JUDGMENT OF THE COURT (Sixth Chamber)

15 June 2000 *

In Case C-365/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Finanzgericht Düsseldorf for a preliminary ruling in the proceedings pending before that court between

Brinkmann Tabakfabriken GmbH

and

Hauptzollamt Bielefeld,

on the interpretation of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann, J.-P. Puissochet, V. Skouris (Rapporteur) and F. Macken, Judges,

Advocate General: J. Mischo,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Brinkmann Tabakfabriken GmbH, by A. Böhlke, Rechtsanwalt, Frankfurt am Main,

— the Commission of the European Communities, by E. Traversa, Legal Adviser, and A. Buschmann, national civil servant seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Brinkmann Tabakfabriken GmbH and of the Commission at the hearing on 11 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1999,

gives the following

Judgment

1 By order of 5 October 1998, received at the Court on 12 October 1998, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10; 'the Directive').

2 That question was raised in proceedings between Brinkmann Tabakfabriken GmbH ('Brinkmann') and Hauptzollamt Bielefeld (Principal Customs Office, Bielefeld, 'the Hauptzollamt') concerning the latter's refusal to determine the tobacco tax, calculated on the basis of Paragraph 4.1.2 of the Tabaksteuergesetz (Law on Tobacco Tax; BGBl. 1992, Part I, p. 2150), in the version in force from 1 January 1993 to 31 May 1998 ('the TabStG'), without applying the minimum levy laid down by that provision, in order to take into account Article 3(1) of the Directive.

Legal background

Community legislation

3 The Directive, which was adopted on the basis of Article 99 of the EC Treaty (now Article 93 EC), sets general minimum excise duties for manufactured tobacco other than cigarettes.

4 According to the fifth recital in the preamble to the Directive, 'the setting of an overall minimum excise duty expressed as a percentage, as an amount per kilogram or for a given number of items is the most appropriate for achieving the internal market'.

5 Article 1 of the Directive states:

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

(a) cigars and cigarillos;

(b) fine-cut tobacco intended for the rolling of cigarettes;

(c) other smoking tobaccos.'

6 Article 3 of the Directive provides:

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

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

— or a specific duty, by quantity,

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

— cigars and cigarillos: 5% of the retail selling price inclusive of all taxes, or ECU 7 per 1 000 items or per kilogram,

— fine-cut smoking tobacco intended for the rolling of cigarettes: 30% of the retail selling price inclusive of all taxes, or ECU 20 per kilogram,

— other smoking tobaccos: 20% of the retail selling price inclusive of all taxes, or ECU 15 per kilogram.

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

3. ...'

7 Article 6(1) of the Directive provides that '[M]ember States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 31 December 1992'.

National legislation

8 Paragraph 4.1.2 of the TabStG states:

'The tax shall be:

...

(2) for cigars and cigarillos, 5% of the retail selling price, and at least 3.1 pfennig per item.

...'

Main proceedings and question referred for preliminary ruling

9 Brinkmann, which runs a tobacco factory, produces *inter alia* 'Steckzigarillos' ('semi-finished cigarillos'). In connection with their manufacture, it made regular tax declarations, in 1996 and 1997, in which it made its own assessment of the tobacco tax.

10 Each time, it lodged administrative complaints with those tax declarations, requesting that the Hauptzollamt determine the tobacco tax, calculated on the

basis of Paragraph 4.1.2 of the TabStG, without applying the minimum levy of 3.1 pfennig (DEM 0.031), in order to take into account Article 3(1) of the Directive.

11 Since the Hauptzollamt rejected those complaints, Brinkmann brought an action before the Finanzgericht.

12 Both in the pre-litigation procedure and before the Finanzgericht, Brinkmann submitted that Paragraph 4.1.2 of the TabStG implemented the Directive incorrectly, since the Directive does not lay down a minimum levy as an additional element of taxation. Furthermore, since Article 3 of the Directive is unconditional in its content and is also drafted with sufficient precision, it has direct effect. Therefore, the Hauptzollamt is obliged to calculate the tobacco tax for cigarillos by applying Article 3(1) of the Directive without setting a minimum tax.

13 On the other hand, the Hauptzollamt contended that, whilst it is true that the Directive does not lay down a national minimum rate of tax for cigars and cigarillos, it does not necessarily follow that the national legislature has implemented the directive incorrectly. Although it is true that the tax scale laid down in Paragraph 4.1.2 of the TabStG is not entirely consistent with the structure of the Directive, it has no significant consequences for persons chargeable to tobacco tax ('taxable persons'). The content of the Directive allows each Member State a certain latitude in regulating individual points, and Paragraph 4.1.2 of the TabStG falls within that discretion.

14 The Hauptzollamt submitted, moreover, that because of the various alternative forms of taxation of manufactured tobacco — other than cigarettes — laid down by the Directive, it does not have direct effect.

15 The Finanzgericht takes the view, first, that Paragraph 4.1.2 of the TabStG does not implement the Directive incorrectly. As a general rule, it can be a question of incorrect implementation only where the national legislation is, as a matter of substantive law, contrary to the Directive, which results in considerable disadvantages for the parties concerned. That is not so in the present case.

16 Moreover, the tax formula '5% of the retail selling price, and at least 3.1 pfennig per item' may also be expressed as follows: 'the tax on cigars and cigarillos with a retail selling price under 62 pfennig shall be 3.1 pfennig per item; otherwise it shall be 5% of the retail selling price'. According to that reading of the national provision in question, it follows that the ad valorem tax and the specific tax are applied not cumulatively but alternatively.

17 Furthermore, the wording of Paragraph 4.1.2 of the TabStG merely gives expression to tax weighting, since in Germany about 90% of cigars and cigarillos are subject to the specific tax rate of 3.1 pfennig. It follows that the taxation of cigars and cigarillos is in reality almost exclusively a tax per item.

18 The Finanzgericht then notes that, in any event, the Federal Republic of Germany has, in the meantime, brought an end to the formal infringement of the Directive by adopting, on 26 May 1998, the Zweites Gesetz zur Änderung der Verbrauchsteuergesetzen (the Second Law Amending Excise Duty Laws; BGBl. 1998, Part I, p. 1121). Under that law, as from 1 June 1998, Paragraph 4.1.2 of the TabStG, in its new version, establishes the rate of tax for cigars and cigarillos at 2.6 pfennig per item and at 1% of the retail selling price.

19 Finally, the Finanzgericht takes the view that the Directive does not have direct effect, since Article 3(1) thereof lays down several options for the taxation of cigars and cigarillos.

20 Since, however, it took the view that there remained a doubt as to whether the Directive had been correctly implemented, the Finanzgericht Düsseldorf decided to stay proceedings and to refer the following question to the Court of Justice:

'Does Paragraph 4.1.2 of the Tabaksteuergesetz (Law on Tobacco Tax) in the version current as at 21 December 1992 (*Bundesgesetzblatt* 1992, Part I, p. 2150) constitute an incorrect implementation of Article 3(1) of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10)?

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

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

The question referred for a preliminary ruling

21 The question referred must be understood as falling into two parts, of which the first concerns the interpretation of Article 3(1) of the Directive and the second the possible acknowledgement of the direct effect of that provision.

The first part of the question

22 By the first part of its question, the national court seeks to ascertain whether Article 3(1) of the Directive precludes the levying on cigars or cigarillos of a tax which is calculated ad valorem without being able to be below a minimum amount, as laid down in Paragraph 4.1.2 of the TabStG.

23 It should be noted, first, that Article 3(1) of the Directive lays down three tax formulas, namely an ad valorem formula, a specific formula, by quantity, and a mixed formula, combining an ad valorem element and a specific element.

24 Since a tax such as that laid down in Paragraph 4.1.2 of the TabStG clearly does not fall into the first two categories, it is necessary to examine whether it can be regarded as a mixed excise duty for the purposes of the Directive.

25 In that regard, it must be stated that, as is clear from the wording of Article 3(1) of the Directive, the mixed duty laid down in that provision involves the

cumulative application of an ad valorem element and a specific element, so that the sum of those two elements constitutes the amount of the excise duty.

26 As the national court correctly pointed out, a tax, such as that laid down in Paragraph 4.1.2 of the TabStG, which is calculated ad valorem without being able to be below a minimum amount, results in the application of a specific duty to products which are not above a certain price and an ad valorem duty to products above that price. In that formula, the two forms of taxation are applied not cumulatively but alternatively according to a price threshold.

27 As a consequence, a technique such as that chosen by the German legislature is clearly different from the mixed duty laid down in Article 3(1) of the Directive and constitutes, therefore, a tax formula which is not laid down in that provision.

28 It must be added that the fact that the tax formula chosen by the German legislature does not cause any substantial disadvantages for taxable persons, as the national court points out, does not affect the interpretation of Article 3(1) of the Directive which is set out in paragraphs 25 to 27 of the present judgment.

29 Accordingly, the answer to the first part of the question must be that Article 3(1) of the Directive must be interpreted as meaning that it precludes the levying on cigars or cigarillos of a tax which is calculated ad valorem without being able to be below a minimum amount.

The second part of the question

30 By the second part of its question, the national court asks in substance whether Article 3(1) of the Directive confers on taxable persons the right to rely on it before a national court in order to avoid the application to them solely of the element of the formula under which they were taxed, which they deem contrary to the Directive, such as the minimum specific duty applied in Germany to cigars and cigarillos, and, consequently, to be taxed in accordance with the Directive.

31 In that connection, it must first be observed that Article 3(1) of the Directive allows Member States a certain discretion by leaving them the choice between three different tax formulae.

32 Second, according to the case-law of the Court of Justice, it would be incompatible with the binding effect conferred on directives by Article 189 of the EC Treaty (now Article 249 EC) for the possibility for those concerned to rely on the obligation which directives impose to be excluded in principle. Particularly where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods for implementing the directive, had kept within the limits of its discretion as defined by the directive (see Case 51/76 *Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraphs 22 to 24; Case C-72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 56; and Case C-435/97 *WWF and Others* v *Bozen and Others* [1999] ECR I-5613, paragraph 69).

33 In the present case, since the German legislature chose, as was noted in paragraph 27 of the present judgment, a tax formula which is not laid down in Article 3(1)

of the Directive, taxable persons can rely on that provision in order to avoid the application to them of that tax formula which goes beyond the discretion left to the national legislature.

34 Brinkmann and the Commission submit that the question of direct effect arises solely in respect of the minimum levy applied in Germany and that, on that subject, Article 3(1) of the Directive is unconditional and sufficiently precise since it does not refer to any minimum levy in the ad valorem tax formula. They submit, therefore, that that provision confers on taxable persons the right to rely on it in order to avoid the application to them solely of the minimum levy.

35 That argument, in that it requires the element relating to the application of a specific duty to be seen in isolation within the tax formula chosen by the German legislature, cannot be accepted.

36 First, it is clear from paragraph 27 of the present judgment that it is not the minimum specific duty taken separately, but the whole tax formula chosen by the German legislature which goes beyond the discretion conferred by Article 3(1) of the Directive.

37 Second, to consider that taxable persons may rely on Article 3(1) of the Directive in order to avoid solely the application of the minimum specific duty presupposes, in the present case, that Article 3(1) of the Directive gives rise to the right for taxable persons to be taxed according to the ad valorem formula.

38 However, the ad valorem formula is only one of the options provided by the Directive, and the Directive cannot therefore be interpreted as meaning that it requires the national court to take the place of the national legislature on which alone it is incumbent to choose the tax formula which it deems appropriate, within the framework defined in Article 3(1) of the Directive.

39 Accordingly, that provision does not confer on taxable persons, in a case such as that at issue in the main proceedings, the right to rely on it before a national court in order to avoid the application to them solely of the minimum specific duty and thus to have solely an ad valorem tax levied.

40 However, it must be borne in mind that, as the Court has consistently held, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty (now Article 10 EC) to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts (Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26; Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8; and Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 26). When applying national law, whether adopted before or after the directive, the national court which has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty (*Marleasing*, paragraph 8; Case C-334/92 *Wagner Miret* v *Fondo de Garantía Salarial* [1993] ECR I-6911, paragraph 20; and *Faccini Dori*, paragraph 26).

41 In the light of all the foregoing, the answer to the second part of the question must be that Article 3(1) of the Directive does not confer on persons chargeable to a tax on cigars or cigarillos, which is calculated ad valorem without being able to be below a minimum amount, the right to rely on it before a national court in order to avoid the application to them solely of the element of the tax formula relating to the levying of the minimum specific duty and, consequently, to have solely an ad valorem tax levied.

However, the national court, where it applies provisions of national law adopted either before or after a directive, must interpret them, as far as possible, in the light of the wording and the purpose of the Directive.

Costs

42 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Finanzgericht Düsseldorf by order of 5 October 1998, hereby rules:

1. **Article 3(1) of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes must be interpreted as meaning that it precludes the levying on cigars or cigarillos of a tax which is calculated ad valorem without being able to be below a minimum amount.**

2. Article 3(1) of Directive 92/80 does not confer on persons chargeable to a tax on cigars or cigarillos, which is calculated ad valorem without being able to be below a minimum amount, the right to rely on it before a national court in order to avoid the application to them solely of the element of the tax formula relating to the levying of the minimum specific duty and, consequently, to have solely an ad valorem tax levied.

However, the national court, where it applies provisions of national law adopted either before or after a directive, must interpret them, as far as possible, in the light of the wording and the purpose of the Directive.

Moitinho de Almeida Gulmann Puissochet

Skouris Macken

Delivered in open court in Luxembourg on 15 June 2000.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber