OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 17 April 1997 *

1. The Court of Appeal has referred to the Court of Justice for a preliminary ruling two questions on the interpretation of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [1] (hereinafter 'the directive').

The facts

2. The Court of Appeal wishes to know in which country the excise duty is chargeable when an individual purchases, for his own use, goods subject to duty (specifically, tobacco products), the purchase takes place in State B, from which the goods are transported to State A, where the individual concerned lives, and both operations involve an agent acting for him.

3. That is the position in this case, in which, as graphically stated by the national court, 'the appellants have set up and participated in a scheme which enables a UK resident, without leaving the comfort of his armchair, to obtain in this country tobacco which he has purchased in a shop in Luxembourg.' In that way he avoids payment of the excise duty applicable in the United Kingdom, which is heavier than that payable in Luxembourg.

4. The appellants in the main proceedings are two companies and a natural person. The first company, EMU Tabac SARL (hereinafter 'the seller' or 'the retailer') is a retailer of tobacco products in Luxembourg. The second, The Man in Black Limited (hereinafter 'the agent'), acts as agent for any buyers living in the United Kingdom. Mr Cunningham is a director of the latter company.

5. Both those companies are in turn subsidiaries of another company (The Enlightened Tobacco Company). The relationship between the two subsidiaries is of a commercial nature and each has different directors. Almost all EMU Tabac Sàrl's sales are made

* Original language: Spanish.

1 — OJ 1992 L 76, p. 1.

in response to requests for specific quantities of cigarettes or tobacco from private individuals living in the United Kingdom, although it also sells to individuals living in Luxembourg.

6. The system devised and implemented by the two companies is as follows:

(a) The seller buys cigarettes of a specified brand, under licence.

(b) The seller and the agent have a commercial agreement under which the first company has opened and maintains a credit account in the name of the second covering all the purchases made by customers through the agent. The latter undertakes to transfer the amount of the payments from customers directly into bank accounts in London or Luxembourg, having furnished a guarantee to that effect.

(c) The sale of the products to the customers follows a procedure which both parties describe in the following terms:

'(1) The offer to purchase products from the retailer is made by the customer.

(2) The agent shall receive and communicate that offer to the retailer in Luxembourg acting as agent for the customer.

(3) At its discretion, the retailer will accept that offer to purchase and will communicate its acceptance to the agent (as agent of the customer) by delivering the products together with a receipted copy of the agent's offer summary document.

(4) The contract for the sale and purchase of the products will be made in Luxembourg and title in those products will pass in Luxembourg. The contract will be subject to the law of England.'

(d) The agent deals with transport of the goods for the customer, under contracts with a transport undertaking: the contract of carriage is signed by the agent as agent for the customer.

(e) Since the sales are to individuals, no customer may buy more than 800 cigarettes per order. If more cigarettes are requested in an order or a large number is ordered in a single month, the agent sends the customer a printed form refusing to supply the goods, as they must be solely for personal use.

7. According to the order for reference, what happens in practice is as follows:

(a) The individual customer obtains an order form for cigarettes, fills it in and sends it to the agent, with a cheque for the requisite amount.

(b) Once the cheque has been paid into the agent's customer account in London, that fact is notified to the agent's office in Luxembourg, together with details of the customer's name and address.

(c) An employee of the agent goes to the retailer's office (which is in the same building) and the latter, having accepted the offer, hands over the goods.

(d) The agent then packages the goods, which are collected by the carrier and sent to the United Kingdom where they are delivered to the customer.

(e) Finally, the agent pays the retailer and the carrier out of a current account to which has previously been transferred from the agent's account in London a sum equivalent to the price of the goods and the cost of transport. The remainder of what has been paid by the purchaser to the agent represents the agent's commission.

The main proceedings and the preliminary questions

8. The United Kingdom tax administration (the Commissioners for Customs and Excise) ordered the seizure, in Dover, of a quantity of tobacco imported under the system described above and required the payment on those goods of United Kingdom excise duty.

9. The now appellants applied to the High Court of Justice (Queen's Bench Division) for a declaration that the United Kingdom excise duty was not payable, that the seizure of the tobacco was unlawful and that the United Kingdom tax administration should refrain from seizing tobacco imported under the scheme.

10. Those applications were dismissed by the High Court of Justice, whereupon the appellants brought the matter before the Court of Appeal, which decided to stay the proceedings and seek a preliminary ruling from the Court of Justice on the following questions:

'1. Does Directive 92/12/EEC and in particular Article 8 have the effect of precluding the charging of excise duty on goods in a Member State A in circumstances where:

(i) the goods were acquired for the use of a private individual in Member State A;

(ii) they were acquired in Member State B by an agent acting on behalf of the private individual;

(iii) transportation of the goods from Member State B to Member State A was arranged by the Agent; and

(iv) the individual did not himself travel with the goods from Member State B to A.

2. Where a scheme has been commercially devised and marketed whereunder purchases made in Member State B for the personal use of a private individual in Member State A are made by an agent for that individual and those purchases are transported from Member State B to Member State A as a result of arrangements made by such an agent, does Directive 92/12/EEC have the effect of precluding the charging of excise duty on those purchases in Member State A?'

The applicable Community provisions

11. Excise duty is an indirect tax levied on certain goods such as tobacco products, alcoholic beverages and hydrocarbons. The rates of duty applied by each Member State are different, harmonisation thereof not having so far been achieved.

12. Products manufactured in, or imported into, the Community are subject to excise duty. Normally, payment of the tax is deferred until the goods are released for consumption. Accordingly, the collection of excise duty is in principle a matter for the Member State where the goods are consumed.

13. Before the creation of the single market, goods subject to excise duty could be held in a warehouse, or move from one warehouse to another in various Member States which were parties to the suspension arrangement, [2] subject to border controls. Such controls are no longer possible since the advent of the single market.

14. The directive lays down general conditions applicable to products subject to excise duty and makes specific provision for the holding and movement of them and for the controls needed to ensure that tax debts are discharged.

15. Article 6 of the directive provides that, as a general rule, the duty becomes chargeable when the goods are released for consumption, [3] the rates of duty in force at the material time being applied in the Member State of release for consumption.

16. Article 7 of the directive provides that, where products subject to excise duty already released for consumption in a Member State are 'held' [4] for commercial purposes in another Member State, the excise duty is to be levied in that other Member State and the tax will be repayable by the Member State from which they came. The wording of the provision [5] is as follows:

'1. In the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in another Member State, the excise duty shall be levied in the Member State in which those products are held.

2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one

2 — The suspension arrangement applies to the manufacture, processing, holding and movement of products subject to excise duty, and under it, although the chargeable event has occurred, the duty is not yet chargeable.

3 — According to Article 6, the duty also becomes chargeable when it is found that there are losses or differences which ought to be subject to excise duty in accordance with Article 14(3). In any event, release for consumption of goods subject to excise duty is deemed to mean:
(a)any departure, including irregular departure, from a suspension arrangement;
(b)any manufacture, including irregular manufacture, of the products concerned outside a suspension arrangement;
(c)any importation of those products, including irregular importation, where they have not been placed under a suspension arrangement.

4 — Footnote 4 relates only to the Spanish version.

5 — As amended by Council Directive 92/108/EEC of 14 December 1992 amending Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of products subject to excise duty (OJ 1992 L 390, p. 124).

Member State are delivered, or intended for delivery in another Member State or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.

3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.

4. The products referred to in paragraph 1 shall move between the territories of the various Member States under cover of an accompanying document listing the main data from the document referred to in Article 18(1). The form and content of this document shall be established in accordance with the procedure laid down in Article 24 of this Directive.

5. The person, trader or body referred to in paragraph 3 must comply with the following requirements:

(a) before the goods are dispatched, make a declaration to the tax authorities of the Member State of destination and guarantee the payment of the excise duty;

(b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;

(c) consent to any check enabling the administration of the Member State of destination to satisfy itself that the goods have actually been received and that the excise duty to which they are liable has been paid.

6. The excise duty paid in the first Member State referred to in paragraph 1 shall be reimbursed in accordance with Article 22(3).

...'.

17. Article 8 of the directive 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.'

18. Article 9 of the directive lays down rules for products subject to excise duty where they are intended to be used for commercial purposes:

'1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purpose in another Member State.

In this case, the duty shall be due in the Member State in whose territory the products are and shall become chargeable to the holder of the products.

2. To establish that the products referred to in Article 8 are intended for commercial purposes, Member States must take account, *inter alia*, of the following:

— the commercial status of the holder of the products and his reasons for holding them,

— the place where the products are located or, if appropriate, the mode of transport used,

— any document relating to the products,

— the nature of the products,

— the quantity of the products.

For the purposes of applying the content of the fifth indent of the first subparagraph, Member States may lay down guide levels, solely as a form of evidence. These guide levels may not be lower than:

...'.

19. Article 10 of the directive contains specific provisions for particular kinds of transactions involving the dispatch or transport of goods subject to excise duty:

'1. Products subject to excise duty purchased by persons who are not authorised warehousekeepers or registered or non-registered traders and dispatched or transported directly or indirectly by the vendor or on his behalf shall be liable to excise duty in the Member State of destination. For the purposes of this Article, "Member State of

destination" shall mean the Member State of arrival of the dispatch or transport.

2. To that end, the delivery of products subject to excise duty already released for consumption in a Member State and giving rise to the dispatch or transport of those products to a person as referred to in paragraph 1, established in another Member State, and which are dispatched or transported directly or indirectly by the vendor or on his behalf shall cause excise duty to be chargeable on those products in the Member State of destination.

3. The duty of the Member State of destination shall be chargeable to the vendor at the time of delivery. However, Member States may adopt provisions stipulating that the excise duty shall be payable by a tax representative, other than the consignee of the products. Such tax representative must be established in the Member State of destination and approved by the tax authorities of that Member State.

The Member State in which the vendor is established must ensure that he complies with the following requirements:

— guarantee payment of excise duty under the conditions set by the Member State of destination prior to dispatch of the products and ensure that the excise duty is paid following arrival of the products,

— keep accounts of deliveries of products.

4. In the case referred to in paragraph 2, the excise duty paid in the first Member State shall be reimbursed in accordance with Article 22(4).

...'.

The first preliminary question

20. The national court links its first question to Article 8 of the directive, for the application of which three cumulative conditions must be met in order for products to be subject to the excise duty in force in the country of purchase:

(a) the products must be acquired by private individuals;

(b) the products must be acquired by private individuals for their own use;

(c) the products must be transported by the private individuals.

21. In the present case there is no problem concerning the second condition, the legal aspects of which are clear: both the parties in dispute and the national court recognise that private individuals resident in the United Kingdom acquire tobacco products for their personal use, not for commercial purposes. No doubts appear to arise as to the application of the criteria laid down in that connection by Article 9 of the directive.

22. The same does not apply to the other two conditions. The dispute between the parties has focused particularly on the requirement of transport, which raises considerable interpretative difficulties, but in my opinion the first condition too must be analysed and examined in relation to the scheme described by the United Kingdom court in its order for reference.

(i) *The meaning of the words 'acquisition by private individuals' used in Article 8 of the directive*

23. I shall first mention a point which, judging from the observations of some of the parties, does not seem to have been taken sufficiently into account: the directive of which interpretation is sought is a tax measure, intended to deal with matters of taxation, and to that end it uses tax-law classifications. By this I mean that the terms used in the directive, on the basis of the corresponding concepts in civil or mercantile law, may have a rather independent meaning which will not coincide in every respect with that of their counterparts in civil or mercantile law.

24. In that light, it is possible that the private individual purchaser, as a subject of civil or mercantile law, may not be precisely the same as the person with which Article 8 of the directive is concerned. That applies to a specific aspect of the involvement of the private individual in the purchase contract referred to in the directive, where it envisages the possibility of his acting, in entering into the contract or giving effect to it, through a third party.

25. A similar possibility is generally available in civil law for all types of acts-in-the-law by virtue of the principle that whoever does something for himself may also do it

through someone else. However, from the taxation point of view, it may be appropriate to distinguish between purchases made by someone who acts for himself and those by someone who acts through an agent or attorney.

26. Specifically, I consider that the concept of a private individual, with whose purchases Article 8 of the directive is concerned (I repeat, for the sole purpose of regulating the territorial chargeability of excise duty), is of more limited scope, so that it excludes the instrumentality of third parties. There are two main reasons for my taking that view.

27. In the first place, the private individual in this case must carry out sequentially a number of personal operations in order to benefit from the tax provisions in the Member State of purchase: as we shall see shortly, he must travel to that Member State and from there he, personally, must transport the goods acquired. It seems to me to follow logically from those requirements that the purchase, as such, should also be deemed to be limited to a purchase made by the buyer himself, not through an agent or middleman.

28. Secondly, the presence of persons other than the purchaser, in the intra-Community movement of goods subject to excise duty, is carefully regulated by the directive. In addition to action by authorised warehousekeepers, registered and non-registered traders, the directive provides for 'a tax representative, other than the consignee of the products' (Article 10(3)). If it had been intended that the purchaser could be replaced, purely and simply, by any natural or legal person to whom he had granted a power of attorney in order to benefit from the rule in Article 8 when the goods cross the frontier of a Member State, that article would have contained a specific provision to that effect.

29. Therefore, Article 8 of the directive provides only for action by the private individual on his own behalf, actively participating in a number of successive operations (travel to another Member State, purchase of products subject to excise duty and transport to his own country) which he must carry out for himself. Transactions which do not fulfil those requirements — as they do not in this case — cannot benefit from the rule contained in that article.

30. All this becomes clearer upon analysis — an analysis which I shall now undertake — of the third precondition for application of the rule laid down in Article 8 of the directive.

(ii) *The concept of 'products transported', according to a literal interpretation of Article 8 of the directive*

31. The first sentence of Article 8 of the directive raises two problems of interpretation relevant here. First, the various language versions differ from each other significantly. Second, the interpretation of the very term 'transport' used in that provision is not without difficulties.

32. The expression used in Article 8 of the directive ('products acquired by private individuals ... and transported by them') has been translated in various ways in the various languages of the Member States which made up the Community when it was adopted.

33. Certain language versions coincide in using the expression 'transported by them' without any additional words — as in the case of the Spanish and English versions. [6] Others, however, reinforce the pronoun 'them' with an additional term: that is so in the French, [7] Portuguese, [8] Italian, [9] Dutch [10] and German [11] versions. Finally, the Greek [12] and Danish [13] versions lay even greater stress on the personal aspect by using terms equivalent to 'transport in person'.

34. In my opinion, a literal interpretation of the provision implies that the person who does the transporting must be, specifically, the private individual purchaser, and not any other person. Even in the absence of the more 'radical' language versions, the intrinsic meaning of the term 'transported by them' or 'transported by themselves' used in the remainder of the language versions refers to transport carried out — and not merely arranged — by the person concerned.

35. It is true that one person may entrust the transport of goods to another or avail himself of the services of an agent to do so. But such operations go beyond the limits of Article 8 of the directive since the private individual is not then 'transporting', as required by that article, but is 'arranging' or 'contracting for' the transport or 'entrusting' it to another person.

36. Article 8 does not say 'products transported on the directions, or on behalf, of private individuals'. Nor does it refer to the action of 'dispatching', which implies using

6 — 'Transportados por ellos'.
7 — 'Transportés par eux-mèmes'.
8 — 'Transportados pelos próprios'.
9 — 'Trasportati dai medesimi'.
10 — 'door hen zelf vervoerde produkten'.
11 — 'Waren, die Privatpersonen ... sie selbst befördern'.
12 — 'τα οποία μεταφέρουν αυτοπροσώπως'.
13 — 'Og som de selv medfører'.

the services of a third party. However, both forms of words are found in other provisions of the directive.

(a) Thus, Article 10(1) of the directive refers to 'products ... *dispatched or transported directly or indirectly* by the vendor or on his behalf'. [14] The same terms are used in Article 10(2). They thus use legal formulae that are wider and more flexible than that used in Article 8.

(b) For its part, Article 9(3) provides for the hypothesis of 'atypical modes of transport *by private individuals or on their behalf*'. [15] By contrast, Article 8 contains no reference to the latter possibility.

37. It is particularly significant that Article 8, unlike Article 10, dispensed with the possibility — provided for and regulated by the latter — of having the goods in question sent, that is to say forwarded or dispatched by private individuals to their own countries: on the contrary, it lays down the imperative requirement that they be transported by the person who acquired them.

38. The literal wording of the provision thus refers to transport operations carried out by the private individual and no-one else. This implies, in my view, that the private individual who buys the products subject to duty has travelled to another country and carries them with him.

39. The status of traveller which the private individual must possess, if not apparent from Article 8, must be inferred as a matter of logic. When Article 26 of the directive laid down exceptional rules for Denmark (later extended to Sweden and Finland in their respective Acts of Accession) it created a direct link between Article 8 and specified quantitative limits enforceable against travellers who go to that country or, if they live there, leave it.

40. Article 26 of the directive, [16] as a temporary exception to the conditions laid down

14 — Emphasis added.

15 — Emphasis added.

16 — The original wording of Article 26 was as follows:
'1. Without prejudice to Article 8, until 31 December 1996 and subject to a review mechanism similar to that laid down in Article 28 (2) of Directive 77/388/EEC (OJ 1977 L 145, p. 6), Denmark shall be authorised to apply the specific arrangements laid down in paragraphs 2 and 3 for spirit drinks and manufactured tobaccos within the general framework of the approximation of excise duty rates.
2. Denmark shall be authorised to apply the following quantitative restrictions:
— private travellers entering Denmark shall benefit from the allowance in force on 31 December 1992 for cigarettes, cigarillos or smoking tobacco and for spirit drinks,
— travellers resident in Denmark and having been outside Denmark for less than the period in force on 31 December 1992 shall benefit from the allowances in force in Denmark on 31 December 1992 for cigarettes and spirit drinks.
3. Denmark may collect excise duties and carry out the necessary checks with respect to spirit drinks, cigarettes, cigarillos and smoking tobacco.
...'
This article has recently been replaced, as from 1 January 1977, by the corresponding text of Council Directive 96/99/EC of 30 December 1996 amending 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 1997 L 8, p. 12).

by Article 8, allows the Member States to which the directive is addressed to apply restrictive measures to travellers who bring into their territories products subject to excise duty acquired by them in another Member State. [17] All this, as a matter of sound logic, postulates the same interpretation of Article 8 as the one which I advocate, namely that the cross-frontier traveller must have personally acquired and transported those products with him.

41. It is true that Article 8 likewise contains no express references to the traveller's 'personal luggage', of which the products purchased should form part. However, that omission does not in my view provide a basis for arguing that transport may be undertaken on behalf of the private individual. That expression appears in Article 28 of the directive only in relation to travellers who take a flight or a sea voyage within the Community, who may be granted an exemption from duty. [18] That fact has nothing to do with Article 8, under which purchasers necessarily have to pay the duty applicable in the country of acquisition of the products.

42. In any event, it must not be forgotten that Article 8 of the directive, in referring to all products subject to excise duty, allows the buyer to transport some of them for himself without necessarily including them in 'his personal luggage': thus, for example, petrol which he has purchased in the country of destination and is in his vehicle's tank does not form part of his 'personal luggage' in the strict sense, but the rule in Article 8 nevertheless continues to apply. This explains why, therefore, that article did not include the requirement that all the products referred to have to be included in travellers' personal luggage.

43. Accordingly, I agree with the position taken by all the Member States which intervened in this case, except France, and I differ from that taken by the appellants in the main proceedings, which on this point coincides only partly with the view taken by the Commission and the French Government. [19]

17 — According to the new text of Article 26 of the directive, in force as from 1 January 1997, Denmark and Finland are authorised to restrict the grant of admission without payment of other duty to 'persons who have been absent from their territory for more than 24 hours'.

18 — The Member States may grant to such travellers, until 30 June 1999, exemption from excise duty on products which they have bought at particular sales outlets in ports or airports or on board the aircraft or vessel carrying them. The exemption applies only to products in quantities not exceeding, per person and journey, the limits laid down in the Community provisions in force for travel between non-member countries and the Community.

19 — The Commission considers that Article 8 may be applied even if the goods, acquired personally by the purchaser, are not carried by him personally but by a carrier designated by him. The French Government for its part considers that Article 8 applies both if transport of the dutiable goods is effected by the buyer and if it is effected on his behalf (provided that the seller does not assume responsibility for the transport operation).

(iii) *The concept of 'products transported' in Article 8, in the legislative context of the directive*

44. Support for the same interpretation of the term 'transported by them' can be drawn from other considerations concerning the internal sense of Article 8 within the legislative context of the directive.

45. As is acknowledged in its preamble, the directive has to fulfil at the same time two imperative requirements: on the one hand, 'movement from the territory of one Member State to that of another may not give rise to checks liable to impede free movement within the Community'; on the other, each State must be assured that it will collect the excise duty at the rates approved by it and in accordance with the common rules on chargeability: accordingly the latter make it 'necessary to know of the movements of products subject to excise duty'.

46. The system of excise duty in force at Community level since 1993 necessitates, in addition to minimum rates of charge, harmonised taxation structures and common rules on the holding and movement within the Community of the products affected. The latter may take three specific forms:

(a) Commercial movement of products under the suspension arrangement; following the abolition of frontier controls, the principle of taxation at destination was maintained by providing for a system of detailed information and checks in which traders, registered or otherwise, and accompanying documents play a key role.

(b) Commercial transactions involving products that have already been taxed, accounting for a small proportion of intra-Community trade in this kind of product, [20] in which the information mechanisms, for which the economic agents concerned are responsible, and control by the Member States, are also regulated in detail.

(c) Cross-frontier purchases by private individuals, of the kind referred to in Article 8 of the directive. By contrast with the other two systems, this one entails no obligation to provide information since the intervention of economic agents as intermediaries is excluded.

20 — This is stated in the Commission's report to the Council and the European Parliament of 13 September 1995 submitted in accordance with Article 4 of Council Directive 92/79/EEC of 19 October 1992 on the approximation of rates for other products subject to excise duty (COM(95) 285 Final).

47. Within that legislative context, the inclusion of Article 8 must be interpreted in the light of the other provisions of the directive so as not to negate the effectiveness of the remaining articles.

48. First, Article 9 of the directive, concerning products held for commercial purposes, would be rendered largely ineffective if a system of purchase and transport of the kind at issue in the main proceedings became general practice. Within such a system, after abolition of internal frontiers, the Member States would in practice find it hard to evaluate the combined effect of the factors mentioned in that provision to determine whether the products were being transported on a commercial or a merely private basis. For example, they would encounter difficulties in verifying whether or not a given private individual, using several agents simultaneously or successively, had exceeded the levels which in principle imply that his purchases are of a private nature.

49. The fact that, under the system at issue in the main proceedings, the appellant undertakings refuse to accept orders from private individuals which exceed those levels indicates their intention not to engage in fraud, but that is not a sufficient argument to render acceptable the incitement to fraud which, objectively, would result from generalisation of the system.

50. Secondly, the rules on distance sales contained in Article 10, observing the principle of taxation in the country of destination and not that of purchase, would in all probability be systematically evaded in sales between countries with widely differing tax rates, where logically there is an incentive to buy products in the country which levies the least tax.

51. In fact, the Article 10 rules expressly mention only distance sales of products 'dispatched or transported directly or indirectly by the vendor or on his behalf'. For the appellants, the scope of that rule does not extend to a mechanism such as that at issue in the main proceedings since there it is the buyers and not the sellers who contract, through an agent, for the transport service.

52. If that interpretation were allowed, there would be a lacuna in the directive regarding distance purchases since, although the system used by EMU Tabac may not conform with Article 10, interpreted literally, it does not thereby cease to be, economically and legally, a distance purchase. The most appropriate legal way of supplying that lacuna is recourse to analogy: application to the circumstances of this case of the legal provision applicable to the most similar situation.

53. As I see it, the legal concept closest to the 'distance purchasing' carried out, 'in the comfort of their armchairs', by United Kingdom residents is, precisely, the 'distance selling' governed by Article 10 of the directive, from both the economic and the legal points of view.

54. Therefore, if it is the case that the Community legislature wished to adhere to the principle of taxation at destination for the distance sales provided for in Article 10, the same principle must be deemed to apply to the distance purchases at issue in the main proceedings, with the result that distant purchasers must pay the excise duty of the Sate in which they receive their tobacco products and not that of the State from which they were dispatched.

55. The principle of taxation at the point of origin (more properly, in the country of acquisition) in Article 8 of the directive does not therefore apply in such cases. Its scope is cut down to purchases made by private individuals followed by personal transport of the products acquired, in all cases for the personal use of the purchaser.

56. The analogy is not invalidated by the fact that Article 10 requires the transport to be carried out, directly or indirectly, by the seller or on his behalf. It would be sufficient, in order to sidestep all the complex obligations [21] imposed by Article 10 on sellers, for the latter to agree with their customers (or with their agents, as occurs in this case) certain conditions concerning transport, perhaps even with guarantees or assurances from the seller.

57. Finally, I have already referred to the rules in the directive on the involvement of persons other than the buyer in the case of dispatches from a distance of products subject to excise duty (authorised warehousekeepers, registered or non-registered traders and tax representatives other than the consignees of the products). The involvement of the latter — whose characteristic function coincides with that of the agent — does not exclude the rule of taxation at destination in the case of distance sales. For the reasons given earlier, that same conclusion must apply to the distance purchases at issue in the main proceedings.

(iv) *The arguments against the proposed interpretation of the term 'products transported'*

58. The appellants have put forward a number of arguments in support of a different view from the one I have just set out. First,

21 — The seller must guarantee payment of the excise duty under the conditions laid down by the Member State of destination before despatch of the products; it must satisfy itself that the duty is paid after the products arrive and keep records of deliveries.

they rely on the general rule that can be inferred from Article 6 of the directive and on the allusion to the 'principle governing the internal market' mentioned in Article 8 of the directive. Secondly, they state that to interpret that article in the manner that I have just advocated would give rise to double taxation and would render Article 10 of the directive superfluous.

59. It is true that Article 6 of the directive provides that the duty becomes chargeable at the time of release for consumption of the products. But its legal force is neither greater nor lesser than that of the remaining articles of the directive. Specifically, it does not support any inference that the rule of taxation in the country of acquisition is to take precedence over the rule of taxation in the country of destination in the case of intra-Community movements of such products. Rather, an analysis of the directive points to precisely the opposite conclusion.

60. Of the three systems of intra-Community movement of products subject to excise duty to which I referred earlier (namely, commercial movement of products under the suspension arrangement, commercial transactions involving products that have already been taxed and purchases by private individuals for their own use) the first two are subject to the rule of taxation at destination.

61. Both when products are being moved under the suspension arrangement and when they are moved outside that arrangement, in the context of intra-Community commercial transactions — such as, for example, distance sales — they are subject to duty at their destination.

62. The rule of taxation at the point of origin is therefore of much more limited scope than the appellants claim. It applies to the purchase of goods which are not subsequently going to move between the various Member States and, under Article 8 of the directive, also to products acquired by private individuals and transported by them, not by way of trade.

63. The directive thus sought to strike a balance between the two rules (one requiring taxation at origin and the other taxation at destination) which cannot simply be frustrated by declaring that the first rule is to be of general application, extending to cases outside the sphere within which the Community legislature sought to confine it.

64. As regards the 'principle governing the internal market' referred to in Article 8 as the reason for making the excise duty chargeable in the country of acquisition, its importance as a means of interpretation is much less than the appellants suggest.

65. The internal market is characterised by the abolition between the Member States of barriers to the free movement of goods, persons, services and capital. It involves an area without internal frontiers, in which that free movement is guaranteed in accordance with the Treaty (Article 7a of the EC Treaty).

66. However, I consider that principle to be compatible with a taxation system which in specific cases requires excise duty — or even other taxes, such as VAT — to be paid at the destination of the goods, not at the point of origin, where the transactions take place within the Community. Needless to say, the opposite approach (taxation at origin) is also perfectly compatible with the internal market and also displays the advantages of simplicity and certainty.

67. In reality, the obstacle to the free movement of goods, and thus to attainment of the internal market, would arise either from the existence of other discriminatory internal taxes and charges having an effect equivalent to import customs duties (both of which, in this case are ruled out), or from double taxation of the products subject to excise duty. Specifically in order to obviate the latter, the directive contains detailed provisions as to the chargeability of the duty, providing in some cases for reimbursement of duty already paid (Article 22).

68. In the case of Article 8, double taxation is avoided — and the 'principle governing the internal market' is complied with, facilitating intra-Community movement of goods without frontier controls — simply by applying the rule of taxation at origin, albeit subject to certain requirements which I have already mentioned. I do not consider that the essence of that principle, as a criterion for interpretation of the rule, calls for the limits of Article 8 to be extended in the way contended for by the appellants.

69. The appellants assert, however, that the interpretation of Article 8 which I advocate would, in certain circumstances, give rise to a clear case of double taxation, since they have to pay the excise duty on the same products first in Luxembourg, when buying them, and then in the United Kingdom when receiving them.

70. I cannot accept that argument. The scheme of the directive is based on the principle of a single payment of duty, to such an extent that a whole section (Title IV) is devoted specifically to 'reimbursement' of sums already paid, in cases of intra-Community trade, in order to avoid double payment of tax on the same products.

71. Article 22(1) of the directive provides: 'In appropriate cases, products subject to

excise duty which have been released for consumption may, at the request of a trader in the course of his business, be eligible for reimbursement of excise duty by the tax authorities of the Member State where they were released for consumption when they are not intended for consumption in that Member State.' And paragraphs 3 and 4 of that article deal more particularly with the conditions for reimbursement in the cases referred to in Articles 7 and 10.

72. In my opinion, those legislative provisions are sufficient to avoid double taxation of the same products, since the reimbursement procedure would apply to the appellants' case, with the result that they would be required to pay only the duty chargeable in the United Kingdom.

73. Even if it is conceded that the directive contains a legal lacuna concerning 'distance purchases' of the kind at issue in the main proceedings, regarding which, in theory, the seller takes neither direct nor indirect responsibility for transport, recourse to analogy, as a means of fleshing out the legal order, would enable the principle of reimbursement of duty already paid at origin to be applied to such circumstances, since only the duty chargeable in the country of destination would be reimbursed.

74. Finally, the parties' argument that Article 10 of the directive would become pointless if Article 8 were interpreted in the manner that I advocate, also seems to me to be unfounded.

75. In my opinion, Article 10 is useful not only in order to confirm the rule that distance sales should be taxable at destination but also to determine the obligations of the seller and thereby facilitate monitoring of the exaction of duty in the relevant Member State.

76. The appellants are in part right to state that, if Article 8 is interpreted as I propose, Article 10 adds nothing of substance to determination of the country which is to levy the duty. Indeed, whilst the rule in Article 8 (taxation at origin) is limited to goods bought by private individuals and transported by them, distance sales, *a sensu contrario*, do not follow the same rule. And that is precisely what Article 10 provides.

77. That conclusion does not mean, however, that Article 10 is superfluous or redundant. The express provision for distance sales, as an economic phenomenon particularly suited to some products subject to excise duty, and the need to add detail to the applicable legal rules, are sufficient reasons

for the Community legislature to have chosen to include that article in the directive.

78. In short, I consider that the answer to the first preliminary question must uphold the chargeability of excise duty in the Member State of destination in the circumstances outlined by the national court.

The second preliminary question

79. Both the appellants and the intervener in support of the United Kingdom tax administration consider that no answer will be needed to the second question if the interpretation of Article 8 which I set out above is adopted.

80. For my part, although essentially agreeing with that view, I see no problem in giving an express answer to the national court, confirming that the circumstances set out in the second question represent no obstacle — quite the contrary — to excise duty being levied in the State to which the products are sent.

81. The terms of the second question are very similar to those of the first since the Court of Appeal raises the same problem, in relation to the same factual situation (purchase in State B for the personal use of a private individual resident in State A, through an agent who acts for the private individual and organises transport of the goods bought). The only difference is that in the second preliminary question it is expressly stated that the scheme was 'commercially devised and marketed'.

82. In my view, the answer that I suggest to the first preliminary question *a fortiori* extends to the case described in the second question. The existence of a scheme like the one described by the national court cannot preclude the chargeability of excise duty in the State of destination when the products have neither been bought by private individuals as such nor transported by them to that State but have been dispatched using a complex commercial mechanism.

83. The directive clearly distinguishes operations in which only private individuals take part from those which, involving as they do economic agents, are of a commercial nature. The reference to 'private individuals' appears only in Article 8 of the directive (and, derivatively, in Article 9(3)), emphasising that they are acting in a merely private

capacity, that is to say neither commercially nor professionally.

84. In contrast, cases in which there is an economic agent acting as such, and in any event involving himself in the intra-Community movement of goods subject to excise duty, fall outside the scope of Article 8 of the directive.

85. On the basis of that distinction, a system for the distribution of tobacco products in which one or more economic agents play a decisive role at the various stages, receiving orders, accepting or rejecting them, giving effect to such orders, physically receiving the products and arranging for them to be transported to the home address in another Member State of the customer who has previously made payment is, in my opinion, a clear example of a commercial operation which has nothing to do with the purchases by private individual covered by Article 8 of the directive.

86. At the heart of that operation, moreover, the action of a commercial service undertaking, which acts as agent for the purchaser, cannot be stripped of its inherent features: the undertaking plays a commercial role in the operations of purchase, transport and delivery of the products subject to excise duty which move from one Member State to another. The fact that such operations are preceded by a contract signed with the customer (the end consumer) does not deprive them of their commercial nature, on the basis of which, for example, the company could be sued in the event of breach of contract.

87. Finally, the peculiar characteristics of this case are such that any court would be entitled to reject the claims of a plaintiff by construing the tax provisions according to the interpretative criteria least conducive to tax evasion.

88. From that standpoint, having regard to the connections between the seller and the agent, which are fellow subsidiaries of the same company, it is even possible that the national court, whose legal system enables it to 'lift the veil of incorporation' in order to obviate any abuse of the law, will choose to apply Article 10 to the case before it, taking the view that it is the selling company itself which, by means of an entrepreneurial subterfuge, in reality 'indirectly' transports the goods to their destination. The expression 'indirectly', when used in relation to transport, as it is in the said Article 10 of the directive, is very flexible and allows such a conclusion.

89. In the same way, if it were necessary to do so as a last resort, the national court could decline to apply the rule contended for

by the appellants (taxation at origin) on the basis that to apply it to the present case would clearly run counter to the spirit and purpose of the directive and would be inimical to the effectiveness of other provisions of it. By so doing it would merely be applying the general legal principle prohibiting acts in fraud of the law.

Conclusion

90. In view of the foregoing, I propose that the Court of Justice reply as follows to the questions referred to it by the Court of Appeal:

(1) Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, and in particular Article 8 thereof, does not preclude the charging of such duty on goods in a Member State A in circumstances where:

(a) a private individual resident in State A acquires those goods for his own use;

(b) the purchase is made in State B, from which the goods are transported to State A;

(c) both operations involve an agent who acts in the name or on behalf of the private individual and arranges for transport of the products;

(d) the individual does not himself travel with the goods from Member State B to Member State A.

(2) The same conclusion applies where purchases displaying the same characteristics take place under a scheme commercially devised and adopted for commercial purposes by one or more economic agents.