OPINION OF ADVOCATE GENERAL JACOBS

delivered on 22 January 1998 *

1. The basic issue put to the Court in this case by the Østre Landsret (Danish Eastern Regional Court) is whether a roll of tobacco enclosed in porous cellulose which the customer makes up into a cigarette by inserting it into a separately marketed cigarette-paper tube constitutes a cigarette or smoking tobacco for the purposes of the Community rules on excise duty.

Relevant Community and national provisions

2. Council Directive 72/464/EEC [1] ('the First Directive') laid down the general principles for the harmonisation of the structure of excise duty on manufactured tobacco. Article 3(1) of the Directive defined manufactured tobacco as:

'(a) cigarettes

(b) cigars and cigarillos

(c) smoking tobacco

(d) snuff

(e) chewing tobacco'.

3. Council Directive 79/32/EEC [2] ('the Second Directive' or 'the Directive') defined the different categories of manufactured tobacco. Article 3(1) of the Directive, in the form applicable at the material time for the purposes of the main proceedings, provided:

'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'.

* Original language: English.

1 — 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) p. 3.

2 — 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.

4. Smoking tobacco was defined in Article 4(1) as provided:

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

5. The First and Second Directives were amended by Council Directive 92/78/EEC. [3] Article 2(3) of the latter directive replaced Article 3(1) of the Second Directive by the following provision:

'1. The following shall be deemed to be cigarettes:

(a) rolls of tobacco capable of being smoked as they are and which are not cigars or cigarillos within the meaning of Article 2;

(b) rolls of tobacco which, by simple non-industrial handling, are inserted into cigarette-paper tubes;

(c) rolls of tobacco which, by simple non-industrial handling, are wrapped in cigarette paper.'

6. More recently the First and Second Directives — which were subject to a number of other amendments not relevant to the present case — have been consolidated in a single text by Council Directive 95/59/EC. [4]

7. The Danish rules applicable at the material time were laid down by Law No 614 of 1988 on Tobacco Duties, as amended by Law No 825 of 1989. Paragraph 1 of the Law set out the tax rates for cigarettes, cigarette papers, smoking tobacco, chewing tobacco and snuff. Cigarettes were taxed at 60.68 øre each, plus 21.22% of the retail price given on the cigarette pack. A distinction was made between fine-cut and coarse-cut tobacco, the former being taxed substantially more heavily at DKR 531.00 per kg. Cigarette papers were taxed at 2 øre each. Although the Law did not itself contain definitions of the various tobacco products, Article 33 of the Law empowered the Minister for Fiscal Affairs to lay down the rules necessary to implement the Law, including provisions defining tobacco products in accordance with the provisions laid down by the European Communities. At the material time no definitions had been laid

3 — Council Directive 92/78/EEC of 19 October 1992 amending Directives 72/464/EEC and 79/32/EEC on taxes other than turnover taxes which are levied on the consumption of manufactured tobacco, OJ 1992 L 316, p. 5.

4 — Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, OJ 1995 L 291, p. 40.

down under that provision. It is however common ground between the parties to the main proceedings that the definitions of tobacco products in the Second Directive are directly applicable in Danish law.

The facts and the national court's questions

8. The applicant in the main proceedings, Brinkmann Tabakfabriken GmbH ('Brinkmann'), is a German company which manufactures and sells tobacco products. In 1988 it acquired an exclusive licence to produce and sell in Denmark and other countries a tobacco product called 'Westpoint'. The product comprises a packet containing 25 g of fine-cut smoking tobacco divided up into 30 industrially produced rolls of tobacco enveloped in porous cellulose. Each roll of tobacco is 68.6 mm long and consists of approximately 833 mg of fine-cut tobacco. The rolls of tobacco cannot be smoked simply by being lit but must first be covered in cigarette paper. Brinkmann sells separately specially designed cigarette-paper tubes into which the Westpoint tobacco rolls can be inserted. Alternatively the product can be wrapped in ordinary cigarette papers.

9. In April 1989 Brinkmann's Danish distributor obtained a ruling from a Danish district customs authority that Westpoint was taxable as fine-cut smoking tobacco. Later in the same year one of Brinkmann's competitors obtained an identical ruling from another district authority. That ruling was upheld on appeal by the Told-og Skattestyrelse (the Customs and Excise Authority) but then overturned on further appeal by the Momsnævn (VAT Board), the highest Danish administrative authority in matters of taxation. By a decision of 14 May 1990, confirmed by a further decision of 23 October 1990, the Board ruled that Westpoint should be taxed as cigarettes, which attract a higher rate of duty than smoking tobacco.

10. On 2 April 1990, shortly before the decision of 14 May 1990, Brinkmann launched Westpoint on the Danish market. Brinkmann's Danish distributor was informed by the VAT Board of the appeal proceedings before it four days later, on 6 April 1990. At the hearing before the Board on 1 May 1990 Brinkmann asked the Board, in the event of the latter's decision being unfavourable to it, to suspend the operation of the decision in order to limit Brinkmann's losses in the event of the Board's decision being inconsistent with a ruling by this Court. Brinkmann's request was refused by the Board in its decision of 14 May 1990 and, although repeated at a re-hearing of the case, was again refused by the Board in its decision of 23 October 1990.

11. Brinkmann brought proceedings before the referring court by an application of 8 January 1991, claiming that the Danish Ministry for Fiscal Affairs was obliged to classify Westpoint as smoking tobacco. It also claimed that, since the combined effect of the higher rate of duty on the rolls of tobacco and the duty payable on the cigarette papers and tubes had forced Westpoint out of the Danish market, it was entitled to compensation for all the losses thereby incurred.

12. Against that background the national court seeks a preliminary ruling from this Court on the following questions:

'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?

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?'

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?

Question 1

13. Brinkmann contends that Westpoint was to be classified as smoking tobacco under the Second Directive in its original form. The Danish Ministry for Fiscal Affairs, the Finnish Government and the Commission consider that it was to be classified as a cigarette.

14. I share Brinkmann's view that Westpoint fell to be classified as smoking tobacco. That conclusion is supported by the wording of the Directive and is consistent with its aims.

15. As regards the wording of the Directive, it is true that there is no specific definition of a product such as Westpoint in the Second Directive. Nevertheless, it seems to me that the product corresponds more closely to the definition of smoking tobacco. The definition

of cigarettes is a precise one comprising three characteristics: (a) they must be rolls of tobacco; (b) they must be capable of being smoked 'as they are'; and (c) they must not be cigars or cigarillos. It is common ground that Westpoint lacks the second characteristic.

16. Smoking tobacco, on the other hand, is defined as 'tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing'. Westpoint has those characteristics. It has been cut and is capable of being smoked without further industrial processing. That is so notwithstanding the fact that it has the additional characteristic of being enveloped in porous cellulose, a characteristic that does not bring it within the definition of a cigarette.

17. I am not persuaded by the argument put forward by the Danish Ministry and Finnish Government that cigars must sometimes be cut before they can be smoked and to that extent cannot be smoked 'as they are' either. What the term 'as they are' implies is that the product must be finished. A cigar, even where it must be cut, is a finished product. It does not entail assembly of two separately marketed products.

18. Support for the above view is to be found in Article 3(1) of the Directive, as amended by Directive 92/78. That provision sets out three independent definitions of a cigarette: 'rolls of tobacco capable of being smoked as they are' (subparagraph (a)); 'rolls of tobacco which, by simple non-industrial handling, are inserted into cigarette-paper tubes' (subparagraph (b)); and 'rolls of tobacco which, by simple non-industrial handling, are wrapped in cigarette paper' (subparagraph (c)). That formulation is inconsistent with the view that Directive 92/78 merely clarified rather than extended the definition of a cigarette. Subparagraph (a), the original provision, remains untouched. Westpoint is not classified as a cigarette by virtue of that provision but by virtue of the new free-standing definitions in subparagraphs (b) and (c).

19. Moreover, the transitional provision in Article 3(1), which allows Germany to continue to tax the rolls of tobacco referred to in (b) as fine-cut smoking tobacco, tends to support the view that Westpoint fell outside the original definition. At the very least it shows that the Council accepted that the original provision was sufficiently open to that interpretation to justify a transitional provision for a Member State where a manufacturer established there had invested on the basis of that interpretation.

20. The conclusion that Westpoint did not meet the definition of a cigarette under the Directive in its original form is moreover supported by the account provided by the

national court in its order for reference of the rulings given by national authorities. It appears that the product was classified as smoking tobacco in Germany, the United Kingdom and, following an appeal, the Netherlands. Moreover, it was also so classified in Denmark by two district customs offices and the Customs and Excise authority; the Danish VAT Board alone took a different view.

21. Turning to the aims of the legislation, I do not think they provide conclusive guidance. As the Danish Ministry maintains, the legislation seeks to prevent distortions of competition between the different categories of tobacco belonging to the same group: see the fifth recital in the preamble to the First Directive. Some guidance about the thinking behind the Directive can be obtained from the explanatory memorandum accompanying the Commission's proposal for a Second Directive, cited in the Danish Ministry's observations. The Commission considered that the inclusion of all smoking tobacco within a single group was justified by the fact that, according to the Commission, all such tobacco, even fine-cut tobacco, could be smoked in a pipe. The Commission was nevertheless concerned that, because fine-cut tobacco could also be used by consumers for rolling their own cigarettes, there might be a distortion of competition between fine-cut smoking tobacco and cigarettes. It proposed to keep the matter under review. Subsequently, Article 1(2) of Directive 92/78 amended the categories of manufactured tobacco in Article 3 of the First Directive by distinguishing between 'fine-cut tobacco for the rolling of cigarettes' and 'other smoking tobacco'. The former is defined in a new Article 4a of the Second Directive introduced by Article 2(4) of Directive 92/78.

22. In the light of the above it is apparent that the root of the problem in this case is that there is inherent potential for distortion of competition where fine-cut smoking tobacco is taxed at a lower rate than cigarettes. The two products are in competition to a significant degree. It is perhaps for that reason that Denmark imposes a tax on the cigarette papers themselves and on cigarette-paper tubes such as those sold by Brinkmann. If such a tax were pitched at an appropriate rate it would presumably be possible to cancel out the advantage of the lower rate of tax on fine-cut tobacco used for making cigarettes.

23. Inevitably, therefore, Westpoint is potentially in competition both with finished cigarettes and with fine-cut smoking tobacco (which can be used to roll cigarettes either manually or using one of the devices designed for that purpose available on the market). It is possible that the somewhat easier assembly of Westpoint may attract some consumers who would normally prefer the convenience of the finished product and would not otherwise be tempted to roll their own cigarettes despite the price advantage. To that extent taxing Westpoint as smoking tobacco would exacerbate the potential distortion of competition between cigarettes and fine-cut smoking tobacco. It is however unclear what propor-

tion, if any, of smokers who prefer finished cigarettes Westpoint would be able to attract. The need for assembly will be inconvenient in many social contexts. Moreover, the degree of manipulation and dexterity still required and the disadvantage of the product being in two separate boxes seems likely in practice to prove a significant deterrent for many smokers.

24. Competition with fine-cut smoking tobacco seems equally, if not more, likely. For some smokers the rolling of their own cigarettes may be motivated by factors unconnected with the price, such as image, which might make Westpoint unattractive (although Westpoint, like loose tobacco, can also be wrapped in cigarette papers). However, for smokers whose primary motive for rolling their own cigarettes is that it is cheaper, Westpoint seems likely to be an attractive proposition (provided that the price of the product compares favourably with self-rolled cigarettes). Indeed the characteristics of Westpoint mentioned in the Danish patent suggest that it was designed to compete primarily with smoking tobacco for rolling cigarettes:

'— 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'.

The sole advantage which Westpoint has by comparison with cigarettes, namely a lower

rate of tax, is shared by fine-cut smoking tobacco.

25. It is true, as the Commission points out, that the characteristics of Westpoint are such as to make it resemble more closely an industrially produced cigarette. To that extent it more closely fulfils the same needs as such a cigarette. However, it might be replied that Westpoint still lacks the main distinguishing feature of an industrially produced cigarette, namely being ready to smoke. Indeed, if by virtue of being subject to a higher duty Westpoint were priced at the same level as cigarettes then, unless a consumer had a very strong preference for the particular taste of Westpoint, the aforesaid disadvantages seem such as to dissuade him from buying it. Taxing Westpoint as a cigarette when it failed to meet such an essential need would be likely to render it uncompetitive. On the other hand, taxing the product as smoking tobacco would allow it to compete on equal fiscal terms with fine-cut tobacco for rolling cigarettes, its particular advantages over such tobacco attracting some but certainly not all smokers who have traditionally rolled their own cigarettes. In other words, classification as smoking tobacco might on balance produce the lesser distortion of competition.

26. Consequently, although the view taken by the Council, when it amended the Directive, that Westpoint was in sufficiently close competition with cigarettes to be classified as such can certainly not be said to be wrong or unreasonable, I do not think any conclusive arguments can be drawn from the Directive's aims for the purpose of interpreting the original provision. For similar reasons the Danish Ministry's reference to the principles laid down by the Court in the context of Article 95 of the Treaty does not get us any further. As the Danish Government states, in *Commission* v *Denmark* [5] the Court, referring to *Rewe*, [6] held that in order to determine whether products are similar for the purposes of the prohibition laid down in the first paragraph of Article 95 it was necessary to consider 'whether they have similar characteristics and meet the same needs from the point of view of consumers'. As already noted, it is at least arguable that on that test Westpoint is closer to fine-cut smoking tobacco than to cigarettes because, like such tobacco, it lacks the key characteristic of a cigarette, as defined in the legislation, of being ready to smoke and to that extent also fails to serve the same need as an industrially produced cigarette.

27. I therefore conclude that under the Second Directive, in its original form, a product such as Westpoint was to be classified as smoking tobacco within the meaning of Article 4(1) of the Directive.

5 — Case 106/84 [1986] ECR 833.

6 — Case 45/75 *REWE* v *Hauptzollamt Landau* [1976] ECR 181.

Questions 2, 3 and 4

28. By its remaining questions, which may conveniently be answered together, the national court inquires about the conditions under which a Member State incurs liability for loss occasioned as a consequence of incorrect classification of a product under the Directive (Question 2); in that connection the national court asks whether it is relevant that the authorities refused to suspend the operation of the decision at the applicant's request (Question 4). The national court also asks whether the definitions of manufactured tobacco products in the Directive are properly implemented if the Minister for Fiscal Affairs is empowered to lay down definitions of tobacco products but has not done so (Question 3(a)); if not, the national court also asks whether it matters, as regards the answer to Question 2, that the parties to the case are in agreement that the definitions in the Directive are directly applicable (Question 3(b)).

29. In that regard the Court's ruling in *Denkavit* [7] contains a useful statement of the relevant principles:

'According to the consistent case-law of the Court, the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (see, in particular, Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31, and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20).

In those judgments, the Court, having regard to the circumstances of the cases, held that Community law recognises the existence of a right to reparation when 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 suffered by the injured parties (*Brasserie du Pêcheur and Factortame*, cited above, paragraph 51, and *Dillenkofer and Others*, cited above, paragraphs 21 and 23). The Court has in particular held that those conditions apply where a Member State incorrectly transposes a Community directive into national law (Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 40).

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

7 — Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit International and Others* v *Bundesamt für Finanzen* [1996] ECR I-5063.

to be characterised as a sufficiently serious breach of Community law.

It follows from the Court's case-law that a breach is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers (*Brasserie du Pêcheur and Factortame*, cited above, paragraph 55, and *Dillenkofer and Others*, cited above, paragraph 25). One of the factors that may be taken into consideration in this regard is the clarity and precision of the rule breached (*Brasserie du Pêcheur and Factortame*, cited above, paragraph 56, and *British Telecommunications*, cited above, paragraph 42).' [8]

30. Before applying those principles to the present case it is appropriate to answer Question 3. It is clear that the mere conferring of a power on the Minister to lay down implementing provisions does not constitute adequate implementation of the Directive. However, the fact that the Danish authorities apply the definitions in the Directive is relevant to the question of the Member State's liability. Where the authorities of a Member State seek to apply the definitions in the Directive, but do so incorrectly, any resultant loss arises not from non-implementation of the definitions in ministerial provisions but from the authorities' misapplication of the Directive. Thus, in the light of the principles set out above, the question arises whether, having regard to the clarity and precision of the relevant provision of the Directive, Denmark manifestly and gravely disregarded the limits of its powers.

31. In my view it is clear that it did not. As Denmark and the Commission point out, Westpoint does not correspond exactly to either of the relevant definitions in the Directive — it falls between two stools. Nor is clear guidance to be obtained from the aims of the Directive. It was therefore necessary for the authorities of the Member States to make a choice between the two definitions.

32. Although I have on balance opted for Brinkmann's interpretation of the Directive, Denmark's view is shared in these proceedings by Finland and by the Commission and also appears to have been taken by a Netherlands Customs Inspector. It cannot be said to be untenable or to have been adopted in bad faith. Indeed Denmark's view that classification as a cigarette flows from the aims of the Directive was evidently shared by the Council in amending the Directive.

8 — Paragraphs 47 to 50 of the judgment.

33. Since it was unclear how the provisions in issue were to be applied to a product such as Westpoint, Denmark's breach of those provisions cannot be considered sufficiently serious to give rise to liability under the abovementioned rulings. There is therefore no need to consider the other conditions for liability set out in those rulings.

34. As regards Question 4, the fact that the authority refused to suspend its decision has no bearing on Denmark's liability in damages in the present case. The contrary view would be liable to paralyse administrative decision-making since administrative authorities would be unable to implement their decisions in other than the clearest of cases without exposing themselves to potentially substantial damages claims. If in a case such as the present a national court considers the interpretation of a provision to be in doubt, it may make a reference to the Court and, provided that the requisite conditions are fulfilled, consider granting interim relief, such as suspension of collection of the higher rate subject to the provision by the taxpayer of appropriate guarantees.

35. Finally, since it has not been suggested that under Danish law Denmark would incur liability in damages for an equivalent breach of national law, it appears that Denmark will not incur liability under the principle that claims based on Community law must not be treated less favourably than those based on national law.

Conclusion

36. Accordingly I am of the opinion that the questions referred by the Østre Landsret should be answered as follows:

(1) A product consisting of a roll of tobacco wrapped in porous cellulose which cannot be smoked as it is but must first be inserted into a cigarette-paper tube or wrapped in ordinary cigarette paper fell to be classified as smoking tobacco under Article 4(1) of Council Directive 79/32/EEC in the version in force on 14 May 1990.

(2) A Member State whose authorities, in applying the definitions in Directive 79/32, mistakenly classified such a product as a cigarette under Article 3(1) of the Directive does not incur liability by virtue of Community law to repair any loss or damage resulting from the mistaken classification, unless in similar circumstances such liability would arise in respect of a breach of national law.