JUDGMENT OF THE COURT (Second Chamber)

5 October 2006 *

In Case C-140/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Finanzsenat, Außenstelle Klagenfurt (Austria), made by decision of 18 March 2005, received at the Court on 25 March 2005, in the proceedings

Amalia Valeško

v

Zollamt Klagenfurt

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J. Makarczyk, R. Silva de Lapuerta, G. Arestis and J. Klučka, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 23 February 2006,

after considering the observations submitted on behalf of:

— Ms Valeško, by R. Vouk, Rechtsanwalt,

— the Austrian Government, by H. Dossi and J. Bauer, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

— the Slovenian Government, by T. Mihelič and V. Klemenc, acting as Agents,

— the Commission of the European Communities, by M. Heller and K. Gross, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 May 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns 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 [to the European Union] and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33) ('the Act of Accession'), as well as Articles 23 EC, 25 EC and 26 EC.

2 That reference was made in the course of proceedings between Ms Valeško and the Zollamt Klagenfurt (Klagenfurt Customs Office, hereinafter 'the Zollamt') concerning the exemption from excise duty applicable on the import into Austria of 200 cigarettes from Slovenia.

Legal context

Community law

3 Article 2 of the Act of Accession states:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

4 Article 10 of the Act of Accession provides:

'The application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.'

5 Article 24 of the Act of Accession reads:

'The measures listed in Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV to this Act shall apply in respect of the new Member States under the conditions laid down in those Annexes.'

6 Section 6(2) of Annexe XIII to the Act of Accession provides:

'31992 L 0079: Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes (OJ L 316, 31.10.1992, p. 8), as last amended by:

— 32002 L 0010: Council Directive 2002/10/EC of 12.2.2002 (OJ L 46, 16.2.2002, p. 26).

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 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [(OJ L 76, 23.3.1992, p. 1. Directive as last amended by Directive 2000/47/EC (OJ L 193, 29.7.2000, 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 as applied with regard to import 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.'

7 Article 8 of Directive 92/12 provides:

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

8 Article 45(1) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ 1983 L 105, p. 1), as amended by Council Regulation (EEC) No 1315/88 of 3 May 1988 (OJ 1998 L 123, p. 2, hereinafter 'Regulation No 918/83'), reads:

'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.'

9 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.

10 Article 49(1) of Regulation No 918/83 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,

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

...'

11 Article 1(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 (OJ, English Special Edition 1969 (I), p. 232), as amended 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 (OJ 1994 L 60, p. 14, hereinafter 'Directive 69/169'), provides:

'1. 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'.

12 Article 4(1)(a) of Directive 69/169 provides that each Member State is, as regards imports from third countries, to set a quantitative limit of 200 cigarettes for exemptions from turnover tax and excise duty.

13 Article 5 of Directive 69/169 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 Articles ... 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.

3. Member States may set lower limits as to value and/or quantity for the exemption of goods when they are imported from another Member State by members of the armed forces of a Member State, including civilian personnel and spouses and dependent children, stationed in another Member State.

...

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

National law

14 Paragraph 6(3) of the Tabaksteuergesetz (Law on Tobacco Duty) of 31 August 1994 (BGBl. I, 704/1994), as amended by the Abgabenänderungsgesetz (Tax Amendment Law) of 19 December 2003 (BGBl. I, 124/2003), (hereinafter 'the TabStG') provides:

'The Federal Minister for Finance shall be authorised by regulation:

(1) to order that tobacco products may be imported free of duty if they can be exempted from customs duty or excise duties pursuant to ... Regulation No 918/83 ... and any other laws adopted by the European Community:

(2) to regulate the duty-free import of tobacco goods from other Member States into the tax territory if such duty-free import is permitted under the rules in point (1):

...

(5) to exclude tobacco duty from the exemption from import duty under Paragraph 2(1) of the Law implementing customs duties if such a measure is necessary for transposing the laws adopted by the European Community or ensuring uniform taxation.'

15 Under Paragraph 29(1) of the TabStG:

'Tobacco 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.'

16 Paragraph 29a of the TabStG reads:

'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.'

17 Paragraph 44f(2)(4) of the TabStG provides:

'Paragraph 29a ... shall enter into force at the same time as the Treaty of Accession of the Czech Republic, the Slovak Republic, the Republic of Hungary, the Republic of Slovenia, the Republic of Poland, the Republic of Estonia, the Republic of Latvia and the Republic of Lithuania to the European Union and shall apply during the transitional periods in respect of

...

(4) the Republic of Slovenia up to 31 December 2007.

...'

18 On the basis of the powers conferred upon him by Paragraph 6(3) of the TabStG, the Federal Minister for Finance adopted the Verbrauchsteuerbefreiungsverordnung (Regulation concerning exemption from excise duties) of 5 January 1995 (BGBl. II, 3/1995) which was amended, with effect on and from 1 July 1997 by the Verordnung: Änderung der Verbrauchsteuerbefreiungsverordnung (Regulation amending the Regulation concerning exemption from excise duties) of 19 June 1997 (BGBl. II, 162/1997) (hereinafter 'the VerbStBefV').

19 Paragraph 1 of the VerbStBefV provides:

'1. Unless stipulated otherwise in Paragraphs 2 to 5, products subject to excise duties which are imported from a third country into the tax territory within the meaning of the laws on excise duty shall be exempt from excise duties if they are exempt from customs duty upon import into the the Community customs territory pursuant to:

(1) Regulation No 918/83 and the legal provisions adopted for its implementation,

(2) Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), and the legal provisions adopted for its implementation,

(3) the Law implementing customs duties, BGBl. No 659/1994.

2. Unless stipulated otherwise in Paragraphs 4 and 5 of this Regulation, for the purposes of the exemption from excise duties, the Community customs territory shall be replaced by the tax territory within the meaning of the excise duty laws, and third country shall be replaced by any country which falls outside the scope of Directive 92/12.'

20 Paragraph 3a of the VerbStBefV provides:

'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 ...

...

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.

...'

The main proceedings and the questions referred for a preliminary ruling

21 Coming from Slovenia, Ms Valeško, an Austrian national, returned on 10 July 2004 to the Republic of Austria, the Member State in which she resides.

22 During a check carried out at the Austrian frontier post of Grablach, she declared 200 Davidoff Gold 200 cigarettes.

23 By decision of 30 July 2004, based on Paragraph 29a of the TabStG and the exemption limited to 25 cigarettes under that provision, the Zollamt (Customs Office) levied tobacco tax on 175 of the 200 cigarettes imported by Ms Valeško, in the sum of EUR 16.80.

24 Ms Valeško appealed against that decision claiming that the exemption from excise duty limited to 25 cigarettes under Paragraph 29a of the TabStG is contrary to Community law. By decision of 17 December 2004, the Zollamt rejected that appeal.

25 Ms Valeško brought an action against that decision before the Unabhängiger Finanzsenat, Außenstelle Klagenfurt (Independent Finance Tribunal, Klagenfurt Division). She asked, should Paragraph 29a of the TabStG be applied, for a question to be referred to the Court of Justice for a preliminary ruling.

26 The national court observes that, under Austrian law, the provisions of customs law apply to the levying of excise duty on imports if goods subject to such duty are brought directly into the tax territory from a third country.

27 According to that court, Section 6(2) of Annex XIII to the Act of Accession could be interpreted as meaning that the Member States may maintain quantitative limits provided that they were already applicable, particularly with regard to the Republic of Slovenia as a third country, at the time of that State's accession to the European Union.

28 Were that interpretation to be accepted, that condition would be satisfied as regards Paragraph 29a of the TabStG, since the quantitative limit of 25 cigarettes laid down by that provision was already prescribed in Paragraph 3a of the VerbStBefV prior to the accession of the Republic of Slovenia to the European Union.

29 However, in the referring court's view, another interpretation is also possible. The wording of Section 6(2) of Annex XIII to the Act of Accession, in particular the passage 'the same quantitative limits ... as those applied with regard to imports from third countries', would permit an approach based on the state of the law in force after the accession of the Republic of Slovenia to the European Union.

30 According to that interpretation, for cigarettes coming from Slovenia, the same quantitative limits would apply as those prescribed for cigarettes from third countries that remain after the last enlargement of the European Union.

31 Were that second interpretation to be upheld, the quantitative limit of 25 cigarettes laid down in Paragraphs 29a of the TabStG and 3a of the VerbStBefV would continue to apply only to imports from the Swiss Samnauntal customs enclave because, apart from the Swiss Confederation and the Principality of Liechtenstein, Member States of the European Free Trade Association, no other third country shares a common frontier with Austria.

32 The referring court expresses doubts about the application to imports from Slovenia of the quantitative limit of 25 cigarettes, since the maintenance of such a restrictive regime seems to go beyond what the legislature intended and, therefore, to conflict with the Act of Accession as well as the principles enshrined in Articles 23 EC, 25 EC and 26 EC.

33 It was in those circumstances that the Unabhängiger Finanzsenat, Außenstelle Klagenfurt decided to stay the proceedings and to refer 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 ... Directive 92/12 ... 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, 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?'

The questions referred for a preliminary ruling

The first question

34 By its first question, the referring court seeks to ascertain whether Section 6(2) of Annex XIII to the Act of Accession is to be interpreted as meaning that it enables the Republic of Austria to maintain, on a transitional basis, its legislation containing an exemption from excise duty for cigarettes imported in travellers' personal luggage limited to 25 units, since that exemption was already in force prior to the accession of the Republic of Slovenia to the European Union, or whether that provision of the Act of Accession is to be understood as meaning that the maintenance of such an exemption is subject to the condition that it be applied by the Republic of Austria to imports from third countries by virtue of its current legislation.

35 At the outset, it must be observed that the matter of exemptions from excise duty on imports of goods contained in the personal luggage of travellers coming from third countries, in particular cigarettes, is governed by Directive 69/169.

36 The purpose of that directive, as its title suggests, is to harmonise exemptions from turnover tax and excise duty on imports in international travel. As is clear from the recitals in its preamble and from those in the preambles to the directives subsequently amending it, the aim is to liberalise still further the system of taxes on imports in travel in order to facilitate such travel (Case C-394/97 *Heinonen* [1999] ECR I-3599, paragraph 25).

37 In addition, in the field covered by Directive 69/169, the Member States retain only the limited powers granted them by the actual provisions of the directive and of the directives amending it (Case C-96/91 *Commission* v *Spain* [1992] ECR I-3789, paragraph 10, and the case-law there cited).

38 As regards, in particular, cigarettes, it is clear from Article 4(1)(a) of Directive 69/169 that the exemption from excise duty, for travel between third countries and the Community, is limited to 200 cigarettes. However, under Article 5(2) and (8) of that directive, Member States continue to have power to lower that limit subject to the conditions laid down by those provisions.

39 Those provisions, as applicable both before and after the Republic of Slovenia's accession to the European Union and at the material time in the main proceedings, have not been amended.

40 It is, in addition, common ground that the Republic of Austria adopted Paragraph 29a of the TabStG and established the exemption limited to 25 cigarettes under that provision on the basis of Article 5(8) of Directive 69/169 and that the national provision was notified by that Member State's authorities to the Commission as one of the transitional measures referred to in Article 24 of the Act of Accession.

41 Moreover, it is not disputed that that provision of the national legislation reproduced, in essentially identical terms, the exemption already laid down in Paragraph 3a of the VerbStBefV, which applied, from 1 January 1997, to imports by travellers of cigarettes from third countries bordering the Republic of Austria, in particular Slovenia, and which, since the last enlargement of the European Union, applies only to the Samnauntal customs enclave.

42 Therefore, the question arises whether, prior to the Republic of Slovenia's accession to the Union, the national legislation at issue in the main proceedings establishing the reduced exemption of 25 cigarettes could be based on the limited powers available to the Republic of Austria under Article 5(8) of Directive 69/169, and whether, following that accession, that legislation can still, in view of the intervention of Article 24 of the Act of Accession, be based on those powers.

43 The Commission submits that the question calls for a negative reply.

44 It maintains that the exception under Article 5(8) of Directive 69/169 cannot be invoked as regards a national exemption such as that in question in the main

proceedings, since it applies only to imports of goods from certain third countries and it is, moreover, limited to a specific category of travellers from those countries, namely those who are normally resident in Austria and enter that Member State directly via a land border or inland waters.

45 The first three paragraphs of Article 5 of Directive 69/169 lay down some exceptions which apply to certain specifically defined categories of travellers. Those exceptions would be superfluous and might, furthermore, be evaded if Article 5(8) had to be understood as according to the Member States a general power to add other specific categories of travellers to those defined in those first three paragraphs.

46 The recognition of such powers could also lead to the introduction of different exemption regimes in the Member States. The development of such regimes would be likely to compromise the objective of Directive 69/169, namely to facilitate international travel.

47 Finally, the Commission maintains that the interpretation which it advocates is necessary in order to comply with the principle prohibiting any discrimination between third countries in international trade.

48 Those arguments cannot be accepted.

49 As regards the argument based on the setting out in Article 5(1) to (3) of Directive 69/169 of specific exceptions applicable to certain categories of travellers, it must be observed that, among those provisions, Article 5(2) alone can be relevant to the main proceedings, since it covers imports from third countries whereas Article 5(1) and (3) concern goods from another Member State.

50 Whilst it is true that the category of travellers constituted by persons who are normally resident in Austria, the subject of the national measure in question in the main proceedings, is defined more widely than the categories represented by persons resident in the frontier zone, frontier zone workers or the crew of the means of transport used in travel between third countries and the Community within the meaning of Article 5(2) of Directive 69/169, the specific nature of the categories referred to by the last exception does not preclude the application of the exception under Article 5(8) to another category of travellers, defined more widely.

51 Indeed, that last exception is also specific since it applies only to certain exhaustively listed goods, in particular, to cigarettes.

52 According to the wording of Article 5(8) of Directive 69/169, Member States may reduce the quantities of the goods referred to in Article 4(1)(a) and (d) of that directive, among others cigarettes, for travellers coming from a third country who enter a Member State.

53 In view of the general nature of the terms used, the wording of that provision could not found a restrictive interpretation, such as that suggested by the Commission, according to which reduced exemptions adopted under that provision are permitted only if they apply to all third countries without distinction and for all categories of travellers.

54 The general nature of that wording implies, on the contrary, that, as regards the specific goods referred to in Article 4(1)(a) and (d) of Directive 69/169, among others cigarettes, a wide power is reserved to the Member States to reduce the quantities of the goods concerned.

55 It is true that a certain tension exists between that power and the general aim of Directive 69/169, which, as noted in paragraph 36 of this judgment, is to liberalise the system of taxes on imports in travel in order to facilitate such travel.

56 In making use of that power, the Member States are therefore required to limit as far as possible the negative effects which the measures adopted could have on the realisation of the general aim of Directive 69/169 and thus to strike a reasonable balance between that aim and the specific aim of Article 5(8) of Directive 69/169.

57 That specific aim must take account of the particular nature of the goods in question, namely tobacco products such as cigarettes, and of the legal interest which the provision in question in the main proceedings allows to be protected.

58 As the Advocate General pointed out in point 35 of his Opinion, fiscal legislation is an important and effective instrument for discouraging consumption of those products and, therefore, for the protection of public health.

59 It is common ground that Paragraph 3a of the VerbStBefV laying down the exemption limited to 25 cigarettes was introduced in order to prevent Austrian residents from systematically evading payment of the overall minimum excise duty on cigarettes, the rates of which are fixed by Article 2 of Directive 92/79, as amended by Directive 2002/10, by buying, often on repeated short journeys, cigarettes in third countries bordering the Republic of Austria where the tax level and therefore prices are considerably lower than those in force in that Member State, and by then importing up to 200 of those cigarettes, exempt from excise duty, on each of those journeys.

60 That specific risk of evasion of fiscal policy and impairment of the objective of protection of public health persists after the accession of the Republic of Slovenia to the European Union, since, under Section 6(2) of Annex XIII to the Act of Accession, that new Member State may, even though it is required to raise its rates gradually, postpone the application of the overall minimum excise duty on cigarettes until 31 December 2007.

61 It must also be observed that the scope of the measure in question in the main proceedings is specifically limited to what is necessary to combat such practices, which are regarded as posing, having regard particularly to their cumulative effects, a significant risk to the effectiveness of fiscal policy relating to tobacco products, and, therefore, to the imperative of the protection of public health.

62 It is important to note that that measure concerns only persons normally resident in Austria, whose protection in health matters is the responsibility of the Austrian legislature, and who enter Austria directly from a third country with a shared border where the level of taxation on cigarettes is lower than that imposed by the Community legislation in force.

63 That explains why that measure does not apply to imports from third countries bordering Austria, such as the Swiss Confederation and the Principality of Liechtenstein, where the level of taxation on tobacco products is not lower than that imposed by the Community legislation, but does apply to those coming from the Swiss Samnauntal customs enclave, since the level of taxation in that area is lower than that required by the Community legislation.

64 Moreover, the national measure at issue in the main proceedings is not applicable to journeys which are not regarded as representing a significant risk to the effectiveness of fiscal policy relating to those products, such as those made by air, or to journeys made to third countries which do not share a border with Austria.

65 It is therefore evident, given the limitation of its scope on the basis of specific considerations relating to the risk of interference with fiscal policy and the protection of public health which arises from the proximity of the countries concerned and the level of taxation on tobacco products in those countries, that the national measure at issue strikes a reasonable balance between the general aim of Directive 69/169 and the specific aim of Article 5(8) of that directive.

66 As regards the Republic of Slovenia's situation following its accession to the European Union, it is common ground that the rates of taxation applicable in that

Member State to tobacco products, although at a higher level than at that accession, are still lower than those imposed by the Community legislation in force.

67 Therefore, the specific risk which the exemption limited to 25 cigarettes is intended to combat remains, with the result that that measure can still be based on Article 5(8) of Directive 69/169, read in conjunction with Article 24 of the Act of Accession.

68 In those circumstances, the Commission's argument that the national legislation in question in the main proceedings is discriminatory cannot be accepted.

69 It follows from the foregoing that, in the light of the objectives pursued, the scope of that national legislation is limited to imports from third countries and new Member States bordering the Republic of Austria where the level of taxation on tobacco products is lower than that imposed by the Community legislation.

70 Therefore, since the situation of those third countries and new Member States bordering the Republic of Austria is not comparable to that of other third countries, the difference in treatment resulting from that legislation cannot be regarded as constituting discrimination against imports from those third countries and new Member States.

71 Having regard to the foregoing, the reply to the first question must be that Section 6(2) of Annex XIII to the Act of Accession must be interpreted as meaning that it does not preclude the Republic of Austria from maintaining, on a transitional basis, its exemption from excise duty limited to 25 cigarettes for cigarettes coming from Slovenia imported into the Republic of Austria in the personal luggage of travellers resident in that Member State and entering it directly via its land border or inland waters.

The second question

72 By its second question, the referring court is asking, in essence, whether Articles 23 EC, 25 EC and 26 EC are to be interpreted as meaning that they prohibit national legislation such as that at issue in the main proceedings, under which the exemption from excise duty for cigarettes imported in travellers' personal luggage is limited to 25 units on entry to the Republic of Austria from certain other Member States, in particular the Republic of Slovenia, because, following the last enlargement of the European Union, that exemption no longer applies to any third country with the sole exception of the Swiss Samnauntal customs enclave, since imports of cigarettes from third countries generally benefit from an exemption for 200 units.

73 In that respect, as regards the situation subsequent to the Republic of Slovenia's accession to the European Union, it is clear from paragraph 67 of this judgment that the national legislation at issue in the main proceedings can still be based on Article 5(8) of Directive 69/169, read in conjunction with Article 24 of the Act of Accession.

74 Since that national legislation is justified in the light of one of the measures referred to in Article 24 of the Act of Accession, in this case the transitional measure provided for in Section 6(2) of Annex XIII to that act, the question of the compatibility of that legislation with other provisions of primary law, such as Articles 23 EC, 25 EC and 26 EC, can no longer arise.

75 Therefore, the reply to the second question is that Articles 23 EC, 25 EC and 26 EC must be interpreted as meaning that they do not prohibit national legislation such as that at issue in the main proceedings, under which the exemption from excise duty for cigarettes imported in travellers' personal luggage is limited to 25 units on entry to the Republic of Austria from certain other Member States, in particular the Republic of Slovenia, notwithstanding the fact that, following the last enlargement of the Union, that reduced exemption no longer applies to any third country with the sole exception of the Swiss Samnauntal customs enclave, since imports of cigarettes from third countries generally benefit from an exemption for 200 units.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Section 6(2) of Annexe 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 is to be interpreted as meaning that it does not preclude the Republic of Austria from maintaining, on a transitional basis, its legislation containing an exemption from excise duty reduced to 25 cigarettes for cigarettes coming from Slovenia imported into the Republic of Austria in the personal luggage of travellers resident in that Member State and entering it directly via its land border or inland waters.**

2. **Articles 23 EC, 25 EC and 26 EC must be interpreted as meaning that they do not prohibit national legislation such as that at issue in the main proceedings, under which the exemption from excise duty for cigarettes imported in travellers' personal luggage is limited to 25 units on entry to the Republic of Austria from certain other Member States, in particular the Republic of Slovenia, notwithstanding the fact that, following the last enlargement of the European Union, that reduced exemption no longer applies to any third country with the sole exception of the Swiss Samnauntal customs enclave, since imports of cigarettes from third countries generally benefit from an exemption for 200 units.**

[Signatures]