Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

26 April 2012 *

(Free movement of goods — Articles 34 TFEU and 37 TFEU — National legislation prohibiting tobacco retailers from importing tobacco products — Rule concerning the existence and operation of a monopoly on the marketing of tobacco products — Measures having equivalent effect to quantitative restrictions — Justification — Consumer protection)

In Case C-456/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Spain), made by decision of 1 July 2010, received at the Court on 17 September 2010, in the proceedings

Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT)

v

Administración del Estado,

intervening parties:

Unión de Asociaciones de Estanqueros de España,

Logivend SLU,

Organización Nacional de Asociaciones de Estanqueros,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), R. Silva de Lapuerta, G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 November 2011,

after considering the observations submitted on behalf of:

— Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT), by J. E. Garrido Roselló, abogado,

— the Spanish Government, by B. Plaza Cruz and S. Centeno Huerta, acting as Agents,

* Language of the case: Spanish.

— the Italian Government, by G. Palmieri, acting as Agent, and by B. Tidore, avvocato dello Stato,

— the European Commission, by A. Alcover San Pedro and by L. Banciella and G. Wilms, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 34 TFEU.

2 The reference has been made in the course of proceedings between Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) and Administración del Estado concerning national legislation which prohibits licensed tobacco and stamp outlets ('tobacco retailers') from importing tobacco products from other Member States.

The national legal framework

3 As set out in Article 1(1) and (2) of Law No 13/1998 organising the Tobacco Market and Taxation Regulations (Ley 13/1998 de Ordenación del Mercado de Tabacos y Normativa Tributaria), of 4 May 1988 (BOE No 107 of 5 May 1998, p. 14871) as amended ('Law No 13/1998'):

'1. The market in tobacco is liberalised, subject to the limitations set out in the present Law, and consequently, the monopoly over the manufacture, importation and wholesale of non-community manufactured tobacco products … are abolished on the territory of the peninsula, the Balearic Islands, Ceuta and Melilla.

2. Any natural or legal person having the legal capacity to carry on a trade may engage in the activities referred to in paragraph 1, in the manner and according to the conditions provided in Articles 2 and 3 of the present Law. However, persons involved in one of the situations listed below, or who become so involved, may not engage in the abovementioned activities:

...

(c) being a [tobacco retailer], having a point of sale subject to a surcharge or being the owner of one of the tobacco outlets under the special regime...'

4 Article 2(3) of the Law states:

'Manufacturers and, where appropriate, importers shall ensure that their [manufactured tobacco products] are available throughout the national territory referred to in Article 1(1), where there is demand for those products.'

5 Article 3(1) of the same Law provides::

'There shall be no restrictions on the importing and wholesale distribution of manufactured tobacco products, irrespective of their origin, save for the requirement to submit an undertaking of compliance [with the applicable rules] to the Tobacco Market Commission … '

6 Article 4 of Law No 13/1998 states:

‘1. The retail trade of manufactured tobacco products in Spain, with the exception of the Canary Islands, shall remain a monopoly owned by the State, operated through the network of tobacco and stamp outlets.

2. The retail selling prices of the various types, brands and forms of tobacco product intended for sale in Spain, with the exception of the Canary Islands, shall be determined by manufacturers or, where applicable, their representatives or agents in the European Union …

3. [Tobacco retailers], who must necessarily be natural persons, having the nationality of any of the States of the European Union, are classified as licensees of the State. … [They] shall not be licence holders of any other outlet or point of sale subject to surcharge, or have any professional or working relationship with any importers, manufacturers or wholesalers on the tobacco market, unless that relationship ends prior to the definitive grant of the outlet licence.

4. An outlet licence shall be granted after a call for tenders ...

The licence shall be granted for a period of twenty-five years. ...

...

7. The [tobacco retailer’s] profit margin on the sale of manufactured tobacco products, which must be acquired from an authorised wholesaler, is fixed at 8.5% of the retail sale price, regardless of the product’s price, type, or origin, or the wholesaler who supplied it Nevertheless, for the sale of cigars, the [tobacco retailer] shall, in any event, receive a profit margin of 9%.

...’

7 Article 1(1) of Royal Decree No 1199/1999 of 9 July 1999 laying down detailed rules for the implementation of Law No 13/1998 (BOE No 166 of 13 July 1999, p. 26330; ‘Royal Decree 1199/1999) states:

‘In accordance with Article 1 of Law [13/1998], any natural or legal person having the legal capacity to carry on a trade may engage in the activities of manufacture, importation and wholesale of manufactured tobacco products, regardless of their origin, under the conditions set out in the present regulation.’

8 Article 2(1) of the royal decree provides:

‘Persons involved in one of the situations listed below may not engage in the activities referred to in Article 1(1):

...

(c) being a [tobacco retailer], having an outlet subject to a surcharge or being the owner of one of the tobacco outlets under the special regime ...’

9 Royal Decree No 1199/1999 was amended by Royal Decree No 1/2007 of 12 January 2007 (BOE No 18 of 20 January 2007, p.2845; ‘Royal Decree No 1/2007’).

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

10 By an action brought before the Tribunal Supremo (Supreme Court), ANETT requested that several provisions of Royal Decree No 1/2007 be annulled, on the ground that they modified Royal Decree No 1199/1999 without resolving an alleged contradiction between European Union law and the rules governing the tobacco market and the monopoly over tobacco distribution in Spain.

11 ANETT claimed, inter alia, that the prohibition of tobacco retailers from importing tobacco was contrary to the principles of the free movement of goods, as provided by Article 34 TFEU, since this prohibition constituted a quantitative restriction or a measure having equivalent effect.

12 In those circumstances, the Tribunal Supremo decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Should Article 34 [TFEU] be interpreted as meaning that Spanish national law prohibiting tobacco [retailers] from importing manufactured tobacco products from other Member States constitutes a quantitative restriction on imports or a measure having equivalent effect as prohibited by the [FEU] Treaty?'

The admissibility of the reference for a preliminary ruling

13 At the hearing, the Spanish Government challenged the admissibility of the reference for a preliminary ruling, maintaining that the Court's response served no purpose in relation to the outcome of the main proceedings since those proceedings concern the validity of Royal Decree 1/2007.

14 That decree modified certain provisions of Royal Decree 1199/1999 without governing or even mentioning the prohibition of tobacco retailers from importing tobacco products. This prohibition arises from Article 4 of Law No 13/1998 and Article 2 of Royal Decree No 1199/1999, which are not affected by Royal Decree 1/2007. It follows that, in the main proceedings, the referring court may not annul any provision connected to the aforementioned prohibition.

15 Moreover, ANETT has already brought an action against Royal Decree No 1199/1999 which lays downs this same prohibition, without challenging that prohibition, and this action has been rejected by the Tribunal Supremo. In light of the principles of legal certainty and *res judicata*, the national court cannot thereby revaluate the prohibition in question in the main proceedings.

16 In this respect, it should be noted that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Joined Cases C-222/05 to C-225/05, *van der Weerd and Others* [2007] ECR I-4233, paragraph 22, and Case C-158/08 *Pometon* [2009] ECR I-4695, paragraph 13).

17 In the main proceedings, it is admittedly not certain that an incompatibility of the prohibition in question with EU law will affect the validity of Royal Decree 1/2007, since that decree does not govern the prohibition and since an action against Royal Decree 1199/1999 which lays down this prohibition has already been rejected by the Tribunal Supremo.

18 However, when the decision to refer is considered in its entirety, it cannot be completely excluded that the response of the Court may serve a purpose in relation to the outcome of the main proceedings. In those circumstances, the abovementioned elements do not suffice, in themselves, to reverse the presumption of relevance evoked in paragraph 16 of the present judgment.

19 Consequently, the reference for a preliminary ruling must be held to be admissible.

The question referred for a preliminary ruling

20 By its question, the national court essentially asks whether Article 34 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes prohibitions on tobacco retailers from importing tobacco products from other Member States.

Applicable Legislation

21 The European Commission, in its written observations, and the Spanish Government, at the hearing, claimed that, contrary to what the referring court stated in its reference for a preliminary ruling, the national legislation must be assessed in the light of Article 37 TFEU and not of Article 34 TFEU. The legislation in question concerns the operation of a monopoly of a commercial character within the meaning of Article 37 TFEU and gives rise to restrictions on trade which are inherent in the existence of such a monopoly.

22 In this respect, according to the case-law of the Court, the rules relating to the existence and the operation of a monopoly must be examined in the light of the provisions of Article 37 TFEU, which are specifically applicable to the exercise, by a domestic commercial monopoly, of its exclusive rights (see, inter alia, Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 35, and Case C-170/04 *Rosengren and Others* [2007] ECR I-4071, paragraph 17).

23 However, the effect on trade within the Union of the other provisions of the domestic legislation, which are separable from the operation of the monopoly although they have a bearing upon it, must be examined in the light of Article 34 TFEU (see, inter alia, *Franzén*, paragraph 36, and *Rosengren and Others*, paragraph 18).

24 In those circumstances, it is necessary to check whether the prohibition at issue in the main proceedings amounts to a rule relating to the existence or the operation of the monopoly.

25 In this regard, it must be borne in mind that, firstly, the specific purpose of the monopoly in question is to reserve the exclusive right of sale of tobacco products at retail level to authorised retailers, which does not imply that they should be prohibited from importing such products.

26 Hence, by preventing tobacco retailers from importing those products on to the Spanish territory, the prohibition at issue in the main proceedings affects the free movement of goods within the European Union, and does not govern the exercise of the exclusive right relating to the monopoly in question.

27 Consequently, this prohibition does not concern the exercise of the specific purpose of the monopoly in question and thus cannot be considered as relating to the very existence of the monopoly (see, by analogy, *Rosengren and Others*, paragraph 22).

28 Secondly, it must be noted that the prohibition imposed on retailers' importing tobacco products has the effect of forcing those tobacco retailers to procure their supplies from authorised wholesalers. On that basis, the prohibition in question is capable of having an impact on the operation of the monopoly.

29 However, and even if, in contrast to the legislation at issue in the proceedings which gave rise to the judgment in *Rosengren and Others*, the prohibition at issue in the main proceedings does not affect private individuals but rather the licensees under the monopoly in question, namely the tobacco retailers, such a prohibition is separable from the operation of the monopoly as it relates not to the selling arrangements for retail sale of tobacco products on the Spanish territory but to the upstream

market in those products. It does not aim to organise the monopoly's system of product selection. Likewise, the prohibition does not target either the sale network of the monopoly in question or the marketing or advertising of the products distributed by the monopoly (see, by analogy, *Rosengren and Others,* paragraph 24).

30 In those circumstances, the prohibition cannot be regarded as a rule relating to the existence or the operation of the monopoly. Accordingly, Article 37 TFEU is irrelevant for the purposes of determining whether such a prohibition is compatible with EU law, in particular with the provisions of the Treaty relating to free movement of goods.

31 Consequently, national legislation prohibiting tobacco retailers from importing tobacco products, such as that at issue in the main proceedings, must be assessed in the light of Article 34 TFEU.

The existence of a restriction on the free movement of goods

32 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 European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 34 TFEU (see, inter alia, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, and Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 33).

33 It is also apparent from settled case-law that Article 34 TFEU reflects the obligation to comply with the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of EU products to national markets (see *Commission* v *Italy*, paragraph 34, and Case C-108/09 *Ker-Optika* [2010] ECR I-12213, paragraph 48).

34 Accordingly, measures adopted by a Member State the object or effect of which is to treat goods coming from other Member States less favourably are to be regarded as measures having an effect equivalent to quantitative restrictions, as are rules that lay down requirements to be met by such goods, even if such rules apply to all products alike (see *Commission* v *Italy*, paragraphs 35 and 37 and *Ker-Optika*, paragraph 49).

35 Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept (*Commission* v *Italy*, paragraph 37, and *Ker-Optika*, paragraph 50).

36 In the main proceedings, nothing indicates that the national legislation at issue has the object or effect of treating tobacco coming from other Member States less favourably. Nor does it concern the requirements that those products must meet.

37 However, it is still necessary to examine whether this legislation hinders the access of tobacco products coming from other Member States to the Spanish market.

38 In this respect, it should be noted that, by prohibiting tobacco retailers from directly importing such products from other Member States, the legislation in question forces them to procure their supplies from authorised wholesalers. Such a procurement method is likely to present various disadvantages which the retailers would not encounter if they carried out the importation themselves.

39 In particular, the retailers in question can only sell a tobacco product coming from another Member State if such a product is included in the range of products offered by the authorised wholesalers in Spain and if those wholesalers have the product in stock. Hence, where the range

of products offered by those wholesalers does not include a specific product, the tobacco retailers have no direct, flexible and quick means of meeting the demands of their own customers who are interested in this product.

40 This finding is not called into question by the importers' obligation to guarantee the availability of tobacco products throughout the national territory, where demand for these products exists, as the national legislation provides. The importers may choose to avoid importing certain products where demand is judged to be insufficient, or to delay the importation of such products. On the other hand, any tobacco retailer would undoubtedly be able to react, in the place of the importers, more flexibly and quickly to the demands of its customers with whom it is in direct and frequent contact.

41 Moreover, the tobacco retailers are prevented from procuring supplies in other Member States, even if the manufacturers and wholesalers located there could offer more advantageous procurement conditions, particularly in border areas, either because of their geographic proximity or because of the specific delivery methods they offer.

42 All of these elements are capable of having a negative effect on the choice of products that the tobacco retailers include in their range of products and, ultimately, on the access of various products coming from other Member States to the Spanish market.

43 In those circumstances, it must be held that the prohibition at issue hinders the access of these products to the market.

44 It follows that the legislation at issue in the main proceedings constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 34 TFEU.

Justification for the restriction on the free movement of goods

45 According to settled case-law, an obstacle to the free movement of goods may be justified on one of the public interest grounds set out in Article 36 TFEU or in order to meet overriding requirements. In either case, the national provision must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, *Commission* v *Italy*, paragraph 59, and *Ker-Optika*, paragraph 57).

Observations submitted to the Court

46 The Spanish and Italian Governments claim, first, that the prohibition at issue in the main proceedings may be justified by the necessity of guaranteeing fiscal and customs control of tobacco products and ensuring their control of health-related aspects.

47 Second, those governments claim that the abovementioned prohibition is necessary to achieve the objective of protecting consumers. If tobacco retailers were authorised to import tobacco products, they might be tempted to favour certain products over others, to the detriment of the neutrality of the tobacco market.

48 Third, the Spanish Government considers that the prohibition at issue in the main proceedings is justified by the fact that allowing tobacco retailers to import these products would amount to giving them an excessive competitive advantage.

49 Fourth, the Spanish Government is of the opinion that, in any event, a restriction on the free movement of goods should be removed only if doing so would present an advantage for consumers such as, in particular, a decline in prices. However, given that tobacco is a monopolised product, sold at fixed prices, the removal of the prohibition of importation by tobacco retailers could not have any benefit for consumers; the only possible beneficiary being the retailers themselves.

The Court's Reply

50 With regard, first of all, to the argument of the Spanish and Italian Governments, based on the necessity of ensuring fiscal, customs, and health control of tobacco products, it should be noted that it is for the national authorities, where they adopt a measure derogating from a principle enshrined by European Union Law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (see Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 45, and Case C-73/08 *Bressol and Others* [2010] ECR I-2735, paragraph 71).

51 However, the Spanish and Italian Governments do not substantiate their argument with any evidence which satisfies the requirements referred to in the previous paragraph. In particular, they have not explained in what respect offering tobacco retailers the possibility of importing tobacco products themselves would constitute an obstacle to the application of fiscal, customs, and health control measures to those products.

52 Moreover, the argument based on the protection of consumers must be rejected. Even if the requirement to ensure a uniform range of products constituted an legitimate public interest objective which merited being pursued by legislation, rather than the law of the market, compliance with such a requirement could, in any event, be achieved by less restrictive measures, such as the imposition of an obligation on tobacco retailers to stock a predefined minimum range of products.

53 Next, the Spanish Government cannot claim that the restriction in question may be justified on the ground that the possibility of importing tobacco products would create an excessive competitive advantage for tobacco retailers. Such a consideration is of a purely economic dimension. However, according to settled case-law, grounds of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (see Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 33, and Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 34).

54 Finally, the Spanish Government's argument that the removal of a restriction on the free movement of goods is only justified if it leads to an advantage for consumers must be rejected. It suffices to point out that, in the present case, the removal of the prohibition at issue in the main proceedings is capable of benefiting consumers by allowing tobacco retailers to expand the range of products available.

55 In light of all the foregoing, it must be held that the restriction arising from the legislation at issue in the main proceedings cannot be justified by the achievement of the objectives invoked.

56 Consequently, the answer to the question referred is that Article 34 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibits tobacco retailers from importing tobacco products from other Member States.

Costs

57 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 34 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibits tobacco retailers from importing tobacco products from other Member States.

[Signatures]