OPINION OF ADVOCATE GENERAL LENZ

delivered on 2 March 1993 *

Mr President,
Members of the Court,

A — Introduction

1. These two references for preliminary rulings in Cases C-222/91 and C-11/92 concern the interpretation of individual articles in Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (hereinafter 'the Directive'). [1] Although the two cases have not been joined, I consider it appropriate to deal with them together in one opinion in view of the fact that they are closely related.

2. The facts, the background and course of the national proceedings, the relevant provisions of Community and national law and the pleas in law of the parties involved are set out in the reports for the hearing; consequently, I may limit myself to recapitulating the essential features of the two cases. In so far as it may prove necessary, I shall return to details in the course of my opinion.

3. Case C-222/91, which is a reference from the Consiglio di Stato (Council of State), [2] concerns the provisions of the ministerial decree adopted to implement Article 4 of the Directive, which have been contested by undertakings in the tobacco sector ('the respondents in the Italian proceedings'). With regard to Article 4(2) of the Directive, which provides for the inclusion of specific warnings on cigarette packets, the decree, in its original form, stipulated that two such warnings should be printed on every packet. The respondents in the Italian proceedings take the view that this was contrary to the provision in the Directive, on the ground that the latter required only one warning.

4. Although the rule in the ministerial decree was amended after being set aside by judgment of the Tribunale Amministrativo Regionale del Lazio, with the result that in future only one specific warning is required, the ministries involved have appealed to the Consiglio di Stato against the judgment of the Tribunale on the ground that the original version of the decree had constituted a proper implementing measure. It is in this connection that the Consiglio di Stato has asked the Court of Justice how many warnings the Directive itself requires and whether the Member States have at least a discretion to insist on more than one warning.

* Original language: German.

1 — OJ 1989 L 359, p. 1.

2 — This is the first reference made by this senior Italian court.

5. In addition, the national court requests the Court of Justice to interpret Article 4(5) of the Directive, which deals with the inclusion of the general warning ('tobacco seriously damages health') on tobacco products other than cigarettes. In that connection, the ministerial decree (in both versions) provides that the warning should cover at least 4% of the side of the packet in question. The respondents in the Italian proceedings take the view that minimum dimensions of this kind cannot be prescribed for such products under the Directive. The question from the national court relates to this issue.

6. In Case C-11/92, the High Court of Justice has requested the Court to interpret those provisions of the Directive which relate to the surface area requirements in respect of information on tar and nicotine yields (Article 3(3)) and warnings (Article 4(4)) on cigarette packets. The national rules introduced in the United Kingdom to give effect to the Directive, namely the Tobacco Products Labelling (Safety) Regulations 1991, stipulate in this regard that the information shall cover 'at least 6%' of the relevant side of the packet. However, in the case where cigarettes of any brand are imported from another Member State in order to be sold in the United Kingdom, the requirements of the United Kingdom regulations are to be regarded as having been satisfied if the packets contain warnings in English which meet the requirements imposed by that other Member State for the purpose of giving effect to the Directive. In the opinion of the national court making the reference, this means that cigarettes labelled under the law of another Member State in accordance with a spatial requirement of 4% may be imported from that Member State and sold in the United Kingdom, whereas cigarettes produced domestically may be sold only if they are labelled in accordance with the 6% requirement laid down by the United Kingdom regulations.

7. The applicants in the national proceedings ('the applicants in the United Kingdom proceedings') argue that it is not compatible with the Directive to replace the spatial requirement there laid down of 'at least 4%' of the side of packets of domestically-produced cigarettes by a more stringent requirement. This problem forms the subject-matter of the question referred by the High Court.

B — Opinion

8. All of the questions referred concern (albeit from different perspectives) the latitude which the Directive confers on Member States in respect of the labelling of tobacco products. It is for that reason appropriate at the outset to examine in general the nature and scope of the approximation of laws towards which the Directive strives (I), in order then to examine individually each of the questions referred (II).

9. *I. (1)* According to its first citation, the Directive is based on Article 100a of the EEC Treaty. That provision authorizes the Council, subject to the conditions set out therein, to adopt the 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. According to Article 8a of the EEC Treaty, the internal market shall comprise an

area without internal frontiers in which, *inter alia*, the free movement of goods is ensured in accordance with the provisions of the Treaty.

10. Those provisions lay down the parameters of the concept underlying the Directive.

11. It should be noted in this regard that the measures to be adopted under Article 100a are undoubtedly intended, in the light of the definition of the internal market, to remove the barriers arising from domestic provisions in Member States under which those States may rely on urgent requirements of public welfare or on the protection of the interests set out in Article 36 of the EEC Treaty. Individual cases, however, may demonstrate that the free movement achieved through this concept cannot by itself suffice to create an internal market. On the contrary, it may prove necessary to this end to approximate conditions of competition existing on the markets of the Member States so that it may be possible to exercise the freedom to move goods (or any other basic freedom) effectively and without discrimination.

12. The Court itself was thinking along these lines when, in its judgment in the '*titanium dioxide*' case, [3] it ruled that:

'... provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and, if there is no harmonization of national provisions on the matter, competition may be appreciably distorted'.

13. The Court went on to say that:

'It follows that action intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition in that sector is conducive to the attainment of the internal market and thus falls within the scope of Article 100a, a provision which is particularly appropriate to the attainment of the internal market.' [4]

14. The harmonization under Article 100a of domestic legal provisions affecting the movement of goods can therefore have as its objective both the free movement of goods and the approximation of conditions of competition. In this, the degree of approximation and the weight attached to each aspect may differ. The Commission set this point out in great detail in Case C-222/91. In the following section I shall demonstrate that those who drafted the Directive unambiguously opted for one of the possible conceptions.

(2) The central reference points which indicate the nature of the harmonization chosen

3 — Judgment in Case C-300/89 *Commission* v *Council* [1991] ECR I-2867.

4 — Paragraph 23 of the judgment.

in the Directive are contained in the preamble and in Articles 8 and 9.

15. So far as the *free movement* of goods imported from other Member States is concerned, the Directive sets out definitively the criteria in compliance with which Member States may not, on grounds of labelling, prohibit or restrict the importation of goods from other Member States. This becomes clear from the preamble to the Directive, read in conjunction with Article 8. The first two recitals mention that:

'... there are differences between the laws, regulations and administrative provisions of the Member States on the labelling of tobacco products; ... these differences are likely to constitute barriers to trade and to impede the establishment and operation of the internal market;

... these possible barriers should be eliminated and ..., to that end, the marketing and free movement of tobacco products should be made subject to common rules concerning labelling'.

16. Article 8 of the Directive provides as follows:

'1. Member States may not, for reasons of labelling, prohibit or restrict the sale of products which comply with this Directive.

2. The provisions of this Directive do not affect the right of the Member States to lay down, in compliance with the Treaty, requirements concerning the import, sale and consumption of tobacco products which they deem necessary in order to protect public health, provided such requirements do not imply any changes to labelling as laid down in this Directive.'

17. Admittedly, the provisions of the Directive do suggest that labelling may vary in certain respects depending on the Member State in which the goods were produced. Article 4(2), for example, expressly allows the list of specific warnings to vary from one Member State to another. However, in so far as the Directive does not exclude such discrepancies, importation may not be prohibited solely on the ground that the labelling of the imported goods differs from that of domestic products, provided that the imported goods comply in that regard with the provisions of the Directive and the State of origin. Despite these discrepancies, the Directive treats such labelling as equally valid.

18. With regard to the *approximation of the conditions of competition*, the question arises of the extent to which the Directive sets out the requirements which Member States may impose on products *irrespective of their origin*. In this connection, a distinction is to be drawn between the lower and upper limits of such requirements. So far as the former aspect is concerned, it appears from the second and third recitals in the preamble, as well as from Article 9, that products which do not comply with the requirements laid down in the Directive may not as a rule be put on sale. With regard to the 'common rules' which, according to the second recital,

the Directive contains, the third recital, pursuant to the spirit of Article 100a(3) of the Treaty, provides that:

'... such common rules must take due account of public health protection'.

19. Article 9(2) provides that the implementing provisions of the Member States must be brought into force before 31 December 1991. Article 9(2) concludes by providing that:

'However,

— until 31 December 1992 cigarettes, and

— until 31 December 1993 other tobacco products existing on 31 December 1991 which do not comply with this Directive may still be put on sale.'

20. It is clear from this that on the expiry of this transitional period only products which comply with the Directive may be put on sale.

21. We must now examine the question whether the Directive also provides a maximum limit for the requirement, which applies even in the case of domestic products, with the result that marketing of such products may not be prevented so long as they comply with that limit.

22. Subject to certain individual provisions which confer on Member States a certain element of latitude, I am of the opinion that this question must in principle be answered in the affirmative.

23. In my view, this follows from the above wording of the first and second recitals and (in particular) of Article 8; Article 8(1) refers expressly to the 'sale' (and thus not merely the 'importation') of goods. With regard to the measures which Member States may continue to adopt for the protection of public health, Article 8(2) provides that such measures shall relate to the 'import, sale and consumption' of tobacco products. It is specifically in respect of this right that the proviso is imposed that the requirements introduced by Member States 'do not imply any changes to labelling as laid down in this Directive'.

24. Perhaps less weight might be attached to these formulations were it not for the Court's judgment in *Ratti*. [5] That case involved criminal proceedings brought by the Italian authorities against an Italian national and the Court of Justice was required to consider Directive 73/173 relating to the classification, packaging and

5 — Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629.

labelling of dangerous preparations (solvents). [6] The relevant provisions of this directive (the first recital in the preamble and Article 8) are almost wholly identical to the corresponding provisions of the present Directive. Article 3 of Directive 73/173 prohibits the marketing of dangerous preparations; its function is analogous to that of Article 9 in the Directive at present under examination.

25. With regard to Directive 73/173, the Court stated (at paragraphs 26 and 27 of its judgment) that:

'The combined effect of Articles 3 [and] 8 of Directive 73/173 is that only solvents which "comply with the provisions of this directive and the annex thereto" may be placed on the market and that Member States are not entitled to maintain, parallel with the rules laid down by the said directive for imports, different rules for the domestic market.

Thus it is a consequence of the system introduced by Directive 73/173 that a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed or in any event different, as regards the classification, packaging and labelling of solvents *and that this prohibition* on the imposition of restrictions not provided for *applies both to the direct marketing of the products on the home market and to imported products.*' [7]

26. That which was valid in this regard for Directive 73/173 must *a fortiori* also be valid for the present Directive, as it must be borne in mind that the Community legislature would have been aware of the *Ratti* judgment when it adopted Directive 89/622. Had it intended to base this Directive on a principle other than that which the Court had previously derived from the text of Directive 73/173, it would have expressed this through a choice of words which represented a clear departure. In view of the fact that this did not happen, it must be assumed that Member States may not in general impose, in the area to which the Directive applies, any different or, in particular, any more stringent requirements than those provided for by the Directive.

27. This conclusion is not placed in question by the judgment in Case C-376/90, [8] to which the United Kingdom referred in the course of the hearing. In that case, the Court classified a provision concerning dose limits in the case of exposure of apprentices to radiation [9] as a rule conferring a minimum of protection, although it was not expressly referred to as such. In its judgment, the Court first of all examined Article 2(b) of the EAEC Treaty and found that the uniformity of safety standards did not mean that those standards precluded stricter protection. [10] So far as the interpretation of the directive in question itself was concerned, the Court relied on the fact that the values set out therein were based on recommendations of the International Commission on Radiological Protection, which for its part regarded those values as only just representing a reasonable upper limit. The Court took the view that the directive was to be understood

6 — Council Directive of 4 June 1973, OJ 1973 L 189, p. 7.

7 — Emphasis added.

8 — Judgment in Case C-376/90 *Commission* v *Belgium* [1992] ECR I-6153.

9 — Article 10(2) of Council Directive 80/836/Euratom of 15 July 1980, OJ 1980 L 246, p. 1.

10 — Paragraphs 18 and 19 of the judgment.

in the same way since it provided no indication that the Community legislature had intended to adopt a stance different from that of the Commission on Radiological Protection. [11] Those considerations, however, cannot be applied by analogy to the present case.

28. None the less, the effects of the principle which thus underlies the Directive and pursuant to which Member States may not impose more stringent requirements than those provided for in the Directive, even on domestically-produced goods, are weakened through the scope allowed by the provisions of the Directive itself. Provisions such as Article 4(2) can purposefully be understood only as meaning that manufacturers have no right to insist that the Member State in which the goods in question are manufactured must adopt the most lenient rules possible under the Directive. It can thus follow from the scheme of Article 4(2) that many products may be placed at a competitive disadvantage on their domestic market vis-à-vis imported goods where the information on domestic cigarette packets is regarded by consumers as being more of a deterrent than that printed on packets of imported cigarettes. The Directive consciously accepts this possibility.

29. *II.* It is on this basis that the questions referred by the Consiglio di Stato and the High Court require to be examined. In this regard it seems appropriate first of all to deal with the single question submitted by the High Court.

11 — Paragraphs 24 to 27 of the judgment.

30. I then intend to address the first question from the Consiglio di Stato (which is similar in certain respects to that referred by the High Court) before going on to deal with the remaining two questions from the Italian court.

The question referred by the High Court (Case C-11/92)

31. This question concerns Articles 3(3) and 4(4) of the Directive. Article 3(3) deals with the indications of tar and nicotine yields on cigarette packets and provides as follows:

'The indications concerned shall be printed on the side of cigarette packets, in the official language or languages of the country of final marketing in clearly legible print on a contrasting background so that at least 4% of the corresponding surface is covered. This percentage shall be raised to 6% for countries with two official languages and to 8% for countries with three official languages.'

32. Article 4(4) regulates the relative size of the general and specific warnings as follows: 'On cigarette packets the warnings provided for in paragraphs 1 and 2 shall cover at least 4% of each large surface of the unit packet,

excluding the indication of the authority provided for in paragraph 3. [12] This percentage shall be increased to 6% for countries with two official languages and to 8% for countries with three official languages.'

33. It is in this connection that the High Court referred its question, which is worded as follows:

'Is it consistent with Articles 3(3) and 4(4) of Directive 89/622 for national rules to require that the information and warnings specified in Articles 3(1) and 4(1) and (2) of the Directive be printed on cigarette packets so as to cover an area amounting to at least 6% of the surface area specified in the Directive, in circumstances where these requirements apply to domestic production but are deemed to be satisfied in the case of cigarette packets imported from another Member State if the packets in question comply with the spatial requirements imposed by that other Member State pursuant to Articles 3(3) and 4(4) of the Directive?'

34. In the light of the preceding considerations, this question raises the problem of whether it was intended through use of the expression '*at least*' to confer on Member States a degree of latitude in the sense that they might impose on domestic products a greater spatial requirement than that under the Directive, provided only that imported products could be marketed freely so long as they satisfied the percentage laid down in the Directive.

35. As the Commission correctly points out, the text as such is not unambiguous. In purely grammatical terms, the phrase 'at least ...' may relate to the action of the Member States, who are thereby precluded from imposing their own lower limit, but it may also be treated with equal justification as a standard for the conduct of manufacturers, which will be regarded as illegal only if they operate below the 4% limit, but not if they exceed it. This latter possible interpretation is not excluded by the fact that the Directive is addressed to the Member States, both under its own Article 10 and under Article 189 of the EEC Treaty. It is simply not possible to say whether the words 'at least' refer to the duty thus imposed on Member States or to the duty which those States are required to impose on manufacturers.

36. It is my opinion that the phrase relates to the labelling by manufacturers and that it confers no discretion on Member States, contrary to the views expressed by the Commission, the United Kingdom and Ireland. The applicants in the United Kingdom proceedings are correct in pointing out that a very similar provision, concerning the labelling of solvents, is be found in Article 6 of

12 — Under paragraph 3, 'Member States may stipulate that the warnings referred to in paragraphs 1 and 2 be combined with the indication of the authority that is their author'.

Directive 73/173, cited above. [13] The inferences which the Court drew in the *Ratti* case with regard to the nature of harmonization under Directive 73/173 do not appear to have been affected by Article 6 of that directive, since the Court refers expressly to that provision.

37. It can moreover be stated that in Directive 79/112, [14] which regulates, *inter alia*, the labelling of foodstuffs, the Community legislature intended a provision which expressly reserved the right to impose more stringent conditions on domestic products. Following on Article 3(1) of that directive, under which the indication of specific particulars alone 'shall be compulsory' on the labelling of foodstuffs (subject to other arrangements and exceptions), Article 3(2) provides that:

'Notwithstanding the previous paragraph, Member States may retain national provisions which require indication of the factory or packaging centre, in respect of home production.'

38. In contrast to the view taken in respect of Article 6 of Directive 73/173 in *Ratti*, the Court has recognized that Article 3(2) of Directive 79/112 represents an exception to the principle of complete harmonization as laid down in Directive 79/112. In its judgment in *Mathot*, [15] which was delivered on 18 February 1987 and therefore prior to the adoption of the Directive here in dispute, the Court ruled that:

'It is correct that Directive 79/112 created obligations concerning the labelling and presentation of foodstuffs marketed in the entire Community without permitting any distinction to be drawn according to the origin of those foodstuffs, subject only to the condition contained in Article 3(2).'

39. The views which the Court then goes on to express do not restrict this statement but merely explain that traders do not have any right to seek exemption from the implementing rules adopted by the Member State in question simply on the ground that there has been a wrongful failure to extend those rules to cover imported products.

40. The principles which it laid down in *Mathot* have in any event also been confirmed by the Court in its judgment in *SARPP*. [16]

13 — Article 6(1) of Directive 73/173 provides as follows:
'1.Where the particulars required by Article 5 appear on a label, that label must be placed on one or more surfaces of the package so that it can be read horizontally when the package is set down normally. The dimensions of the label must be as fol-lows:

Package contents		Dimensions
— less than or equal to 3 l	if possible	52 x 74 mm
— greater than 3 l and not exceeding 50 l	at least	74 x 105 mm
— greater than 50 l and not exceeding 500 l	at least	105 x 148 mm
— greater than 500 l	at least	148 x 210 mm

Each symbol must cover at least one tenth of the surface area of the label. The entire surface of the label must adhere to the package immediately containing the substance.'

14 — Council Directive of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ 1979 L 33, p. 1.

15 — Judgment in Case 98/86 *Ministère Public* v *Mathot* [1987] ECR 809, at para. 11.

16 — Judgment in Case C-241/89 *SARPP* v *Chambre Syndicale des Raffineurs et Conditionneurs de Sucre de France and Others* [1990] ECR I-4695, at para. 16.

41. In the light of the practice followed by the Community legislature in the case of earlier measures governing the labelling of specific products and in the light of the differing inferences which the Court has drawn from the various formulations, the unavoidable conclusion is that the phrase here under consideration was not intended to confer any discretion on Member States to impose greater spatial requirements.

42. This conclusion is consistent with the objective pursued by the Directive both with regard to the easing of restrictions on the movement of goods and the approximation of conditions of competition.

As the applicants in the United Kingdom proceedings correctly argued, a manufacturer wishing to export his produce from Member State A, which imposes a more stringent spatial requirement than that laid down by the Directive, to Member State B, which has the same official language as Member State A, would have to change his packaging if Member State B treats a spatial requirement of 4% as adequate. Although the product labelled in accordance with the provisions of Member State A would also be marketable in Member State B (if one subscribes to the views expressed by the Commission and the United kingdom), those imports would be placed at a commercial disadvantage vis-à-vis domestic goods produced in Member State B if the manufacturer were not to adapt to the less stringent requirements existing in the latter State. The liberalization of trade and the approximation of conditions of competition, as objectives of the Directive, would here be placed in equal jeopardy.

43. Undoubtedly, this phenomenon is relevant only to trade between a limited number of Member States in view of the variety of official languages in the Member States. Cigarette packets intended for export must often be labelled differently from those intended for sale on the domestic market (compare Article 3(3) and Article 4(1) and (2)). It is precisely this, however, which argues in favour of the view that the imposition of spatial requirements was designed in particular to bring about an approximation of conditions of competition, in the sense that goods manufactured in a Member State should not be subject to more stringent rules than imported goods. The interpretation of the disputed provisions favoured by the Commission and the United Kingdom would clearly be at variance with this objective. This conclusion is all the more justified when one considers that the Directive (if understood as laying down a minimum limit) does not specify any maximum limit for the percentage which may be imposed by Member States. Consequently, that figure could-theoretically-lie anywhere between 5% and 100%. I cannot imagine that those who drafted the Directive intended to bring about such a position in law.

44. A joint reading of Article 4(2) and the annex to the Directive would suggest rather that those drafters, even though they might have intended to acquiesce in differences between domestic provisions, none the less marked out the exact parameters of the discretion enjoyed by Member States. Within this area of discretion, Member States do not in fact depart from the Directive, but rather apply it (in ways which are permitted and predictable) differently from one Member State to another.

45. The nature of the common rules here at issue also suggests such a course of action. Differences in the stringency of rules on labelling warning against consumption of the product in question and thereby designed to bring about a reduction in that consumption may have a particularly marked detrimental impact on the equality of competitive prospects. To that extent, then, there is a difference between rules of this kind and those which relate to the inherent qualities of the product itself. National provisions which go beyond the standard laid down in a harmonization directive with regard to the inherent qualities of the product concerned may, depending on the case, justify products manufactured in that State in enjoying a competitive advantage on the markets of Member States (including Member States other than the State of manufacture) in the case where those more stringent provisions are associated with the product's good reputation. In certain circumstances, this advantage may balance out the competitive disadvantage arising from the application of more stringent provisions on the market of the Member State of manufacture. Such a scheme, however, is not conceivable in the present case, since the function of the warnings is precisely to damage the 'reputation' of the product.

46. In those circumstances, I remain unconvinced by the fact that the Commission and the United Kingdom support their arguments by reference to the evolutionary nature of the Directive (as referred to in the eighth recital in the preamble) and the fight against the use of tobacco products, which the resolution mentioned in the fifth recital [17] describes as being the prime objective of the joint programme of action against cancer.

47. When one considers the protection of public health, for the improvement of which the eighth recital retains the right to introduce subsequent measures, it might have been appropriate to provide a different system. However, no such intention on the part of the drafters of the Directive is expressed in its text or structure and the Court, for the purposes of its interpretation, may rely only on objective and consequently verifiable points of reference.

48. For the above reasons, I propose that the Court should reply as follows to the question referred by the High Court:

Under Articles 3(3) and 4(4) of Directive 89/622, Member States must prescribe for all cigarette packets that the information on nicotine and tar yields and the warnings under Article 4(1) and (2) shall cover at least 4% of the side of the packet in question. Member States may not impose a greater spatial requirement even if they confine this more stringent requirement to domestic production.

17 — Resolution of the Council and the representatives of the Governments of the Member States meeting within the Council, of 7 July 1986, on a programme of action of the European Communities against cancer, OJ 1986 C 184, p.19.

The first question referred by the Consiglio di Stato

49. The first question referred by the Consiglio di Stato concerns Article 4(5) of the Directive, which deals with the general warning in the case of tobacco products other than cigarettes. That provision reads as follows:

'In the case of tobacco products other than cigarettes, the general warning laid down in paragraph 1 shall be printed in, or irremovably affixed to, a conspicuous place on a contrasting background and in such a way as to be easily visible, clearly legible and indelible. It shall not in any way be hidden, obscured or interrupted by other written or pictorial matter.'

Unlike the provision on cigarette packets (Article 4(4)), [18] Article 4(5) does not lay down a specific spatial percentage for the warning on the side or other surface of the packet.

50. In this connection, the Consiglio di Stato had asked the Court the following question: 'Is Article 4 of Directive 89/622/EEC of 13 November 1989 to be interpreted as meaning that the national authority may require that on unit packets of tobacco products other than cigarette packets the general warning referred to in Article 4(1) should cover at least 4% of the surface on which it is printed?'

51. Unlike the case with the question just discussed, this raises the problem of Member States' discretion from the perspective, not of a power set out in a directive, but of the scope of harmonization. Article 4(5) in no way states that Member States may adopt differing rules according to the particular context. From this two possible results follow: either the spatial requirement is subject to the harmonization created by Article 4(5), with the result that it breaches that provision and is in that case entirely impermissible in respect of domestic and imported products alike; in the alternative, it falls outside the area covered by harmonization, again for both types of products, in which case it can no longer be assessed in the light of the Directive but rather in that of Articles 30 and 36 of the EEC Treaty, both of which deal exclusively with imported goods.

52. In my opinion, such a requirement is subject to harmonization in the sense that Article 4(5) excludes that requirement implicitly but unequivocally.

53. It is clear from Articles 3(3) and 4(4) that those who drafted the Directive were

18 — See point 32 above.

familiar with the problem of spatial requirements. We must for that reason assume that they consciously chose not to adopt a rule in this sense in the case of Article 4(5). This conclusion becomes all the more cogent when one considers that the warning under Article 4(5) must be affixed to a (conspicuous) 'place' on the product. Article 3(1) and (3) and Article 4(1), (2) and (4), in contrast, proceed on the basis that the warnings shall be printed on the 'surfaces' of the packets, up to a specified percentage of those surfaces. In addition, a requirement of the type here under discussion complements the rules on visibility and legibility set out in similar terms in Article 3(3) and in Article 4(4) and (5): if the labelling is below a specific *absolute* size, the average consumer will not be able to decipher it; if below a specific *relative* size, the lettering may not attract his attention since it will appear insignificant in comparison with the dimensions of the packet.

54. Finally, this view is reinforced by the preparatory documents, [19] which demonstrate that the original proposal regarding the spatial requirement for products other than cigarettes was subsequently dropped (apparently on practical grounds). Directive 92/41 [20] has also amended Article 4(5) in as much as each of the required warnings must now cover '1% of the total surface of the unit packet'.

19 — See Commission Proposal (COM (87) 719 final), OJ 1988 C 48, p. 8; Opinion of the Economic and Social Committee, OJ 1988 C 237, p. 43; and Amended Commission Proposal (COM (88) 845 final), OJ 1989 C 62, p. 12.

20 — Council Directive of 15 May 1992 amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, OJ 1992 L 158, p. 30.

55. I propose that the Court should answer the first question referred by the Consiglio di Stato in the following terms:

Article 4(5) of Directive 89/622 does not permit Member States, in the case of tobacco products other than cigarettes, to require that the general warning laid down in Article 4(1) must cover at least 4% of the surface on which it is printed.

The second and third questions referred by the Consiglio di Stato

56. These questions concern Article 4(2) of the Directive, which deals with the 'specific' warnings on packets of cigarettes and which provides as follows:

'With regard to cigarette packets, the other large surface of the packet [21] shall carry, in the official language or languages of the country of final marketing, specific warnings alternating in accordance with the following rule:

— each Member State shall draw up a list of warnings taken exclusively from those listed in the Annex,

21 — The large surface situated opposite to that which is most visible within the meaning of Article 4(1).

— the specific warnings selected shall be printed on the unit packets so as to guarantee the appearance of each warning on an equal quantity of unit packets, with a tolerance of around 5%.'

57. It is with regard to those provisions that the Italian court poses the following questions:

'(b) Is Article 4(2) of Directive 89/622/EEC of 13 November 1989 to be interpreted as requiring only one specific warning to be printed on each cigarette packet, or as requiring a greater number of specific warnings to be printed thereon?

(c) If the answer to Question (b) is that the aforesaid Community Directive in itself requires not more than one specific warning to be printed on each cigarette packet, may the national authority nevertheless require a greater number of specific warnings to be printed on each packet?'

58. Each of those questions is justified by reason of a linguistic ambiguity in Article 4(2): the provision uses only the plural term 'warnings'. While the sense of the plural in the first indent is immediately clear (the reference there being to the 'warnings ... listed in the Annex'), uncertainty surrounds the wording of the introductory clause and the second indent, which refer merely to the 'warnings' which cigarette packets shall 'carry' or which shall be 'printed' on such packets.

59. Several possibilities are theoretically conceivable.

— The Directive requires only one warning. In that case, the requirement that the packet must display more than one warning may be either permissible or excluded.

— The Directive requires several warnings, that is to say, at least two. Logically this means that Member States will be complying with the Directive if they require more than two warnings.

60. My understanding of the wording, as construed, is that only one warning must be required, but also that more than one warning cannot be required.

61. The reason for this is that any solution which even merely allows Member States to require more than one warning would have the result that the number of warnings which could lawfully be required could not be limited in accordance with objective criteria. Thus, what is lacking here is a framework of provisions from which the assumption may

be drawn that those who drafted the Directive consciously regarded different values as equivalent.

62. In conclusion, any other interpretation would give rise to insuperable problems regarding the application of Article 4(4), as it would remain totally unclear what the 4% figure relates to (whether to each individual warning or to all the warnings together) and what procedure is to be followed in the case of several warnings in Member States having two or three official languages.

63. The foregoing considerations lead me to propose the following reply to the second and third questions referred by the Consiglio di Stato:

Article 4(2) of Directive 89/622 is to be interpreted as meaning that it requires one specific warning to be printed on each cigarette packet and that Member States may not require a greater number of such warnings to be printed on each packet.

C — Conclusion

64. For the above reasons, I propose that the Court should make the following replies to the questions referred in Cases C-222/91 and C-11/92:

In Case C-222/91:

(1) Article 4(5) of Directive 89/622 does not permit Member States, in the case of tobacco products other than cigarettes, to require that the general warning laid down in Article 4(1) must cover at least 4% of the surface on which it is printed.

(2) Article 4(2) of Directive 89/622 is to be interpreted as meaning that it requires one specific warning to be printed on each cigarette packet and that Member States may not require a greater number of such warnings to be printed on each packet.

In Case C-11/92:

Under Articles 3(3) and 4(4) of Directive 89/622, Member States must prescribe for all cigarette packets that the information on nicotine and tar yields and the warnings under Article 4(1) and (2) shall cover at least 4% of the side of the packet in question. Member States may not impose a greater spatial requirement even if they confine this more stringent requirement to domestic production.