty calculated on the maximum retail selling price, including customs duties, *and also to*[8] a specific excise duty calculated per unit of the product'. Paragraph 4 of the same article also makes it clear that 'the excise duty on cigarettes may include a minimum tax component'.[9]

30. In my opinion, the Commission was right to conclude, on the basis of the principle of non-extensive interpretation, that these texts show 'that Member States cannot normally set a minimum excise duty when a directive does not expressly provide for that possibility'.

31. Thus, Directive 92/80 did not authorise Member States to levy a minimum excise duty on cigars or cigarillos.

32. At the same time, unlike Brinkmann and the Commission, I do not consider such

7 — OJ 1995 L 291, p. 40.

8 — Emphasis added.

9 — The same text had previously been used in Article 4 of Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ, English Special Edition 1972 (31 December), re OJ 1972 L 303, p. 1).

a levy to be contrary to the spirit of Directive 92/80, which pursues the same objectives with respect to the harmonisation of excise duties on cigars and cigarillos as those which underlie the harmonisation of excise duties on cigarettes, namely, to prevent taxes affecting the consumption of products in the manufactured tobacco sector from distorting conditions of competition and impeding their free movement within the Community. Those objectives are defined in the basic directive common to all products in the manufactured tobacco sector, namely, Directive 72/464 (first recital) and Directive 95/59 (second recital), which replaced it.

33. This is what led the Council to note, in the sixteenth recital in the preamble to Directive 1999/81 amending Article 3 of Directive 92/80, that 'there is nothing to prevent Member States from being authorised to apply a minimum excise duty to cigars, cigarillos and smoking tobacco where such an option already exists for cigarettes and hand-rolling tobacco'.

34. Consequently, the Council inserted the following sentence in Article 3 of Directive 92/80: 'In cases where excise duty is either *ad valorem* or mixed, Member States may establish a minimum amount of excise duty'.

35. That authorisation entered into effect retroactively on 1 January 1999 (Directive 1999/81 being dated 29 July 1999).

36. Thus, the Finanzgericht was right to consider that the German provision at issue constitutes only 'a formal infringement, without serious consequences'.

37. Nevertheless, I have no choice but to propose that, in answer to the first question, the Court should reply that Article 3(1) of Directive 92/80, in the wording in force up to 31 December 1998, should be interpreted as not permitting the levying on cigars and cigarillos of a minimum specific tax in combination with an *ad valorem* duty.

B — *The second question*

38. By its second question referred for a preliminary ruling, the Finanzgericht inquires, in essence, whether Article 3(1) of Directive 92/80 confers upon a person chargeable to tobacco tax a right to be taxed in accordance with the directive on which he can rely before the national court, thus requiring the latter to set aside the fixed minimum rate of tax specified in Paragraph 4.1.2 TabStG.

39. The Finanzgericht considers, first, that since in this case the infringement of Directive 92/80 is 'without serious consequences', it is the duty of the Member State concerned, at most, to bring the national law into conformity with the directive, which the German Government has done.

40. Second, it argues that Article 3(1) of Directive 92/80 has no direct effect since it is not unconditional and sufficiently precise. If it were, it would not be 'subject, in its implementation or effects, to the taking of any measure either by the Community institutions or by the Member States'. In fact, the implementation of the article does require the taking of a measure by the Member State, which must choose between the three different possible methods of raising tax on cigars and cigarillos allowed by the provision in dispute.

41. Finally, the Finanzgericht points out that the tax levied under Paragraph 4.1.2 of the TabStG is in practice almost exclusively a tax per unit, since in Germany about 90% of cigars and cigarillos are subject *de facto* to the specific tax rate of 3.1 Pfennig.

42. Brinkmann maintains that Article 3(1) of Directive 92/80 confers upon the person chargeable to tobacco tax a direct right to be taxed in accordance with the directive.

43. According to Brinkmann, in adopting the TabStG of 21 December 1992, the German legislature opted for an *ad valorem* tax at the minimum rate of 5% of the retail price. Brinkmann therefore considers itself to be automatically subject to that tax, without it even being necessary to have recourse to Directive 92/80. It follows from the phrasing of the question referred for a preliminary ruling that the dispute relates only to the inconsistent part of the national provision, that is to say the 'minimum rate of tax which is applied... in Germany contrary to the wording of the directive'.

44. In Brinkmann's view, Directive 92/80 is unconditional and sufficiently precise for a litigant to be able to invoke it in order to have the national court set aside that part of Paragraph 4.1.2 of the TabStG which is incompatible with the directive.

45. Finally, citing the judgment in *IN. CO. GE. '90 and Others*, [10] Brinkmann argues that the primacy of Community law must also be taken into account. This meant that any provision of national law incompatible with Community law would be inapplicable.

10 — Judgment of 22 October 1998 (Joined Cases C-10/97 to C-22/97, [1998] ECR I-6307, paragraph 20).

46. According to the Commission, the national provision in question means that the *ad valorem* excise duty must be applied, provided that the specific excise duty (3.1 Pfennig per item) is not higher. It acknowledges that, as a result, 'in practice about 90% of cigars and cigarillos, the unit price of which does not exceed 62 Pfennig, are subject to the specific excise duty, while the *ad valorem* duty on the retail price is applicable only to the remaining 10%' or, in other words, that 'in practice, the German excise duty is mainly a specific duty which, starting from a retail selling price of 63 Pfennig per item, becomes an *ad valorem* duty'.

47. The Commission also acknowledges that Article 3(1) of Directive 92/80 leaves Member States a certain discretion by allowing them to choose among three different tax-raising options. Thus, that provision is not unconditional 'in its entirety'. However, the tax structure is established 'unconditionally and sufficiently precisely' for each individual tax-raising option. The Commission concludes that 'Member States cannot deviate from those options or introduce an excise duty determined in accordance with some additional option' and that the provision can have direct effect even if includes three different tax-raising options.

48. Again according to the Commission, when a directive has direct effect, a national provision can be split into a part consistent with Community law and an inconsistent part, which must be set aside. In that connection, it cites the judgment in *Fantask and Others*,[11] in which certain provisions of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital,[12] were recognised as having direct effect with the result that a duty consisting of a fixed basic element and a proportional element was split into a part consistent with the directive and an inconsistent part the application of which was precluded.

49. It considers that the minimum specific excise duty included, as a sort of ancillary provision, in Paragraph 4.1.2 of the TabStG is inapplicable and that the words 'not less than 3.1 Pfennig per item' should therefore be excluded from that provision before it is applied.

50. As is apparent from the configuration of the provision and the use of the words 'cigars and cigarillos: 5% of the retail selling price', the German legislature had opted for an *ad valorem* excise duty. That conclusion is reinforced by the fact that the German legislature autonomously 'set a rate (5%) for this general case of an *ad valorem* excise duty'.

11 — Judgment of 2 December 1997 (Case C-188/95, [1997] ECR I-6783, paragraphs 31 and 53).

12 — OJ, English Special Edition 1969 (II), p. 412.

51. Brinkmann was entitled, according to the Commission, to demand that its cigars and cigarillos be taxed at 5% of the retail selling price, since the *ad valorem* excise duty, described unconditionally and sufficiently precisely in the first indent of Article 3(1) of Directive 92/80, should be applied and, accordingly, both the tax base and the rate of tax had been established.

52. The Commission then appears to backtrack, acknowledging that it is 'aware that the German legislature did not intend to subject the whole of the cigar and cigarillo market to an *ad valorem* excise duty of 5% of the retail selling price. On the contrary, it must have realised that, for most of the market, the duty applicable would be the minimum specific duty...'.

53. However, it dismisses this objection to its own reasoning by asserting that 'nevertheless, the German legislature must have anticipated that the minimum excise duty might be found incompatible with Community law and that, consequently, given the direct applicability of the first indent of Article 3(1) of the directive, it would be bound, for the whole of the market, by the *ad valorem* duty which it had chosen as the normal basis of taxation'.

54. Alternatively, invoking the judgments in *Habermann-Beltermann*, *Faccini Dori* and *Spano and Others*,[13] the Commission maintains that the national court should give the provision at issue an interpretation consistent with Article 3(1) of Directive 92/80, which would also lead to the inconsistent part of the national provision not being applied.

55. The Commission therefore proposes that the Court should declare that Article 3(1) of Directive 92/80 confers upon individuals a direct right, on which they can rely before the national courts, to be 'subjected either to an *ad valorem* excise duty, or to a specific excise duty, or to a mixture of both, in accordance with this provision'.

Assessment

56. The Court has consistently held that, whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where the State fails to implement the directive in national law by the end of the

13 — Judgments of 5 May 1994 (Case C-421/92, [1994] ECR I-1657), of 14 July 1994 (Case C-91/92, [1994] ECR I-3325) and of 7 December 1995 (Case C-472/93, [1995] ECR I-4321).

period prescribed or where it fails to implement the directive correctly. [14]

57. The decisions of the Court on direct effect are intended to protect the rights of individuals no matter whether those rights have been granted to them directly or whether they follow indirectly from an obligation imposed upon the Member State.

58. A careful examination of the directive at issue, Directive 92/80, reveals, first, that it is not *intended* to ascribe rights to individuals, in this instance, the right not to be subjected to too high a tax on cigarillos.

59. Thus, the third, fourth and fifth recitals in its preamble read as follows:

'Whereas, in order to establish the *internal market* on 1 January 1993, it is necessary to establish minimum excise duties for manufactured tobacco other than cigarettes;

Whereas a harmonised incidence of tax should be established for all products belonging to the same group of manufactured tobacco;

Whereas the setting of an overall minimum excise duty expressed as a percentage, as an amount per kilogram or for a given number of items is the most appropriate for achieving the *internal market*;' [15]

60. Article 3 of the directive provides that, for cigars and cigarillos, this 'overall minimum excise duty' must be at least equivalent to 5% of the retail selling price, inclusive of all taxes, or ECU 7 per 1 000 items or per kilogram.

61. I should again point out that, in the recitals set out in the preamble to the basic directive, namely, Directive 72/464, which was supplemented by Directive 92/80, the Council explained that 'the objective of the 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'.

14 — See, in particular, Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava and Others* [1994] ECR I-483, Case C-389/95 *Klattner* [1997] ECR I-2719 and Joined Cases C-246/94 to C-249/94 *Cooperativa Agricola Zootecnica S. Antonio and Others* [1996] ECR I-4373.

15 — Emphasis added.

62. There can therefore be no doubt that the Community legislation in this field is aimed at preventing distortions of competition that might result in a particularly low level of taxation of manufactured tobacco in some countries. With regard to cigarillos, in particular, Directive 92/80 leaves Member States at liberty to set excise duties higher than 'the overall minimum excise duty' prescribed.

63. It may be, however, that a directive, without being expressly 'intended' to confer rights on individuals, imposes upon Member States obligations which are unconditional and sufficiently precise to warrant the conclusion that it defines [16] rights which individuals are able to assert, for example the right to be subjected to a particular tax to the exclusion of any other.

64. That was the position in the case of the regulations which the Court examined in the abovementioned judgment in *Fantask and Others*, cited by the Commission. In that instance, the Court found as follows:

'As the recitals in its preamble indicate, the Directive aims at encouraging the free movement of capital which is regarded as essential for the creation of an economic union whose characteristics are similar to those of a domestic market. As far as concerns taxes on the raising of capital, the pursuit of such an objective presupposes the abolition of indirect taxes in force in the Member States until then and imposing in place of them a duty charged only once in the common market and at the *same level* [17] in all the Member States' (see paragraph 13 of the judgment).

65. Clearly, that directive gave rise, for individuals, to the right not to be subjected to a tax on the raising of capital other than capital duty or the duties paid by way of fees or dues authorised as an exception by the directive. It is hardly surprising, therefore, that the Court should have found, in that judgment, that that *prohibition*, [18] like the derogation therefrom, was expressed in sufficiently precise and unconditional terms to be invoked by individuals in their national courts in order to contest a provision of national law which infringed the directive. [19]

66. In the present case, the applicant in the main proceedings argues that 'because of the rule establishing a minimum tax' it paid 'more excise duty than that for which it was legally liable'. [20]

16 — In the French text, '*est de nature á définir*' (is such as to define). See Case 8/81 *Becker* [1982] ECR 53, paragraph 25.

17 — Emphasis added.

18 — Emphasis added.

19 — See the abovementioned judgment in *Fantask and Others*, paragraph 55.

20 — See paragraph 24, *in fine*, of Brinkmann's observations.

67. Accordingly, it remains to be determined whether Directive 92/80 is sufficiently precise to support such a conclusion. The Court has held that 'a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms'. [21]

68. In the present case, therefore, the question which must be answered is: Does it follow from the third indent of Article 3(1), according to which the mixed excise duty must combine 'an *ad valorem* element and a specific element', that when:

— a Member State introduces a specific element which is not added to an *ad valorem* element but operates as a minimum tax in relation to the latter,

— and that specific element has, for the least expensive categories of cigarillos, an incidence greater than that of the *ad valorem* duty,

the individual will pay more excise duty than that for which he is legally liable?

69. The answer must be that it does not, since a legally permissible level of excise duty cannot be inferred from 'the directive alone'. [22] As has been shown above, Directive 92/80 prescribes only an 'overall excise duty' and not a maximum duty.

70. Thus, Article 3 would have allowed the Federal Republic of Germany to apply to all cigarillos either an *ad valorem* duty of more than 5% or a specific duty of more than 3.1 Pfennig per item. It would also have allowed that Member State to have imposed an excise duty consisting of a specific element of 3.1 Pfennig or more applied concurrently with an *ad valorem* element of 5% or more.

71. If the applicant in the main proceedings is questioning the level of the excise duty to which it has been subjected and a maximum permissible level cannot be deduced from Directive 92/80, it is immaterial whether its assessment to tax was calculated by directly setting a given *ad valorem* or specific duty or by applying a special method of taxation, namely, a 'minimum duty', for which the directive does not provide.

72. In short, since the system introduced by Article 3 of Directive 92/80 is 'open-ended upwards', it is insufficiently precise for

21 — See the judgment in *Comitato di Coordinamento per la Difesa della Cava and Others*, cited above.

22 — See the judgment in *Faccini Dori*, paragraph 28.

individuals to be able to derive from it rights with respect to the level of taxation to which they can be subjected.

73. The provision is precise only with respect to the lower limit below which the excise duties must not fall. In actual fact, Brinkmann has not called this aspect of the case into question.

74. However, leaving aside the matter of the level of taxation to which it was subjected, can Brinkmann at least plead before the national court the right to be taxed in accordance with one of the three methods for which Article 3(1) provides, to the exclusion of any other?

75. This, in substance, is what the Commission says in its proposal for a reply, according to which Article 3(1) 'confers upon individuals the right, on which they may rely in the national courts, to be subjected either to an *ad valorem* excise duty, or to a specific excise duty, or to a mixture of both, in accordance with this provision'.

76. Acceptance of this line of reasoning would imply that, at the time, the Federal Republic of Germany introduced a fourth type of excise duty, for which Directive 92/80 did not provide, and that the national court should have refused to apply it. The result would have been the total exemption of cigarillos from excise duty during the period in question. This, however, would have been contrary to the purpose of Directive 92/80 which was precisely intended to ensure the levying of a minimum excise duty on cigarillos. Accordingly, the applicant in the main proceedings and the Commission do not call for the national court to take this approach.

77. On the contrary, they consider that the national court should determine the tax by simply disregarding the 'minimum duty'.

78. In that connection, they refer to the abovementioned judgment in *Fantask and Others*. In that judgment, the Court found that 'charges with no upper limit which increase directly in proportion to the nominal value of the capital raised cannot, *by their very nature*,[23] amount to duties paid by way of fees or dues within the meaning of the Directive [69/335]'. The Court concluded that the charges levied should be reimbursed in so far as they did not correspond to the actual costs of registration, even when calculated at a flat rate on the basis of an average.

23 — Emphasis added.

79. In the present case, the situation is quite different as the specific element at issue is not, by its very nature, incompatible with the Community provision in issue, since it is expressly permitted when applied separately or concurrently with an *ad valorem* element.

80. Finally, there is another, in my opinion essential, reason for dismissing the arguments put forward by Brinkmann and the Commission. Those arguments are based on a line of reasoning which seeks to deduce automatically from the existence of an obligation upon Member States to opt for one of the three methods of raising taxes for which Directive 92/80 provides — and consideration of the first question has shown that that obligation does indeed exist — the existence for individuals of a right to be taxed only in accordance with one or other of those three formulas.

81. However, in thus establishing an absolute correlation between an obligation and a right, that argument, mistakenly in my view, completely disregards the fact that for a genuine right to exist, that is to say a right that can be relied on in court, it is indispensable that the court before which that right is invoked be able to give it specific effect.

82. In the case of Brinkmann's alleged right to be taxed in accordance with one of the formulas for which Directive 92/80 provides, it is hard to see how the national court could give it concrete expression without deciding which formula should be applied.

83. As a matter of principle, that decision lies outside its sphere of competence, since Directive 92/80 leaves the national legislature entirely free to make its own choice. There is no point in objecting that the court could pick out, from amongst the three possibilities, the formula that the national legislature had intended to choose since the latter, mistakenly, chose none of them and, in my view, it would be rash to claim to be able to identify, with the degree of certainty which a court must achieve in order to decide the case before it, the formula with which the tax-raising method created by the TabStG has the greatest affinity.

84. Thus, if there is no possibility of the court identifying the counterpart, for individuals, of the Member State's obligation to choose one of the three authorised tax-raising formulas, the Community legislature cannot, in my opinion, have created a right in favour of individuals.

85. Consequently, the argument put forward by the Commission and Brinkmann to the effect that the national court should determine the tax by simply disregarding the minimum duty and applying only the *ad valorem* duty, runs up against the objections which I have just outlined. It presupposes that the national court is able, without straying beyond the limits of its jurisdiction, to decide that the national legislature chose the *ad valorem* duty

formula while applying it incorrectly by coupling it with a minimum duty.

86. Even though it is certainly not for me to prejudge the scope of the jurisdiction conferred on the national court, I consider this line of argument to be fraught with difficulties given, firstly, that the system adopted by the German legislature had the very tangible effect of subjecting 90% of cigarillos not to an *ad valorem* duty but to a minimum levy of 3.1 Pfennig per item, which must have been clear to the legislature when it adopted the provisions in dispute, and, secondly, that when the German legislation was reformed in 1998, the mixed duty formula was preferred.

87. The Commission also contends that, should the Court not find that Article 3(1) of Directive 92/80 has direct effect, the 'inconsistent part' of Paragraph 4.1.2 of the TabStG should be set aside by the national court on the basis of the duty to interpret national law in conformity with a Community directive, as established, in particular, in the abovementioned judgments in *Habermann-Beltermann*, *Faccini Dori* and *Spano and Others*.

88. In the judgment in *Faccini Dori*, the Court stated *inter alia* that, in applying its national law, a court should interpret it 'as far as possible in the light of the wording and the *purpose*[24] of the directive so as to achieve the *result*[25] it has in view and thereby comply with the third paragraph of Article 189 of the Treaty'.

89. However, I have already shown that the *purpose* of Directive 92/80 is to prevent any distortions of competition that might follow from too low a tax being imposed on cigarillos in some Member States and that the *intended result* is the establishment of a tax floor and not a tax ceiling.

90. Furthermore, it cannot be maintained that a subsidiary purpose of Directive 92/80 was to prohibit the application of the 'minimum duty' method of taxation. In fact, when Directive 92/80 was amended, the Community legislature considered that there was 'nothing to prevent' Member States from applying that method, which is therefore in conformity with the system or, at the very least, compatible with it.

91. Accordingly, the answer to the second question posed by the Finanzgericht Düs-

24 — Emphasis added.
25 — Emphasis added.

seldorf should be that Article 3(1) of Directive 92/80 does not constitute a provision sufficiently precise to enable an individual to rely on it before a national court and to oblige that court not to apply a minimum specific duty, for which its national legislation provides, in combination with an *ad valorem* duty.

Conclusion

92. I therefore propose that the questions referred by the Finanzgericht Düsseldorf should be answered as follows:

(1) Article 3(1) of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes, in the wording in force up to 31 December 1998, should be interpreted as not permitting the levying on cigars and cigarillos of a minimum specific tax in combination with an *ad valorem* duty.

(2) Article 3(1) of Directive 92/80 does not constitute a provision sufficiently precise to enable an individual to rely on it before a national court and to oblige that court not to apply a minimum specific duty, for which its national legislation provides, in combination with an *ad valorem* duty.