JUDGMENT OF THE COURT (First Chamber)

10 November 2005 *

In Case C-197/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 30 April 2004,

Commission of the European Communities, represented by K. Gross, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by C.-D. Quassowski, A. Tiemann and U. Forsthoff, acting as Agents,

defendant,

* Language of the case: German.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, E. Juhász, M. Ilešič and E. Levits (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 May 2005,

after hearing the Opinion of the Advocate General at the sitting on 14 July 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by applying the rate of tax for fine-cut tobacco for self-rolled cigarettes to rolls of tobacco sold under the name 'W est Single Packs', the Federal Republic of Germany has failed to fulfil its obligations under Article 4(1)(b) of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover

taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40) and the first paragraph of Article 2 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8).

Legal context

Community legislation

2 According to the 14th recital in the preamble to Directive 95/59, 'rolls of tobacco capable of being smoked as they are after simple handling should also be deemed to be cigarettes for the purposes of uniform taxation of these products'.

3 Under Article 4(1)(b) of Directive 95/59 'rolls of tobacco which, by simple non-industrial handling, are inserted into cigarette-paper tubes' are regarded as cigarettes.

4 The second subparagraph of Article 4(1) of Directive 95/59, as amended by Council Directive 1999/81/EC of 29 July 1999 (OJ 1999 L 211, p. 47) provides that, 'up to and including 31 December 2001, the Federal Republic of Germany shall be authorised to tax the rolls of tobacco referred to in (b) at least at the rate or amount applicable to fine-cut tobacco for the rolling of cigarettes'.

5 Council Directives 92/79 and 92/80/EEC of 19 October 1992 on the harmonisation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10) set the minimum rates of excise duty on cigarettes and tobacco respectively. Under these two directives, the minimum excise duty on fine-cut tobacco is considerably lower than that on cigarettes

National legislation

6 Article 2(2)(2) of the Law on Tobacco Duty (Tabaksteuergesetz) transposes, in substantially identical terms, Article 4(1)(b) of Directive 95/59.

7 Article 4(1)(1) and Article 4(1)(3) of that law set the rates of excise duty for cigarettes and fine-cut smoking tobacco. Those rates are consistent with the minimum rates set by the Community legislation.

8 It is apparent from the documents before the Court that, in the Federal Republic of Germany, the lowest rate, intended for fine-cut tobacco for self-rolled cigarettes, is applied to 'West Single Packs'.

Pre-litigation procedure

9 By a letter of formal notice of 18 October 2002, the Commission notified the Federal Republic of Germany that it considered the abovementioned national law to infringe

the provisions of Directives 95/59 and 92/79, in that it taxes 'West Single Packs' at the rate of excise duty applicable to fine-cut tobacco. According to the Commission, this product should have been taxed at the rate applicable to cigarettes.

10 In its reply of 18 December 2002, the German Government disputed the claim made by the Commission. By a letter of 11 July 2003, the Commission then sent the German Government a reasoned opinion calling on it to take the necessary measures to remedy that breach within two months of notification of that reasoned opinion.

11 In a letter of 4 September 2003, the German Government replied to the Commission, stating that it maintained its position and that it still considered 'West Single Packs' not to be cigarettes.

12 In those circumstances, the Commission decided to bring the present action.

The action

Arguments of the parties

13 As regards the interpretation of Article 4(1)(b) of Directive 95/59, the Commission submits, first, that this provision makes a distinction between non-industrial and

industrial handling. The adjective 'simple' is used in that context merely to qualify the adjective 'non-industrial'.

14 Secondly, the Commission claims that a systematic analysis of Directive 95/59 shows that its purpose is to establish separate categories of tobacco products. The taxation of the products depends on their classification in one or other of those categories, so that inaccuracies in the classification of those products may result directly in a substantial distortion of competition.

15 To avoid difficulties of classification, the Commission suggests an objective test for ascertaining whether the process of assembly constitutes 'simple non-industrial handling'. It submits that, in the course of that test, the objective criterion to bear in mind is that of a final product which is perfectly identical in form, both as regards the amount of tobacco used and the rate of filling or density of the stuffing, to a cigarette assembled by a wholly industrial process. The Commission considers that, in the case of fine-cut tobacco, the appearance of the final product depends largely on the skill of the consumer and may not, consequently, be compared to that of an industrially-manufactured cigarette. On the other hand, pre-fabricated rolls of tobacco which, thanks to an entirely manual, hence 'non-industrial' process, are inserted into pre-fabricated cigarette tubes, result in a final product which is largely identical to an industrially-manufactured cigarette.

16 Furthermore, the Commission points out that the purpose of the provision being examined, as demonstrated by the 14th recital in the preamble to Directive 95/59, is to ensure uniform taxation of cigarettes. As a result, a cigarette manufacturer should not be able to avoid the higher rate of tax on cigarettes by simply giving up the last stage of the production process and leaving to the consumer the task of assembling a product largely identical to a cigarette.

17 The Commission also draws attention to the fact that, under the second subparagraph of Article 4(1) of Directive 95/59, up to and including 31 December 2001, the Federal Republic of Germany could tax the rolls of tobacco referred to in that same provision under (b) at a rate of duty which was at least equal to the rate applied to fine-cut tobacco. The Commission takes the view that the derogating provision concerned inter alia, products such as 'West Single Packs'. That derogating provision would not have been necessary if products such as 'West Single Packs' were to be regarded as fine-cut tobacco and not as cigarettes.

18 In that connection, the Commission considers that the term 'simple non-industrial handling' used in Article 4(1)(b) of Directive 95/59 is to be given a wide interpretation. Thus, all the products produced by a consumer without much manual handling from tobacco rolls and pre-fabricated cigarette tubes and which are largely identical to industrially-manufactured cigarettes should be regarded as cigarettes for the purpose of that provision.

19 As regards the application of the relevant provisions as defined above to the product 'West Single Packs', the Commission refers to the international patent application for 'West Single Packs' (published in accordance with the Patent Cooperation Treaty under the title 'fine cut unit pack'). According to that document, it is a product which offers consumers a straightforward means of easily making their own cigarettes, which are comparable in every respect to industrially-manufactured cigarettes, and which also benefit from the lower rate of tax on fine-cut tobacco. Therefore, the Commission considers that the criteria for the application of Article 4 (1)(b) of Directive 95/59 are met in this instance and that the products concerned, such as 'West Single Packs', must be classified in the category of cigarettes.

20 The German Government submits that the criterion used by the Commission for the purpose of interpreting Article 4(1)(b) of Directive 95/59 do not meet the requirements of objectivity and a uniform interpretation of the decisive points.

21 First, the German Government is of the view that the wording of the provision, by using the adjective 'simple', lays down an extra criterion which has its own specific meaning, just as the adjective 'non-industrial' does. Following the Commission's analysis, according to which the adjective 'simple' is merely used to qualify the adjective 'non-industrial', raises the question as to how 'complex non-industrial handling' and 'simple industrial handling' should be classified. In that government's submission, if the Commission's interpretation were to be applied, then those two categories would remain excluded from the scope of the provisions at issue.

22 The German Government considers that, in order to achieve the objective of Directive 95/59, which is to establish a clear distinction between two categories of products, the following two criteria must be applied: the handling must be 'simple' and of a 'non-industrial' nature. If only the 'non-industrial nature' of the handling were taken into account, there could no longer be any justification for making the distinction in relation to the taxation of fine-cut tobacco. Under that criterion a consumer could assemble a cigarette himself by non-industrial means and the final product concerned would, in those circumstances, also be a cigarette.

23 So far as concerns the delimitation of those two categories of products on the basis of the criterion of the quality of the final product, the German Government maintains that Directive 95/59 clearly does not take account of that criterion, but of the 'manufacturing process' needed to make the final product.

24 Having thus set out the relevant provisions applicable to the product 'West Single Packs', the German Government submits, firstly, that a cigarette can only be assembled from 'West Single Packs' in a number of successive stages, calling for precise and experienced handling. It refers, inter alia, to the fact that people taking part in tests found that the use of 'West Single Packs' was complicated, impractical and required a lot of practice, which does not justify a description of it as 'simple'.

25 Secondly, the German Government argues that the documentation relating to the patent for 'West Single Packs' does not permit an assessment of the 'simple non-industrial handling' involved since it is intended to emphasise the product's novelty.

Findings of the Court

26 Whether or not there has been a failure to fulfil obligations, as the Commission claims, is subject to the finding that the product 'West Single Packs' is covered by the definition of 'cigarette' under Article 4(1)(b) of Directive 95/59.

27 In that regard, it must be noted, as it was by the Advocate General in point 27 of his opinion, that it is apparent from a combined reading of the different parts of Directive 95/59, in particular Articles 4 and 6, and the 14th recital in the preamble to the directive, that the Community legislature intended to make a clear distinction between, on the one hand, manufactured 'rolls' of tobacco, which are regarded as cigarettes, and, on the other, smoking tobacco 'intended for rolling cigarettes'. A clear material distinction is therefore established between tobacco already made up by the manufacturer into a unit of the size and shape of a cigarette, and loose tobacco which the smoker must coax into that form.

28 This finding is reinforced by legislative developments so far as concerns taxes other than turnover tax on the consumption of manufactured tobacco. In Council Directive 92/78/EEC of 19 October 1992, amending Directives 72/464/EEC and 79/32/EEC on taxes other than turnover taxes which are levied on the consumption of manufactured tobacco (OJ 1992 L 316, p. 5) the Community legislature widened the definition of 'cigarette', adding to it, inter alia, 'rolls of tobacco which, by simple non-industrial handling, are inserted into cigarette-paper tubes'.

29 In this instance, it is not disputed that the product 'West Single Packs' is made up of rolls of tobacco within the meaning of Article 4(1)(b) of Directive 95/59.

30 It is still necessary to establish whether that product corresponds to the rolls of tobacco 'which, by simple non-industrial handling, are inserted into cigarette-paper tubes' within the meaning of Article 4(1)(b) of Directive 95/59, which is the provision the Commission refers to in its action.

31 As the Advocate General notes in point 25 of his opinion, and as confirmed by the demonstration carried out by the Commission's agent at the time of the hearing, making a cigarette from the manufactured components of 'West Single Packs' involves easy, non-industrial handling, consisting merely in inserting the component, in its aluminium wrapping, into a cigarette paper tube, and then pulling off the wrapping leaving the tobacco inside the tube.

32 It follows that the rolls of tobacco in question are slipped into the cigarette tubes by simple non-industrial handling. Accordingly, all the criteria set out in Article 4(1)(b) of Directive 95/59 are met.

33 It must therefore be noted that, by applying the tax rate for fine-cut tobacco for self-rolled cigarettes to 'West Single Packs', the Federal Republic of Germany has failed to fulfil its obligations under Article 4(1)(b) Council Directive 95/59/EC and the first paragraph of Article 2 of Directive 92/79.

Costs

34 Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by applying the tax rate for fine-cut tobacco for self-rolled cigarettes to rolls of tobacco sold under the name 'West Single Packs', the Federal Republic of Germany has failed to fulfil its obligations under Article 4(1)(b) of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, and the first paragraph of Article 2 of Council**

Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes;

2. Orders the Federal Republic of Germany to pay the costs.

[Signatures]