OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 4 May 2006 [1]

1. By this reference for a preliminary ruling, the Unabhängiger Finanzsenat, Außenstelle Klagenfurt (Independent Finance Tribunal, Klagenfurt Division) (Austria) raises questions relating essentially to the interpretation of Section 6(2) of Annex XIII to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded. [2]

2. At issue, more specifically, is the question whether the Republic of Austria can apply legislation by which the exemption from excise duty for cigarettes imported from Slovenia is limited to 25 cigarettes, provided that they are brought into Austria in the personal luggage of residents of Austria who enter its tax territory directly from Slovenia via a land border or inland waters.

I — Facts of the case in the main proceedings, legal background and questions referred to the Court for a preliminary ruling

3. This reference was made in the context of proceedings brought by Ms Valeško, a resident of Austria, against a decision made by the Zollamt Klagenfurt (Klagenfurt Customs Office; 'the Zollamt') concerning the import into Austrian territory on 10 July 2004 of 200 cigarettes from Slovenia, whereby the Zollamt refused to grant Ms Valeško exemption from excise duty in respect of 200 cigarettes and assessed her tobacco tax liability in respect of the 175 cigarettes which exceeded the applicable allowance of 25 cigarettes.

4. That decision to refuse to grant an exemption in respect of 175 cigarettes imported by Ms Valeško was based on the

1 — Original language: Portuguese.

2 — OJ 2003 L 236, p. 33 ('the Act of Accession').

Tabaksteuergesetz (Law on Tobacco Duty) of 31 August 1994,[3] in particular on Paragraph 29a.

5. Paragraph 29(1) of the TabStG establishes, first of all, that '[t]obacco products purchased in another Member State where they are in free circulation by a natural person for his own use and introduced by him into the tax territory shall be duty-free if they are for private, non-commercial purposes'.

6. In addition, Paragraph 29a of the TabStG provides:

'1. During the transitional periods mentioned in Paragraph 44f(2), the exemption from excise duty under Paragraph 29 applicable to tobacco products imported into the tax territory in travellers' personal luggage shall be limited to

...

(3) 200 cigarettes on entry from the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Poland, the Republic of Slovenia and the Slovak Republic.

2. By way of derogation from subparagraph 1, the exemption from excise duty applicable to tobacco products imported in the personal luggage of travellers who are normally resident in the tax territory and enter that territory directly via a land border or inland waters shall be limited, during the transitional periods mentioned in Paragraph 44f (2), to

...

(2) 25 cigarettes on entry from the Slovak Republic, the Republic of Slovenia or the Republic of Hungary.'

7. Paragraph 44f(2)(4) of the TabStG provides that Paragraph 29a is to enter into force at the same time as the Act of Accession and is to apply during the transitional period in respect of, inter alia, the Republic of Slovenia, up to 31 December 2007.

3 — BGBl. 704/1994, as amended by the Tax Amendment Law (Abgabenänderungsgesetz) of 19 December 2003 (BGBl. I, 124/2003; 'the TabStG').

8. According to Paragraph 3a of the Verbrauchsteuerbefreiungsverordnung (Regulation concerning exemptions from excise duties) of 5 January 1995: [4]

'1. The exemption from excise duty applicable to tobacco products imported in the personal luggage of travellers who are normally resident in the territory to which this Regulation applies and who enter that territory via a land border with States other than the Member States of the European Union and the EFTA States shall be limited to:

1. 25 cigarettes, or

...

2. Subparagraph 1 shall not apply to tobacco products which can be proved to have been purchased in the territory to which this Regulation applies or in another Member State of the European Union where they were in free circulation for tax purposes and in respect of which the excise duty has not been reimbursed.

3. Subparagraph 1 shall also apply to tobacco products imported from the Swiss Samnauntal customs enclave.

...'

9. Ms Valeško appealed against the decision of the Zollamt requiring her to pay tobacco tax on the 175 cigarettes which exceeded the applicable allowance of 25 cigarettes, arguing that the exemption limit of 25 cigarettes prescribed in Paragraph 29a of the TabStG is contrary to Community law. By decision of 17 December 2004, the Zollamt rejected that objection as unfounded.

10. Ms Valeško then appealed against that decision to the Unabhängiger Finanzsenat, Außenstelle Klagenfurt, which referred the following questions to the Court for a preliminary ruling:

'(1) Are the provisions contained in Section 6(2) of Annex XIII to the Act [of Accession], which state that, without prejudice to Article 8 of Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, and having informed the Commission, Member

4 — BGBl. 3/1995. The Regulation was amended inter alia with effect from 1 July 1997 by the Verordnung: Änderung der Verbrauchsteuerbefreiungsverordnung (Regulation amending the Regulation concerning exemptions from excise duties) of 19 June 1997, BGBl. II, 162/1997.

States may, as long as the above derogation applies, "maintain" the same quantitative limits for cigarettes which may be brought into their territories from Slovenia without further excise duty payment as those applied with regard to imports from third countries, to be interpreted as meaning — in the light of the technical term "maintain" — that they permit quantitative limits which applied in a Member State until the accession of the Republic of Slovenia, inter alia in relation to the Republic of Slovenia as a third country?

(2) If the Court of Justice concludes that the Treaty provisions in question are not in fact to be construed as permitting quantitative limits which applied in a Member State until the accession of the Republic of Slovenia, inter alia in relation to the Republic of Slovenia as a third country:

on a proper construction of Articles 23 EC, 25 EC and 26 EC, do the rules of a Member State, under which the exemption from excise duty applicable to tobacco products imported in the personal luggage of travellers who are normally resident in the tax territory of that Member State and enter that territory directly via a land border or inland waters is limited to 25 cigarettes on entry from certain other Member States, comply with the principles of the free movement of goods where a quantitative limit of that kind exists only in respect of a customs enclave in a single third country (the Swiss Confederation) whilst from any other third country importation of 200 cigarettes free of excise duty into that Member State is allowed?'

11. Those questions require the Court to interpret a number of provisions of Community legislation including, first of all, Section 6(2) of Annex XIII to the Act of Accession, which provides:

'...

By way of derogation from Article 2(1) of Directive 92/79/EEC, Slovenia may postpone the application of the overall minimum excise duty of EUR 60 and EUR 64 per 1 000 cigarettes for cigarettes of the price category most in demand until 31 December 2007, provided that during this period Slovenia gradually adjusts its excise duty rates towards the overall minimum excise duty provided for in the Directive.

Without prejudice to Article 8 of 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 [OJ 1992 L 76, p. 1], Directive as last amended by Directive 2000/47/EC [of 20 July 2000] [OJ 2000 L 193, p. 73], and having informed the Commission, Member States may, as long as the above derogation applies, maintain the same quantitative limits for cigarettes which may be brought into their territories from Slovenia without further excise duty payment as those applied with regard to imports from third countries. Member States making use of this possibility may carry out the necessary checks provided that these checks do not affect the proper functioning of the internal market.'

12. Article 8 of Directive 92/12 provides that '[a]s 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'.

13. According to Article 45(1) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty: [5]

'Subject to Articles 46 to 49, goods contained in the personal luggage of travellers coming from a third country shall be admitted free of import duties, provided such imports are of a non-commercial nature.'

14. As regards cigarettes, Article 46(1)(a) of Regulation No 918/83 prescribes 200 as the maximum quantity to which the relief referred to in Article 45(1) is limited.

15. Article 49(1) of the said regulation provides:

'Member States may reduce the value and/or the quantities of goods allowed to enter duty-free if they are imported by:

— persons residing in the frontier zone,

— frontier workers,

5 — OJ 1983 L 105, p. 1.

— the crews of means of transport used between third countries and the Community.

...'

16. Article 1 of Council Directive 69/169/EEC of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel, [6] as amended by Fourth Council Directive 78/1033/EEC of 19 December 1978 [7] and by Council Directive 94/4/EC of 14 February 1994 amending Directives 69/169/EEC and 77/388/EEC and increasing the level of allowances for travellers from third countries and the limits on tax-free purchases in intra-Community travel [8] provides:

'Goods contained in the personal luggage of travellers coming from third countries shall be exempt from the turnover tax and excise duty levied on imports if the imported goods have no commercial character and the total value of the goods does not exceed ECU 175 per person.'

6 — OJ, English Special Edition 1969 (I), p. 232.

7 — OJ 1978 L 366, p. 31.

8 — OJ 1994 L 60, p. 14 ('Directive 69/169').

17. Article 4(1)(a) of Directive 69/169 provides that each Member State is to set a quantitative limit of 200 cigarettes for exemption from turnover tax and excise duty.

18. Article 5 of the same directive provides:

'1. Member States may reduce the value and/or quantity of the goods which may be admitted duty-free, down to one tenth of the values and/or quantities provided for in Article ... 4(1), column II, where such goods are imported from another Member State by persons resident in the frontier zone of the importing Member State or in that of the neighbouring Member State, by frontier zone workers, or by the crew of the means of transport used in international travel.

However, duty-free entitlement in respect of the goods listed below may be as follows:

(a) tobacco products

40 cigarettes

...

2. Member States may set lower limits as to value and/or quantity for the exemption of goods when they are imported from a third country by persons resident in the frontier zone, by frontier zone workers or by the crew of the means of transport used in travel between third countries and the Community.

...

8. Member States may reduce the quantities of the goods referred to in Article 4(1)(a) and (d) for travellers coming from a third country who enter a Member State.'

II — Legal analysis

19. It follows from the relevant provisions of Austrian law that a quantitative exemption from excise duty for 25 cigarettes applies to cigarette imports undertaken personally by Austrian residents returning to Austria from Slovenia via a land border or inland waters. By contrast, if those same Austrian residents, again personally, import cigarettes while travelling from a third country (other than the Swiss Samnauntal customs enclave), the relevant exemption would be for 200 cigarettes.

20. Austrian legislation thus applies an exemption from excise duty that is limited to 25 cigarettes for imports from a Member State (in the present case, the Republic of Slovenia) which is *lower* than the limit of 200 cigarettes which applies to imports from third countries other than the Swiss Samnauntal customs enclave, which is effectively in a similar position to the Republic of Slovenia. Imports of cigarettes into Austria which are undertaken by travellers coming from a Member State (the Republic of Slovenia, in this case) are thus treated less favourably than imports of cigarettes from virtually any third country.

21. Viewed from that perspective, the case shows apparent discrimination against tobacco imports from a Member State (in the present case, the Republic of Slovenia), as against tobacco imports by travellers from a third country, other than the Swiss Samnauntal customs enclave.

22. Such disparity of treatment can, however, be objectively justified and may have been expressly sanctioned by Community

law. It must be noted in that regard that Section 6 of Annex XIII to the Act of Accession expressly provides that 'Member States may ... maintain the same quantitative limits for cigarettes which may be brought into their territories from Slovenia without further excise duty payment as those applied with regard to imports from third countries.'

question is given by Directive 69/169 and by Regulation No 918/83. It is clear from Article 4(1)(a) of Directive 69/169 and from Article 46(1)(a) of Regulation No 918/83 that, in principle, 200 cigarettes are duty-free. The Member States may, however, reduce that quantitative limit on imports, according to Article 5 of Directive 69/169 and Article 49(1) of Regulation No 918/83.

III — Question 1

23. The referring court focuses in its first question on the problem of interpreting the word 'maintain' in Section 6(2) of Annex XIII to the Act of Accession. The issue to be determined is whether that word allows the quantitative restrictions applicable in Austria prior to the accession of the Republic of Slovenia to be maintained with regard inter alia to that country as a third country, or whether, on the contrary, that word should be construed as meaning that the quantitative limits which currently apply in Austria with regard to third countries may be maintained.

24. In any event, irrespective of whether the word 'maintain' in Section 6 is interpreted as referring to the past or the present, it is important to determine which quantitative limits, according to Community law, the Member States may apply to the importation — free of excise duty, value added tax or customs duty — of cigarettes by travellers from third countries. The answer to that

25. Article 5(8) of Directive 69/169 is particularly relevant in that regard. It states: 'Member States may reduce the quantities of the goods referred to in Article 4(1)(a)' — meaning the quantity of 200 cigarettes which are free of turnover tax and excise duty — 'for travellers coming from a third country who enter a Member State'.

26. The Austrian legislation in this case, which reduces to 25 the duty-free allowance for cigarette imports, was in fact enacted on the basis of Article 5(8) of Directive 69/169 on travel. So far as concerns the interpretation of that provision — which is central to this case — it matters little whether one is looking at the period before or after the accession of the Republic of Slovenia. I shall

turn first of all to the interpretation of Article 5(8) of Directive 69/169 in order to determine whether it allows the Member States to adopt legislation such as that at issue in this case in relation to certain third countries only.

27. In that regard, the Commission does indeed take the view that the Austrian legislation at issue is incompatible with Article 5(8) of Directive 69/169. Even before the accession of the Republic of Slovenia, the Austrian legislation referred to was contrary to Community law. According to that argument, Article 5(8) of Directive 69/169 permits a Member State to reduce the allowance to less than 200 cigarettes but only uniformly, without distinguishing between third countries. The fact that the allowance of 200 cigarettes is applied to almost all third countries by the Austrian legislation at issue, whereas the reduced allowance of 25 cigarettes is applied to others (currently only the Swiss Samnauntal customs enclave) amounts to discrimination which is not permissible under Article 5(8) of Directive 69/169. That provision must be interpreted in the light of the principle of international trade law which prohibits discrimination between different third countries.

28. Neither, according to the Commission, is the Republic of Austria entitled to adopt legislation which reduces the allowance to 25 cigarettes solely in respect of a category of persons not provided for in Article 5(8) of Directive 69/169, namely residents of Austria who cross a land border or an internal waterway to return to Austria from Slovakia, Slovenia, Hungary or the Swiss Samnauntal customs enclave.

29. I do not share the Commission's view. Although there is in international trade law a principle of non-discrimination between third countries [9] by reference to which Article 5(8) of Directive 69/169 must be interpreted, that does not mean that any differentiating treatment is prohibited. Such treatment can be justified on objective grounds which preclude the existence of genuine discrimination. In particular, in the present case, it must be acknowledged that it is possible for Member States to adopt — on the basis of Article 5(8) of Directive 69/169 — the measures necessary to maintain the effectiveness of their excise duty regimes for tobacco goods, as the reason for the adoption of such measures is often the protection of health.

30. It is true that the measures adopted on the basis of Article 5(8) of Directive 69/169

9 — See, in particular, Article I(1) of the 1994 General Agreement on Tariffs and Trade ('the GATT').

must in no circumstances constitute a means of arbitrary or unjustifiable discrimination between States. [10] However, that does not appear to be the case in the Austrian legislation at issue. As the Austrian Government submits in its observations, there are objective grounds to justify, in accordance with Community law, not extending to all third countries and to all travellers without distinction as to their place of residence the reduction of the exemption limit to 25 cigarettes that was adopted in the Austrian legislation.

31. First of all, it must be noted that the wording of Article 5(8) of Directive 69/169 is quite broad. It follows from that wording that the Member States may introduce an allowance of less than 200 cigarettes in respect of imports by travellers from a third country. Every Member State therefore has a general power expressly granted by an actual provision of the directive to restrict the quantitative limits on duty-free imports specifically in relation to tobacco products. [11] Article 5(8) of Directive 69/169 does not therefore require a Member State to reduce those quantitative limits in the same way for all third countries and for all travellers without distinction. It is relevant therefore to check whether, taking into account the objectives of Directive 69/169 and in particular of Article 5(8), there is in the present case an objective justification for differentiating between third countries and between groups of travellers.

32. As for the rationale of Article 5(8) in the context of the general scheme of Directive 69/169, it must be noted that the aim of that directive is generally to facilitate international passenger traffic from third countries by simplifying the clearance through customs of goods contained in personal luggage. [12] To that end, the directive sets quantitative limits or value limits below which travellers coming from third countries can import goods contained in their personal luggage free of turnover tax and excise duty.

33. However, Article 5 of Directive 69/169 provides for the Member States to be able to introduce restrictions on those established limits a priori and generally in Articles 2 and

10 — See Article XX of the GATT concerning the general exceptions by which members of the World Trade Organisation may derogate from the GATT rules.

11 — It must be noted that '[a]s the Court has consistently held, in the field covered by the Directive, the Member States retain only the limited powers granted them by the actual provisions of the Directive' (Case C-96/91 *Commission* v *Spain* [1992] ECR I-3789, paragraph 10 and the case-law cited).

12 — Case C-394/97 *Heinonen* [1999] ECR I-3599, paragraphs 24 and 25. In the Opinion of Advocate General Saggio in that case (point 16), both Directive 69/169 and Regulation No 918/83 'confer on private individuals the right to import into the territory of Member States a specified quantity of goods which is not subject to customs duty or to turnover tax and excise duty, provided that the importation is of a non-commercial nature. These are clearly measures which are aimed, on one hand, at facilitating international travel and, on the other, at facilitating the work of the customs authorities of the Member States'.

4 of the directive in respect of imports from third countries. The Member States' power to impose such restrictions is thus an exception to the general aim of Directive 69/169 of facilitating international passenger traffic by simplifying the formalities of customs clearance on the importation of goods. The power granted to Member States in Article 5(8) to reduce the quantitative limits for the importation of two products — namely tobacco and coffee and coffee extracts and essences — appears in the context of the exceptions provided for in Article 5.

34. It is true that Article 5(2) provides that the Member States 'may set lower limits as to value and/or quantity for the exemption of goods' if they are imported in the context of frontier zone travel from third countries. It does not however flow from that that Article 5(8) may not underpin legislation such as the Austrian legislation at issue. Indeed, Article 5(8) relates solely to certain products, tobacco and coffee. It is specific, as opposed to Article 5(2) which is wider in scope, applying as it does to goods in general. Accordingly, the existence of Article 5(2) does not preclude legislation adopted on the basis of Article 5(8) from also taking account of considerations relating to the geographical proximity of the State of origin of the tobacco or coffee products imported by travellers. Such considerations can be taken into account by a Member State when deciding to reduce the quantitative limits of the cigarette allowance in order to tackle short frontier zone journeys made for the purchase of cigarettes that are subject to a much lower level of excise duty.

35. The rationale for being able to reduce the quantitative import limits laid down in Article 5(8) stems from the specificity of the products concerned and the different national sensitivities as to their consumption. The products concerned — tobacco and coffee and extracts and essences of coffee — can be priced very differently in different countries due to the great variety in tax regimes, particularly in terms of the excise duty to which they are subject. [13] That is particularly the case in relation to tobacco products. Although a State's aims in adopting a high level of excise duty can vary, the aim of discouraging consumption, in connection particularly with the protection of health, is entirely legitimate. [14] As regards tobacco

13 — As regards coffee, excise duty is currently levied by five Member States. See, in that regard, the proposal for a Council directive on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries presented by the Commission (COM(2006) 76 final, p. 5).

14 — It is common knowledge that excise duty is an indirect tax on consumption which can have the budgetary purpose of securing revenue for the public purse as well as the purpose of acting as a deterrent against the consumption of certain products, particularly on the grounds of health protection. Recognition of that duality of purpose so far as excise duty is concerned is apparent in Case C-434/97 *Commission* v *France* [2000] ECR I-1129, paragraph 19, and in point 13 of the Opinion of Advocate General Saggio in that case. See also the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-325/99 *Van de Water* [2001] ECR I-2729, point 25.

products specifically, the fiscal levy is an effective instrument for discouraging consumption and thus protecting the population's health, as the Community expressly acknowledges. [15]

36. It follows that a Member State is justified in adopting measures on the basis of Article 5 (8) of Directive 69/169 which enable it to avoid its policy of taxing tobacco products being frustrated. If the residents of that State could easily go to third countries in which cigarettes are taxed at a much lower rate — because those countries are not obliged to adhere to an overall minimum level of excise duty equivalent to that laid down in Article 2 of Directive 92/79/EEC [16] — and buy and import those products at a much lower price, there would clearly be an impact on the effectiveness of such a fiscal policy in terms of discouraging the consumption of cigarettes.

37. The Republic of Austria must therefore be able, entirely consistently with the wording and rationale of Article 5(8) of Directive 69/169, to reduce to 25 the quantitative limit on the importation of cigarettes by travellers returning overland to Austria from certain third countries *only*. Furthermore, it is possible for such a reduced allowance to apply only to travellers resident in Austria, because it is effectively to them that the fiscal policy on tobacco products which the Member State may legitimately wish to safeguard is addressed.

38. The differentiation at issue in the present case can therefore be justified objectively. That justification stems from the combination of two elements: the absence in those countries treated differently of a level of duty on cigarettes which is equivalent to the minimum level of duty on those products prescribed by Community law, and the geographical proximity of those countries to Austria, which encourages residents of Austria to make short journeys to buy such products.

39. To the extent that such circumstances are established, as appears to be the case, the differentiation between certain adjoining countries, as against third countries which are not Austria's neighbours or which, even if they are, tax cigarettes above the minimum rate established under Community law, is objectively justified.

15 — Article 6 of the WHO Framework Convention on Tobacco Control signed in Geneva on 21 May 2003 and approved by Council Decision 2004/513/EC of 2 June 2004 (OJ 2004 L 213, p. 8) establishes that '[t]he Parties recognise that price and tax measures are an effective and important means of reducing tobacco consumption ...'.

16 — Council Directive of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8). After amendment by Council Directive 2002/10/EC of 12 February 2002 (OJ 2002 L 46, p. 26), Article 2 is worded as follows: 'Each Member State shall apply an overall minimum excise duty (specific duty plus ad valorem duty excluding VAT), the incidence of which shall be set at 57% of the retail selling price (inclusive of all taxes) and which shall not be less than EUR 60 per 1 000 cigarettes for cigarettes of the price category most in demand. As from 1 July 2006, the figure of "EUR 60" shall be replaced by "EUR 64".'

40. Such differentiated treatment must, furthermore, be proportionate to the purpose. If, in order to prevent travel (for the purchase of cigarettes) to adjoining countries which do not levy the overall minimum excise duty on cigarettes prescribed by Community law, the Republic of Austria were required to reduce the quantitative limits of the allowance in a uniform manner for imports from all the third countries of the world by adopting the approach endorsed by the Commission, such legislation would be disproportionate to the purpose.

41. Indeed, it would be entirely contrary to the principle of proportionality if, in the exercise of the power granted to them under Article 5(8) of Directive 69/169, Member States were obliged to reduce the allowance for travellers from all third countries or, on the other hand, not to reduce that allowance at all. Such an 'all or nothing' solution disregards the fact that the key objective of Directive 69/169 is, it must be recalled, to liberalise the import taxation scheme in international passenger travel between third countries and the Community and to facilitate such travel. There is a tension between that general objective of Directive 69/169 and the power provided for in Article 5(8) of the directive in so far as exercising that power impedes international passenger travel. The need to find a balance between exercising the power provided for in Article 5(8) of Directive 69/169 and the key objective of Directive 69/169 means that a reduction of the cigarette allowance adopted by a Member State on the basis of Article 5 (8) is made without going beyond that which is required to ensure that the State's objectives, which are recognised under Community law, are achieved.

42. I therefore take the view that Article 5(8) of Directive 69/169 must be interpreted as meaning that legislation adopted by a Member State is compatible with Article 5(8) where such legislation reduces the quantitative limits of the allowance for the importation of cigarettes by individuals residing in that Member State only as from adjoining third countries which do not impose a level of taxation that is at least equivalent to the minimum excise duty prescribed under Community law.

43. Consequently, Section 6 of Annex XIII to the Act of Accession must be interpreted as not precluding the Republic of Austria from temporarily maintaining a reduced exemption from excise duty of 25 cigarettes for imports undertaken by travellers resident in Austria who are coming from Slovenia overland or by internal waterways, such reduced exemption being equal to that which is currently being applied by the Republic of Austria in relation to the neighbouring third countries remaining after the last enlargement in so far as those countries do not levy an overall minimum excise duty on cigarettes equivalent to that provided for in Article 2(1) of Directive 92/79, as amended by Directive 2002/10.

IV — Question 2

44. As regards the answer to the second question submitted by the referring court, I share the Austrian Government's view. The fact that the reduced exemption from excise duty of 25 cigarettes currently applies only to a customs enclave in a single third country (Switzerland), whereas for all other third countries 200 cigarettes can be imported into Austria free of duty, is explained by the objective fact that, following the accession of the Republic of Slovenia, that area is the only area adjoining Austria which belongs to a third country in which the level of duty applicable is not at least equivalent to the overall minimum excise duty imposed by Community law. Such a situation does not affect the compatibility of the Austrian legislation at issue with regard to the Republic of Slovenia (and with regard to the other new Member States neighbouring Austria) in the transitional period during which the Republic of Slovenia is not required to apply the overall minimum excise duty for cigarettes imposed by Community law. Nor does such a situation mean that the applicability of such a reduced allowance to a Member State, such as the Republic of Slovenia, in the same way as to a customs enclave in a single third country, is likely, in the words of the referring court, not to comply with the principles of the free movement of goods in accordance with Articles 23 EC, 25 EC and 26 EC.

V — Conclusion

45. In the light of the foregoing, I propose that the Court give the following answers to the questions referred by the Unabhängiger Finanzsenat, Außenstelle Klagenfurt for a preliminary ruling:

(1) Section 6(2) of Annex XIII to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the

Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded must be interpreted as not precluding the Republic of Austria from temporarily maintaining a reduced exemption from excise duty of 25 cigarettes for imports undertaken by travellers resident in Austria who are coming from Slovenia overland or by internal waterways, such reduced exemption being equal to that which is currently being applied by the Republic of Austria in relation to the neighbouring third countries remaining after the last enlargement in so far as those countries do not levy an overall minimum excise duty on cigarettes equivalent to that provided for in Article 2(1) of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes, as amended by Council Directive 2002/10/EC of 12 February 2002.

(2) The answer to the preceding question is not affected by the fact that the quantitative restriction laid down by the Austrian legislation at issue currently applies only to a customs enclave of a single third country and that it is at the same time permitted to import into Austria 200 duty-free cigarettes from all other third countries. Such a situation does not amount to a failure to comply with Articles 23 EC, 25 EC and 26 EC.