Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 21 April 2016 [1]

Case C-221/15

Openbaar Ministerie
v
Etablissements Fr. Colruyt NV

(Request for a preliminary ruling from the hof van beroep te Brussel (Court of Appeal, Brussels, Belgium))

(Directive 2011/64/EU — Excise duties applicable to manufactured tobacco — Retail price of manufactured tobacco — Revenue stamp — Minimum prices — Free movement of goods — Quantitative restrictions — Article 101 TFEU)

1. Four decades after the introduction of the first directive on the harmonisation of excise duties on manufactured tobacco products [2] it may come as some surprise that the provisions laid down by the most recent directive on the matter [3] still require interpretation by the Court of Justice.

2. However, as the questions from the referring court attest, the compatibility with EU law of national measures regulating the price of tobacco products on the domestic market continues to present difficulties and to require clarification. Those difficulties concern not only the provisions of the abovementioned directive, but also the applicability to those national measures of the EU rules on free movement of goods and free competition.

3. In the present proceedings, the Court is asked to clarify whether a national law such as the one at issue in the main proceedings is compatible with Article 15(1) of Directive 2011/64, Article 34 TFEU, and Article 101 TFEU read in conjunction with Article 4(3) TEU.

I – **Legal framework**

A – *Directive 2011/64*

4. Directive 2011/64 is a codification of three previous directives concerning taxes on manufactured tobacco products. [4]

1 — Original language: English.

2 — That directive was Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ, English Special Edition 1972 (I), p. 3).

3 — Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco ('Directive 2011/64') (OJ 2011 L 176, p. 24).

4 — Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8); Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10) and 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).

5. Recitals 3, 9 and 10 of Directive 2011/64 state:

‘(3) One of the objectives of the Treaty on European Union is to maintain an economic union, whose characteristics are similar to those of a domestic market, within which there is healthy competition. As regards manufactured tobacco, achievement of this aim presupposes that the application in the Member States of taxes affecting the consumption of products in this sector does not distort conditions of competition and does not impede their free movement within the Union.

…

(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 and, consequently, in the opening of the national markets of the Member States.

(10) The imperative needs of competition imply a system of freely formed prices for all groups of manufactured tobacco.’

6. According to Article 1 of Directive 2011/64, that instrument 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 15(1) of Directive 2011/64 provides:

‘Manufacturers or, where appropriate, their representatives or authorised agents in the Union, and importers of tobacco from third countries shall be free to determine the maximum retail selling price for each of their products for each Member State for which the products in question are to be released for consumption.

The first subparagraph may not, however, hinder implementation of national systems of legislation regarding the control of price levels or the observance of imposed prices, provided that they are compatible with Union legislation.’

B – *Belgian law*

8. Article 7(2a)(1) of the Wet 24 januari 1977 betreffende de bescherming van de gezondheid van de gebruikers op het stuk van de voedingsmiddelen en andere producten (Law of 24 January 1977 on the protection of consumer health in relation to foodstuffs and other goods [5], ‘the law at issue’) states the following:

‘It is prohibited to display advertisements for, or to organise sponsorship by, tobacco, tobacco-based products and similar products, hereinafter referred to as tobacco products.

Any communication or act which is directly or indirectly aimed at promoting sales, irrespective of the place, method of communication or techniques used, shall be regarded as constituting advertising or sponsorship.’

5 — *Moniteur belge*, 8 April 1977, p. 4501.

II – **Facts, procedure and the questions referred**

9. Etablissements Fr. Colruyt NV ('Colruyt') operates several supermarkets in Belgium.

10. According to the referring court, Colruyt sold various tobacco products at a unit price below the price indicated on the revenue stamp affixed by the manufacturer or importer, applied both a temporary general discount and a quantity discount to some tobacco products, and offered a general discount to members of youth movements. The Openbaar Ministerie (Public Prosecution Service) considered that, by doing so, Colruyt had breached the law at issue since, inter alia, the sale of tobacco products at a price below the one on the stamp constitutes an act directly or indirectly aimed at promoting sales of those products.

11. Following a finding of infringement by the correctionele rechtbank te Brussel (Criminal Court, Brussels), the case was appealed to the hof van beroep te Brussel (Court of Appeal, Brussels).

12. Before that court, Colruyt submitted that the prohibition on applying retail prices which are lower than the price on the revenue stamp is incompatible with EU law, namely Article 15(1) of Directive 2011/64, Article 34 TFEU and Article 101 TFEU read in conjunction with Article 4(3) TEU.

13. Entertaining doubts as to the interpretation of those provisions, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling.

'(1) Does Article 15(1) of Directive 2011/64/EU, whether or not read in conjunction with Articles 20 and 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000, preclude a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price that the manufacturer/importer has affixed to the revenue stamp?

(2) Does Article 34 TFEU preclude a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price that the manufacturer/importer has affixed to the revenue stamp?

(3) Does Article 4(3) [TEU],[6] read in conjunction with Article 101 TFEU, preclude a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price that the manufacturer/importer has affixed to the revenue stamp?'

14. Written observations have been submitted by Colruyt, the Belgian, French and Portuguese Governments and the Commission. Colruyt, the Belgian and French Governments and the Commission presented oral arguments at the hearing on 17 February 2016.

6 — The hof van beroep te Brussel (Court of Appeal, Brussels) refers to Article 4(3) TFEU which I understand to be a simple drafting error, as that provision is not relevant to the question at hand.

III – **Analysis**

A – *Admissibility*

15. The Belgian and French Governments contest the admissibility of the request for a preliminary ruling on two grounds: they argue, on the one hand, that the questions concern provisions of EU law which are irrelevant to the dispute in the main proceedings and, on the other hand, that the hof van beroep te Brussel (Court of Appeal, Brussels) has not provided sufficient information on the legal and factual context of the dispute in the main proceedings.

16. I am not persuaded by those arguments.

17. First, I do not believe that the EU provisions referred to by the hof van beroep te Brussel (Court of Appeal, Brussels) can be considered irrelevant for the dispute in the main proceedings. That court seeks to determine whether the national provision which Colruyt is alleged to have breached is consistent with EU law. Clearly, were such a provision to be incompatible with EU law, no criminal penalty could be imposed on Colruyt for having breached it. I should point out, in this context, that national criminal provisions which lay down penalties in respect of conduct permitted under, or required by, rules of EU law, or which would deprive those rules of their *effet utile*, are incompatible with the Treaty[7] and, consequently, should be set aside by the national court.[8]

18. Second, while it is true that the request for a preliminary ruling could be described as succinct, I find that the elements provided are sufficient to answer the questions referred. That request therefore complies with Article 94 of the Rules of Procedure of the Court.

19. In the light of the above, the objection of inadmissibility is thus unfounded.

B – *The first question*

20. By its first question, the referring court essentially asks whether Article 15(1) of Directive 2011/64 precludes a national measure which prohibits retailers from selling manufactured tobacco products at a price below the price on the revenue stamp affixed by the manufacturer or importer.

21. At the outset, I would begin by recalling that Directive 2011/64, like its predecessors, aims to ensure the functioning of the internal market and to foster healthy competition by harmonising Member States' systems of excise duties on tobacco products. Recital 3 of Directive 2011/64 states that those objectives are to be achieved by ensuring that taxes affecting the consumption of manufactured tobacco do not distort conditions of competition and do not impede the free movement of those products within the Union.

22. That said, I shall now examine the compatibility of the law at issue in the light of the provisions of Article 15(1) of Directive 2011/64.

7 — See, among others, judgments of 19 March 2002 in *Commission* v *Italy*, C-224/00, EU:C:2002:185, and 6 March 2007 in *Placanica and Others*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133.

8 — See, judgments of 28 April 2011 in *El Dridi*, C-61/11 PPU, EU:C:2011:268, paragraph 55, and 29 February 1996 in *Skanavi and Chryssanthakopoulos*, C-193/94, EU:C:1996:70, paragraph 17.

1. Article 15(1), first subparagraph, of Directive 2011/64

23. Article 15(1), first subparagraph, of Directive 2011/64 requires Member States to leave the maximum retail price of manufactured tobacco to be determined by the manufacturer or importer. Thus, it ensures that the manufacturers and importers are able to compete on price while also ensuring that the determination of the tax base of proportional excise duties is subject to the same rules in all Member States. [9]

24. It appears to me that the law at issue presents no difficulties in relation to that provision. It simply prevents retailers from selling tobacco products at a price lower than that indicated on the revenue stamp. Importantly, the revenue stamp price continues to be freely determined by manufacturers or importers, who remain at liberty to exploit any competitive advantage they might have over their competitors. Therefore, the law at issue does not interfere with the right of manufacturers or importers to freely set their maximum retail price.

25. As regards retailers, Directive 2011/64 simply does not mention them, let alone provide for an equivalent right for them to freely determine prices. I may add that this omission is explained by the objective of the directive which, as explained, aims to harmonise excise duties and therefore is concerned with ensuring equivalent conditions of market access to importers and manufacturers of tobacco products.

26. This assessment seems confirmed by the judgment in *GB-INNO-BM*. The national measure in that case was in fact almost identical to the law at issue and was examined in the light of Article 5(1) of Directive 72/464, the predecessor of Article 15(1) of Directive 2011/64. In its judgment, the Court held that a national provision whereby a selling price, namely the price stated on the revenue stamp, is imposed for the sale to the consumer of imported or domestic manufactured tobacco products is not prohibited, provided that that price (that is to say, that stated on the revenue stamp) is freely determined by the manufacturer or importer. [10]

27. However, since the judgment in *GB-INNO-BM*, the directive on excise duties for manufactured tobacco products has been recast and codified and a rich case-law has provided clarification on its interpretation. This case-law has dealt, in particular, with the issue of national measures imposing minimum prices, which in turn limited the ability of manufacturers or importers to freely set maximum prices. Since the law at issue does de facto result in the maximum and minimum retail price being one and the same, I consider it useful and necessary to examine that law in the light of these more recent developments on minimum pricing.

28. In *Commission* v *Greece*, a measure whereby the minimum retail price for tobacco products was determined by ministerial decree was found to contravene Article 9 of Directive 95/59 (another predecessor of Article 15(1) of Directive 2011/64). The Court observed that the setting of a minimum price by ministerial decree inevitably curbed the freedom of manufacturers or importers to set their prices, as they were not allowed to set their maximum retail price below the obligatory minimum. [11]

29. Subsequently, in *Commission* v *France*, a measure whereby the minimum retail price for tobacco products was prohibited from being lower than 95% of the average price of tobacco products on the market was also held to be contrary to Article 9 of Directive 95/59, since it resulted in the elimination of price competition between manufacturers and importers. [12]

9 — See judgments of 4 March 2010 in *Commission* v *France*, C-197/08, EU:C:2010:111, paragraph 36, and 19 October 2000 in *Commission* v *Greece*, C-216/98, EU:C:2000:571, paragraph 20.

10 — See judgment of 16 November 1977 in *GB-Inno-BM*, 13/77, EU:C:1977:185, paragraph 64.

11 — See judgment of 19 October 2000 in *Commission* v *Greece*, C-216/98, EU:C:2000:571, paragraph 21.

12 — See judgment of 4 March 2010 in *Commission* v *France*, C-197/08, EU:C:2010:111, paragraph 41.

30. In both cases the national measures had the effect of limiting the freedom of manufacturers and importers to set their prices in normal competitive conditions. Indeed a minimum price, fixed either unilaterally by national authorities, or by reference to an average price, inevitably prevents manufacturers from setting their maximum retail price freely: the maximum price can never be lower than the obligatory minimum.

31. The aforementioned case-law leads me to conclude that measures providing for minimum prices are prohibited only in the event that they affect the manufacturers' or importers' freedom to determine maximum prices and, as a result, cancel out any potential competitive advantage the manufacturers or importers may have over their competitors.

32. The law at issue leaves manufacturers and importers free to determine their maximum retail price and does not affect their capacity to compete on price. For these reasons, I conclude that Article 15(1), first subparagraph, of Directive 2011/64 does not preclude a measure, such as the law at issue, whereby a retailer is prohibited from selling tobacco products at a lower price than the price on the revenue stamp affixed by manufacturers or importers.

2. Article 15(1), second subparagraph, of Directive 2011/64

33. Notwithstanding that conclusion, mention should be made of the fact that Article 15(1), second subparagraph, of Directive 2011/64 provides that the principle laid down in the first subparagraph does not hinder the implementation of 'national systems of legislation regarding the control of price levels or the observance of imposed prices, provided that they are compatible with Union legislation'.

34. As the wording of this provision makes clear, the second subparagraph constitutes a derogation from the rule contained in the first subparagraph. In essence, pursuant to the second subparagraph, Member States are permitted — under certain conditions — to introduce or maintain certain national measures which may have an impact on the manufacturers' and importers' ability to freely set the maximum prices of tobacco products.

35. In principle, having concluded that the law at issue is not incompatible with Article 15(1), first subparagraph, of Directive 2011/64, there would be no need to review that law against the second subparagraph of the same provision. The reason is obvious: since the law at issue does not breach the principle laid down in the first subparagraph, there is no point in determining whether the derogation from that principle may apply.

36. Nevertheless, given that the parties have abundantly discussed this issue, and merely for the sake of completeness, I shall explain why I take the view that the law at issue falls outside the scope of Article 15(1), second subparagraph, of Directive 2011/64.

37. This provision concerns two categories of national measures: those regarding the control of price levels and those regarding the observance of imposed prices.

38. As concerns the former category, it is settled case-law that the expression 'control of price levels' refers *only* to national legislation of a general nature intended to check the increase in prices.[13] This expression covers mainly general measures aimed at curbing price inflation.[14]

13 — See judgment of 21 June 1983 in *Commission* v *France*, 90/82, EU:C:1983:169, paragraph 22, and 19 October 2000 in *Commission* v *Greece*, C-216/98, EU:C:2000:571, paragraph 25.

14 — See judgment of 4 March 2010 in *Commission* v *France*, C-197/08, EU:C:2010:111, paragraph 43 and the case-law cited.

39. As regards the latter category (observance of imposed prices), the Court seems to have interpreted it very restrictively. In *GB-INNO-BM*, the Court found that the provision in question allowed Member States to impose a selling price only provided that *that price had been freely determined by the manufacturer or importer*.[15]

40. Subsequently, in *Commission* v *France*, the issue arose as to whether a national measure fixing a minimum retail price for tobacco products at 95% of the average price of the products on the market could be regarded as a measure for 'the observance of imposed prices' within the meaning of what is now the second subparagraph of Article 15(1) of Directive 2011/64. The Court unambiguously rejected this possibility as the French system did not ensure that the minimum price imposed did not impair the potential competitive advantage held by manufacturers or importers. Since it undermined the freedom of manufacturers and importers to determine their maximum retail price as guaranteed by Article 15(1), first subparagraph, the system imposing a minimum price could not benefit from the derogation provided in the second subparagraph of the same provision.[16] In other judgments, the Court has essentially followed the same approach, excluding the possibility that Member States' legislation which concerned the pricing of tobacco products could be construed as measures regarding the observance of imposed prices within the meaning of Article 15(1), second subparagraph, of Directive 2011/64.[17]

41. In fact, in its case-law the Court has defined the term 'observance of imposed prices' as 'referring to a price which, once determined by the manufacturer or importer and approved by the public authority, is compulsory as a maximum price and must be observed as such at all stages of the distribution chain, up to the sale to the consumer'.[18]

42. This case-law leads me to consider that, as regards measures on the observance of imposed prices, Article 15(1), second subparagraph, no longer contains, if it ever did, a derogation from the right of manufacturers or importers to freely set prices. If anything, it is simply a reminder of what already follows from the directive as such, namely that Member States have the right to put in place measures to ensure the observance, up to and including the final sale to the consumer, of the maximum retail price set by the manufacturer or importer.[19] This possibility ensures that the integrity of the system of excise duties is not undermined by exceeding the imposed prices.[20]

43. Against that background, I observe that the legislation at issue is neither a measure aimed at curbing inflation nor one intended to ensure the integrity of the system of excise duties. Therefore, it seems to me that, in any event, the law at issue does not fall within the scope of Article 15(1), second subparagraph, of Directive 2011/64.

3. Articles 20 and 21 of the Charter of Fundamental Rights

44. Finally, the referring court also asked the Court to interpret Article 15(1) of Directive 2011/64 in the light of Article 20 ('Equality before the law') and 21 ('Non-discrimination') of the Charter of Fundamental Rights.

15 — See judgment of 16 November 1977 in *GB-Inno-BM*, 13/77, EU:C:1977:185, paragraph 64.

16 — Judgment of 4 March 2010 in *Commission* v *France*, C-197/08, EU:C:2010:111, paragraphs 41 to 44.

17 — See judgment of 4 March 2010 in *Commission* v *Austria*, C-198/08, EU:C:2010:112, paragraph 30, and 4 March 2010 in *Commission* v *Ireland*, C-221/08, EU:C:2010:113, paragraph 41.

18 — See judgment of 7 May 1991 in *Commission* v *Belgium*, C-287/89, EU:C:1991:188, paragraph 13 and the case-law cited.

19 — See judgment of 4 March 2010 in *Commission* v *France*, C-197/08, EU:C:2010:111, paragraph 43 and the case-law cited.

20 — See judgment of 4 March 2010 in *Commission* v *France*, C-197/08, EU:C:2010:111, paragraph 43, and 19 October 2000 in *Commission* v *Greece*, C-216/98, EU:C:2000:571, paragraph 26.

45. However, the referring court does not explain why it considers that those provisions might be relevant in the present proceedings. Moreover, I fail to see how the law at issue can be construed as treating comparable situations differently, or as introducing discrimination on the grounds of gender, race, religious and political belief among others.

46. Consideration of Articles 20 and 21 of the Charter does not therefore alter the result of my assessment.

47. To conclude, Article 15(1) of Directive 2011/64 does not preclude a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price indicated on the revenue stamp, provided that the measure leaves the price stated on the revenue stamp to be freely determined by the manufacturer or importer.

C – *The second question*

48. By its second question, the referring court asks whether Article 34 TFEU precludes a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price affixed by the manufacturer or importer to the revenue stamp.

49. At the outset, I would draw attention to the fact that the referring court limits its question to the ban on price promotions of manufactured tobacco products. While the same national legislation seems also to prohibit advertising and other forms of promotion, those aspects of the legislation are not the object of the referring court's question and I will therefore not examine them. [21]

50. Article 34 TFEU prohibits quantitative restrictions on imports or measures having equivalent effect. According to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the Union are to be considered to be measures having equivalent effect to quantitative restrictions for the purposes of that treaty provision. [22]

51. However, in the line of case-law originating with *Keck and Mithouard*, the Court found that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements does not constitute such a hindrance, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and that of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede their access any more than it impedes the access of domestic products. [23]

52. Against that background, I take the view that the aspect of the law at issue which, in essence, prohibits the sale of tobacco products at a price below that freely set by the manufacturer or importer, should be considered a 'selling arrangement' within the meaning of the *Keck and Mithouard* case-law.

21 — I would merely observe that the advertising of tobacco products has been the object of EU legislation, most notably **Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products** (OJ 2003 L 152, p. 16) which prohibits cross-border advertising of tobacco products.

22 — See judgment of 11 July 1974 in *Dassonville*, 8/74, EU:C:1974:82, paragraph 5.

23 — See judgment of 24 November 1993 in *Keck and Mithouard*, C-267/91 and C-268/91, EU:C:1993:905, paragraphs 16 and 17. See also judgment of 10 February 2009 in *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 36.

53. Indeed, the rules provided for in that legislation do not affect the characteristics that tobacco products must have to be marketed in Belgium, but solely the arrangements under which they may be sold. [24]

54. Therefore, consideration must be given to whether the law at issue applies to all relevant traders operating within the national territory and affects in the same manner, in law and in fact, the marketing of domestic products and that of those from other Member States.

55. First, it is common ground that the law at issue applies without distinction to all tobacco products locally produced or imported into Belgium. That legislation does not appear to put any additional burden on imported products or make their access to the Belgian market more difficult, as manufacturers or importers from other Member States (as well as from third countries) remain completely free to set the price of their products as they see fit, and are thus able to compete with domestic manufacturers on an equal footing.

56. Second, although the retailers' ability to set prices of tobacco products is severely reduced, that ability is not completely eliminated. Indeed, at least in theory, nothing prevents retailers (especially large retailers) from negotiating with manufacturers or importers (including parallel importers) with a view to setting a price for the products lower than that usually practised. [25] Provided the manufacturer or importer agrees to affix a revenue stamp with a lower price, the sale of tobacco products at that lower price is, and should be, permissible.

57. In the light of the above considerations, the law at issue falls within the concept of 'selling arrangement' as defined by *Keck and Mithouard* and, treating local tobacco products and imported tobacco products equally in law and in fact, is not caught by the prohibition laid down in Article 34 TFEU.

58. The answer to the second question should thus be that Article 34 TFEU does not preclude a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price on the revenue stamp affixed by the manufacturer or importer.

D – *The third question*

59. By its third and final question, the national court seeks to determine whether Article 101 TFEU, read in conjunction with Article 4(3) TEU, precludes national legislation such as that at issue.

60. I should point out that, according to well-established case-law of the Court, while Articles 101 and 102 TFEU are concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those provisions, read in conjunction with Article 4(3) TEU, nonetheless require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. [26]

24 — See, to that effect, judgment of 30 April 2009 in *Fachverband der Buch- und Medienwirtschaft*, C-531/07, EU:C:2009:276, paragraph 20.

25 — See, to that effect, judgments of 7 May 1991 in *Commission* v *Belgium*, C-287/89, EU:C:1991:188, and 14 July 1988 in *Commission* v *Belgium*, 298/86, EU:C:1988:404.

26 — Among many, see judgments of 16 November 1977 in *GB-Inno-BM*, 13/77, EU:C:1977:185, paragraph 31; 5 December 2006 in *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 46, and 4 September 2014 in *API and Others*, C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, EU:C:2014:2147, paragraph 28.

61. The Court has held, in particular, that Articles 4(3) TEU and 101 TFEU are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. [27]

62. In the present proceedings, there is no indication that the situation in the main proceedings may fall within one of those three sets of circumstances.

63. First, the law at issue does not impose or encourage the adoption of agreements contrary to Article 101 TFEU. Indeed, where a minimum price is imposed either unilaterally by public authorities or by automatic application of a legal rule there is no basis for concluding that a law such as the one at issue compels importers, manufacturers or retailers to conclude anti-competitive agreements. [28] This is particularly so when the national rule suffices in itself and does not require implementing agreements to give it effect. [29]

64. Second, the referring court gives no indication that agreements contrary to Article 101 TFEU were in existence when the law at issue was adopted or have come into effect following the enactment of that law.

65. Finally, I see nothing in the information provided by the referring court to indicate that the Belgian authorities have delegated power to private economic operators.

66. It follows from the above considerations that a national law such as that at issue is not precluded under Article 101 TFEU read in conjunction with Article 4(3) TEU.

IV – **Conclusion**

67. In the light of the foregoing, I propose that the Court should answer the questions referred by the hof van beroep te Brussel (Court of Appeal, Brussels) as follows:

Article 15(1) of Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duties applied to manufactured tobacco, Article 34 TFEU, and Article 101 TFEU read in conjunction with Article 4(3) TEU, do not preclude a national provision prohibiting price promotions on manufactured tobacco which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price on the revenue stamp affixed by the manufacturer or importer.

27 — See, inter alia, judgments of 5 October 1995 in *Centro Servizi Spediporto*, C-96/94, EU:C:1995:308, paragraph 21; 19 February 2002 in *Arduino*, C-35/99, EU:C:2002:97, paragraph 35; 5 December 2006 in *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 47; and 4 September 2014 in *API and Others*, C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, EU:C:2014:2147, paragraph 29.

28 — See judgment of 29 January 1985 in *Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers*, 231/83, EU:C:1985:29, paragraph 17.

29 — See judgments of 17 November 1993 in *Meng*, C-2/91, EU:C:1993:885, paragraph 15, and 17 November 1993 in *Ohra Schadeverzekeringen*, C-245/91, EU:C:1993:887, paragraph 11.