Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

14 March 2024*

(Reference for a preliminary ruling – Taxation – General arrangements for excise duty – Directive 2008/118/EC – Article 1(2) – Other indirect taxes on excise goods – Conditions for levying such a tax – Specific purpose pursued by the tax – Excise duty applied to manufactured tobacco – Directive 2011/64/EU – Article 14 – Taxation rules – Compliance with those rules by other indirect taxes on excise goods – Heated tobacco – National legislation establishing, for heated tobacco, a tax structure and tax rate differing from those applicable to 'other smoking tobaccos')

In Case C-336/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), made by decision of 29 April 2022, received at the Court on 23 May 2022, in the proceedings

f6 Cigarettenfabrik GmbH & Co. KG

v

Hauptzollamt Bielefeld,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Third Chamber, N. Piçarra (Rapporteur), N. Jääskinen and M. Gavalec, Judges,

Advocate General: A. Rantos,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 15 June 2023,

after considering the observations submitted on behalf of:

– f6 Cigarettenfabrik GmbH & Co. KG, by D. Atanasova and C. Salder, Rechtsanwälte,

– the German Government, by J. Möller, R. Kanitz and N. Scheffel, acting as Agents,

– the European Commission, by A.C. Becker and M. Björkland, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 28 September 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12), and point (b) of the first subparagraph of Article 14(1), point (c) of the first subparagraph of Article 14(2), and Article 14(3) of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ 2011 L 176, p. 24).

2 The request has been made in proceedings between f6 Cigarettenfabrik GmbH & Co. KG ('f6') and the Hauptzollamt Bielefeld (Main Customs Office, Bielefeld, Germany) concerning the lawfulness of the supplementary tax, in addition to excise duty, applicable with effect from 1 January 2022 to heated tobacco manufactured by that company.

Legal context

European Union law

Directive 2008/118

3 Recital 4 of Directive 2008/118, repealed and replaced by Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (OJ 2020 L 58, p. 4), but applicable *ratione temporis* to the dispute in the main proceedings, stated:

'Excise goods may be subject to other indirect taxes for specific purposes. In such cases, however, and in order not to jeopardise the useful effect of Community rules relating to indirect taxes, Member States should comply with certain essential elements of those rules.'

4 Article 1 used to read as follows:

'1. This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter "excise goods"):

…

(c) manufactured tobacco covered by [Directive 2011/64].

2. Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax [(VAT)] as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.

…'

Directive 2011/64

5 Recitals 2 and 9 of Directive 2011/64 state:

‘(2) The [European] Union’s fiscal legislation on tobacco products needs to ensure the proper functioning of the internal market and, at the same time, a high level of health protection …

…

(9) As far as excise duties are concerned, harmonisation of structures must, in particular, result in competition in the different categories of manufactured tobacco belonging to the same group not being distorted by the effects of the charging of the tax …’

6 Article 1 of that directive provides:

‘This Directive lays down general principles for the harmonisation of the structure and rates of the excise duty to which the Member States subject manufactured tobacco.’

7 Article 2 of that directive is worded as follows:

‘1. For the purposes of this Directive manufactured tobacco shall mean:

(a) cigarettes;

(b) cigars and cigarillos;

(c) smoking tobacco:
(i) fine-cut tobacco for the rolling of cigarettes;
(ii) other smoking tobacco.

2. Products consisting in whole or in part of substances other than tobacco but otherwise conforming to the criteria set out in Article 3 or Article 5(1) shall be treated as cigarettes and smoking tobacco.

…’

8 Article 5(1) of that directive provides:

‘For the purposes of this Directive smoking tobacco shall mean:

(a) tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing;

(b) tobacco refuse put up for retail sale which does not fall under Article 3 and Article 4(1) and which can be smoked. …’

9 Under Article 14 of Directive 2011/64:

‘1. Member States shall apply an excise duty which may be:

(a) either an *ad valorem* duty calculated on the basis of the maximum retail selling price of each product …; or

(b) a specific duty expressed as an amount per kilogram, or in the case of cigars and cigarillos, alternatively for a given number of items; or

(c) a mixture of both, combining an *ad valorem* element and a specific element.

In cases where excise duty is either *ad valorem* or mixed, Member States may establish a minimum amount of excise duty.

2. The overall excise duty (specific duty and/or *ad valorem* duty excluding VAT), expressed as a percentage, as an amount per kilogram or for a given number of items, shall be at least equivalent to the rates or minimum amounts laid down for:

(a) cigars or cigarillos: 5% of the retail selling price inclusive of all taxes or EUR 12 per 1 000 items or per kilogram;

(b) fine-cut smoking tobacco intended for the rolling of cigarettes: 40% of the weighted average retail selling price of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption, or EUR 40 per kilogram;

(c) for other smoking tobacco: 20% of the retail selling price inclusive of all taxes, or EUR 22 per kilogram.

…

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

…’

German law

10 Paragraph 1 of the Tabaksteuergesetz (Law on tobacco tax) of 15 July 2009 (BGBl. 2009 I, p. 1870), as amended by the Law of 10 August 2021 (BGBl. 2021 I, p. 3411) (‘the TabStG’), provides:

‘(1) Manufactured tobaccos, heated tobacco and water pipe tobacco shall be subject to tobacco tax [which] constitutes an excise duty within the meaning of the Abgabenordnung [(General Tax Code)].

(2) Tobacco products are

1. cigars or cigarillos …

…

2. cigarettes

…

3. smoking tobacco (fine-cut tobacco or pipe tobacco): tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing.

(2a) For the purposes of this Law, heated tobacco is smoking tobacco in individual portions, intended for consumption by inhalation of an aerosol or smoke produced in a device.

…'

11 Paragraph 1a of the TabStG, headed 'Heated tobacco, water pipe tobacco', provides:

'Unless otherwise provided, the provisions of this Law relating to smoking tobacco and the detailed rules for their application shall also apply to heated tobacco and water pipe tobacco.'

12 Paragraph 2 of that law is worded as follows:

'(1) The tax shall be:

1. for cigarettes

…

(b) for the period from 1 January 2022 to 31 December 2022, 10.88 cents per unit and 19.84% of the retail selling price, but not less than 22.276 cents per unit, after deduction of the [VAT] on the retail selling price of the taxable cigarette;

…

4. for pipe tobacco

…

(b) for the period from 1 January 2022 to 31 December 2022, EUR 15.66 per kilogram and 13.13% of the retail selling price, but not less than EUR 24.00 per kilogram;

5. for heated tobacco, the amount of the tax provided for in point 4, plus a supplementary tax at 80% of the amount of the tax provided for in point 1 less the amount of the tax provided for in point 4. For the purposes of the calculation of the amount provided for in point 1, an individual portion of smoking tobacco shall be equivalent to one cigarette;

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 f6 produces rolls of heated tobacco that are to be inserted into a battery-powered heating device. These rolls are wrapped in a co-laminated paper with an aluminium coating so that they can neither be lit nor burned inside that device. The rolls are heated by electrical energy to a temperature below their combustion temperature and thus produce an aerosol containing nicotine, which is inhaled by the consumer, like conventional tobacco smoke, through a mouthpiece.

14 Until 31 December 2021, rolls of heated tobacco were taxed in Germany only at the rate of tax on tobacco applicable to pipe tobacco. Paragraph 2(1)(5) of the TabStG provides, however, for a supplementary tax on heated tobacco, in addition to that excise duty, as of 1 January 2002. The amount of that supplementary tax corresponds to 80% of the amount of the excise duty applicable to cigarettes, less the amount of the excise duty applicable to pipe tobacco ('the supplementary tax at issue').

15 On 2 December 2021, f6 filed a tax return with the Hauptzollamt Bielefeld (Main Customs Office, Bielefeld), in which it assessed the amount that it was to pay in respect of the tax applicable to heated tobacco, relying to that end on the taxation scale in force as of 1 January 2022. Of that amount, a sum of EUR 2 181.02 was attributable to the excise duty applicable pursuant to the first part of Paragraph 2(1)(5) of the TabStG, and a sum of EUR 4 100.44 to the supplementary tax at issue, provided for by the second part of that provision. f6 then brought an action against that tax return before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), which is the referring court, by which f6 disputes the lawfulness of that supplementary tax in the light, inter alia, of Article 1(2) of Directive 2008/118.

16 In support of its action, f6 claims, in the first place, that the supplementary tax at issue does not constitute an 'other indirect tax' authorised by that provision, since it fails to satisfy the conditions laid down therein. In the second place, such a tax infringes Article 14(3) of Directive 2011/64, by treating heated tobacco differently to other smoking tobaccos, of which it forms part. In the third place, the supplementary tax at issue infringes the combined provisions of point (b) of the first subparagraph of Article 14(1) and point (c) of Article 14(2) of that directive, by taking into account, in the calculation method thereof, not only the weight but also the number of units of the product.

17 The Hauptzollamt Bielefeld (Main Customs Office, Bielefeld) contends that the levying of the supplementary tax at issue is compatible with the provisions of Article 1(2) of Directive 2008/118. That tax is levied, on the one hand, in order to serve a specific purpose, namely that of reducing the consumption of nicotine, which is harmful to health, by taxing heated tobacco in a manner similar to cigarettes. On the other hand, that tax, as a non-harmonised national excise duty, does not have to satisfy all of the requirements laid down by Article 14 of Directive 2011/64.

18 Taking the view that heated tobacco must be categorised as 'smoking tobacco' within the meaning of Article 2(1)(c)(ii) of Directive 2011/64, and that, as a manufactured tobacco, it therefore constitutes an 'excise good' for the purposes of Article 1(1)(c) of Directive 2008/118, the referring court harbours doubts as to the compatibility of the supplementary tax at issue with Article 1(2) of Directive 2008/118.

19 That court wishes to ascertain, in essence, whether that tax constitutes an 'other indirect tax' within the meaning of the latter provision, or whether it is to be regarded merely as an increase in the excise duty applicable to heated tobacco, contrary to that provision. It points out that the supplementary tax at issue serves a budgetary purpose, since the tax revenue that it generates is paid into the general budget of the German Federal State, without necessarily being allocated to the protection of health. In any event, the referring court asks whether the objective pursued by the supplementary tax at issue – namely, according to that court, reducing the consumption of nicotine, which is harmful to health – is sufficient to be described as a 'specific purpose' within the meaning of Article 1(2) of Directive 2008/118.

20 Furthermore, the referring court seeks to ascertain whether the levying of a supplementary tax on heated tobacco contravenes Article 14(3) of Directive 2011/64, in that that type of smoking tobacco is ultimately subject to a higher rate of taxation than other types of smoking tobacco, thus giving rise to unequal treatment within the category of 'other smoking tobaccos' referred to in Article 14(2)(c) of that directive.

21 It also questions the compatibility of the taxable amount of the supplementary tax at issue with point (b) of the first subparagraph of Article 14(1) and point (c) of the first subparagraph of Article 14(2) of Directive 2011/64, in so far as one of the elements of that taxable amount is expressed, by reference to the rules applicable to excise duty on cigarettes, in relation to the number of units and not of the weight of heated tobacco.

22 It was in those circumstances that the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(2) of [Directive 2008/118] be interpreted as precluding national legislation … on the levying of tobacco tax on heated tobacco which provides, with regard to the calculation of the tax, that, in addition to the tax rate for pipe tobacco, a supplementary tax which is 80% of the tax amount for cigarettes less the tax amount for pipe tobacco is to be levied?

(2) If the supplementary tax on heated tobacco is not another indirect tax on excise goods for specific purposes within the meaning of Article 1(2) of Directive 2008/118[,] must Article 14(3) of [Directive 2011/64] be interpreted as precluding national legislation … on the levying of tobacco tax on heated tobacco which provides, with regard to the calculation of the tax, that, in addition to the tax rate for pipe tobacco, a supplementary tax which is 80% of the tax amount for cigarettes less the tax amount for pipe tobacco is to be levied?

(3) If the supplementary tax on heated tobacco is not another indirect tax on excise goods for specific purposes within the meaning of Article 1(2) of Directive 2008/118: must point (b) of the first subparagraph of Article 14(1) and point (c) of the first subparagraph of Article 14(2) of Directive [2011/64] be interpreted as precluding national legislation … on the levying of tobacco tax on heated tobacco which provides, with regard to the calculation of the tax, that that tax is to be determined according to the *ad valorem* tax rate and a specific tax rate based on the weight and given number of rolls of tobacco?'

The application to reopen the oral part of the procedure

23 By document lodged at the Registry of the Court of Justice on 10 October 2023, following the delivery of the Advocate General's Opinion, f6 requested that the oral part of the procedure be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

24 In support of its application, f6 states, in essence, that the Advocate General's Opinion contains arguments that were not the subject of argument between the parties. It argues, first, that the Advocate General departs from the factual context and the interpretation of national law as set out by the referring court. Second, he fails to take the case-law of the Court of Justice into consideration and proposes an interpretation *contra legem* of Article 14(3) of Directive 2011/64.

25 It should be recalled, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the parties or the interested persons referred to in Article 23 of that statute to submit observations in response to the Advocate General's Opinion. Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's submissions or by the reasoning which led to those submissions. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paragraphs 62 and 63 and the case-law cited).

26 Admittedly, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the interested persons.

27 However, in the present case, the Court has all the information needed to rule and f6 has failed to demonstrate, in its application to have the oral part of the present case reopened, that that case must be decided on the basis of an argument which was not the subject of discussion between the parties. Furthermore, that application does not contain any new facts of such a nature as to be a decisive factor for the decision that the Court is called upon to deliver in the present case. In those circumstances, the Court considers, after hearing the Advocate General, that there is no need to order that the oral part of the procedure be reopened.

Consideration of the questions referred

The first question

28 By its first question, the referring court is asking, in essence, whether Article 1(2) of Directive 2008/118 must be interpreted as meaning that the concept of 'other indirect taxes on excise goods for specific purposes' covers a supplementary tax applicable to heated tobacco, the amount of which is 80% of the excise applicable to cigarettes, less the amount of excise duty applicable to such heated tobacco.

29 As a preliminary point, it must be determined whether heated tobacco falls within the scope of Directive 2008/118 as an 'excise good', within the meaning of Article 1(1) of that directive and, more particularly, whether it forms part, in accordance with point (c) of that provision, of 'manufactured tobaccos covered by [Directive 2011/64]', since the latter directive does not refer to heated tobacco.

30 Article 2(1) of Directive 2011/64, classifies as 'manufactured tobacco' cigarettes, cigars, cigarillos and smoking tobacco. The latter category includes, first, fine-cut tobacco for the rolling of cigarettes and, second, a residual category of 'other smoking tobaccos'. Article 2(2) treats as cigarettes and smoking tobacco those products consisting in whole or in part of substances other than tobacco but otherwise conforming to the criteria set out, inter alia, in Article 5(1) of that directive.

31 Article 5(1)(a) of Directive 2011/64 defines 'smoking tobacco' as tobacco that must be cut or otherwise split, twisted or pressed into blocks, and that which is capable of being smoked without further industrial processing; these two conditions are cumulative (judgments of 6 April 2017, *Eko-Tabak*, C-638/15, EU:C:2017:277, paragraph 25, and of 16 September 2020, *Skonis ir kvapas*, C-674/19, EU:C:2020:710, paragraph 36). Article 5(1)(b) of that directive provides that smoking tobacco may also be composed of 'tobacco refuse put up for retail sale' which does not fall under the definition of cigarettes, set out in Article 3 of that directive, or that of cigars and cigarillos, set out in Article 4(1) of that directive, and which, furthermore, can be smoked.

32 As regards the first condition set out in each of the provisions referred to in the preceding paragraph of the present judgment, it is clear from the order for reference that the heated tobacco at issue in the main proceedings consists of compressed tobacco produced from tobacco dust. Accordingly, heated tobacco appears to be constituted either of tobacco which has been 'cut' or otherwise 'split', within the meaning of Article 5(1)(a) of Directive 2011/64, or of 'tobacco refuse put up for retail sale', within the meaning of Article 5(1)(b) of that directive.

33 As to the second condition set out in those provisions, it is apparent from the order for reference that the heated tobacco at issue in the main proceedings produces, when heated by electrical energy, an aerosol which is inhaled by the consumer, thus allowing it to be found that that tobacco can be smoked, for the purposes of Article 5(1)(b) of Directive 2011/64, or can be smoked without further industrial processing, for the purposes of Article 5(1)(a) of that directive, that is to say, without any transformation, by a standardised process, of raw materials into tangible goods (see, to that effect, judgments of 6 April 2017, *Eko-Tabak*, C-638/15, EU:C:2017:277, paragraphs 30 to 32, and of 16 September 2020, *Skonis ir kvapas*, C-674/19, EU:C:2020:710, paragraph 39).

34 It follows from the foregoing that, subject to the checks which it is for the referring court to carry out, the heated tobacco at issue in the main proceedings, in so far as it comes under the definition of 'smoking tobacco', within the meaning of Article 5(1)(a) and (b) of Directive 2011/64, is, as a manufactured tobacco covered by that directive, an excise good within the meaning of Article 1(1) of Directive 2008/118. It may, in that capacity, be subject to 'other indirect taxes on excise goods for specific purposes' within the meaning of Article 1(2) of that directive.

35 In accordance with the latter provision, read in the light of recital 4 of Directive 2008/118, those indirect taxes may be levied on excise goods only on two conditions. First, such taxes must be levied for specific purposes and, second, those taxes must comply with the EU rules applicable to excise duty or VAT as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

36 Those two conditions, which are intended to prevent additional indirect taxes from improperly obstructing trade, are cumulative, as is apparent from the very wording of Article 1(2) of Directive 2008/118 (see, to that effect, judgment of 24 February 2000, *Commission* v *France*, C-434/97, EU:C:2000:98, paragraph 26, and order of 7 February 2022, *Vapo Atlantic*, C-460/21, EU:C:2022:83, paragraphs 21 and 22).

37 As regards the first of those conditions, it is clear from the settled case-law of the Court that a specific purpose within the meaning of that provision must not be purely budgetary. However, since every tax necessarily pursues a budgetary purpose, that fact alone cannot preclude other taxes from also having a specific purpose, within the meaning of that provision, if the latter is not be rendered meaningless (judgments of 27 February 2014, *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraphs 23 and 27, and of 22 June 2023, *Endesa Generación*, C-833/21, EU:C:2023:516, paragraphs 38 and 39).

38 Thus, other taxes on excise goods, the revenue from which is not subject to a predetermined allocation, can be regarded as pursuing a specific purpose within the meaning of Article 1(2) of Directive 2008/118, only if they are designed, so far as their structure is concerned, and particularly the taxable item or the rate of tax, in such a way as to guide the behaviour of taxpayers in a direction which facilitates the achievement of the stated specific purpose, for example by taxing the goods in question heavily in order to discourage their consumption (judgments of 27 February 2014, *Transportes Jordi Besora*, C-82/12, EU:C:2014:108, paragraph 32, and of 22 June 2023, *Endesa Generación*, C-833/21, EU:C:2023:516, paragraph 42).

39 In the present case, it must be noted that the specific purpose indicated by the referring court, namely the protection of health, is also amongst the objectives pursued by Directive 2011/64, which are set out in recital 2 of that directive. However, the mere fact that a tax is intended, in addition to serving a budgetary purpose, to ensure a high level of protection of health – a general objective also pursued by Directive 2011/64 – also cannot exclude from the outset the existence of a 'specific purpose' within the meaning of Article 1(2) of Directive 2008/118.

40 As the Advocate General observes, in essence, in point 56 of his Opinion, there may be, in spite of the identical nature of those objectives, a 'specific purpose' within the meaning of Article 1(2) of Directive 2008/118, where other taxes on excise goods seek to tax the goods concerned in such a way as to bring the total taxation of those goods into line with other comparable excise goods, with the ultimate aim of discouraging the consumption of such goods.

41 It is apparent from the order for reference that the supplementary tax at issue seeks to bring the taxation of heated tobacco into line with that of cigarettes. Accordingly, by adapting the tax system for heated tobacco, the specific purpose of that tax is to deter consumers who are dependent on nicotine from giving up cigarettes in favour of the heated tobacco at issue in the main proceedings, since the latter product is also harmful to health.

42 As regards the second condition relating to compliance, by way of a supplementary tax such as that at issue in the main proceedings, with EU tax rules applicable to excise duty or VAT as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, it should be borne in mind that Article 1(2) of Directive 2008/118 does not require that Member States comply with those rules in their entirety. It is sufficient that the indirect taxes pursing specific purposes should, on those points, accord with the general scheme of the EU rules applicable either to excise duty or to VAT (see, to that effect, judgments of 24 February 2000, *Commission* v *France*, C-434/97, EU:C:2000:98, paragraphs 23, 24 and 27, and of 9 March 2000, *EKW and Wein & Co*, C-437/97, EU:C:2000:110, paragraph 47).

43 In that connection, it should be observed, first, that Article 14(1)(c) of Directive 2011/64 authorises the principle of a 'mixed excise duty', combining an *ad valorem* element and a specific element envisaged in point (b) of Article 14(1), which may be expressed as 'an amount per kilogram, or in the case of cigars and cigarillos, alternatively for a given number of items'. Second, Article 14(2)(c) of that directive states that the overall excise duty (specific duty and/or *ad valorem* duty excluding VAT), expressed as a percentage, as an amount per kilogram or for a given number of items, is to be at least equivalent '[for] other smoking tobaccos [to] 20% of the retail selling price inclusive of all taxes, or EUR 22 per kilogram'.

44 Although it is apparent from those provisions that the mixed excise duty may combine an *ad valorem* element with a single 'specific element' only, the supplementary tax at issue is not the result of the combination of an *ad valorem* element and two 'specific elements'. As the German Government stated at the hearing, it is, on the contrary, the result of the deduction of an amount calculated on the basis of units from an amount calculated on the basis of weight.

45 It follows that the second condition laid down by Article 1(2) of Directive 2008/118 for a supplementary tax such as that at issue in the main proceedings to be classified as 'other indirect taxes on excise goods for specific purposes' has been met.

46 Moreover, as regards any distinction as may have been introduced by the supplementary tax at issue between the goods belonging to the group of 'other smoking tobaccos', within the meaning of Article 14(2)(c) of Directive 2011/64, thereby disregarding Article 14(3) of that directive, it should be pointed out, as the Advocate General does in point 65 of his Opinion, that the rules laid down by Article 14(3) seek to ensure that there is no discriminatory tax treatment between products the essential characteristics and mode of consumption of which are, if not identical, at least comparable.

47 As has been recalled in paragraph 30 of the present judgment, the category of tobaccos identified as 'other smoking tobaccos' is a residual category, which cannot be construed narrowly (judgment of 6 April 2017, *Eko-Tabak*, C-638/15, EU:C:2017:277, paragraph 24). Accordingly, as the Advocate General observes in point 66 of his Opinion, that category includes, by definition, heterogeneous tobacco products the manufacturing characteristics and mode of consumption of which vary and are more diversified than those included in the other two categories, namely 'cigarettes' and 'cigars and cigarillos', in which the products are expressly identified. In such

circumstances, to require the same tax treatment for all products in that residual category could itself give rise to discrimination and distort competition between tobacco products belonging to the same group, in disregard of the objectives pursued by Directive 2011/64, as recalled in recital 9 thereof.

48 It follows from the foregoing that the answer to the first question is that Article 1(2) of Directive 2008/118 must be interpreted as meaning that the concept of 'other indirect taxes on excise goods for specific purposes' covers a supplementary tax applicable to heated tobacco, the amount of which is 80% of the excise applicable to cigarettes, less the amount of excise duty applicable to such heated tobacco.

The second and third questions

49 In view of the answer to the first question, there is no need to answer the second or third questions.

Costs

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

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

Article 1(2) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC

must be interpreted as meaning that the concept of 'other indirect taxes on excise goods for specific purposes' covers a supplementary tax applicable to heated tobacco, the amount of which is 80% of the excise applicable to cigarettes, less the amount of excise duty applicable to such heated tobacco.

[Signatures]