Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

21 September 2016*

(Reference for a preliminary ruling — Directive 2011/64/EU — Article 15(1) — Free determination, by the manufacturers and importers, of the maximum retail selling prices of manufactured tobacco products — National regulation prohibiting the sale of such products by retailers at prices lower than those indicated on the revenue stamp — Free movement of goods — Article 34 TFEU — Selling arrangements — Article 101 TFEU, read in conjunction with Article 4(3) TEU)

In Case C-221/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the hof van beroep te Brussel (Court of Appeal, Brussels, Belgium), made by decision of 5 May 2015, received at the Court on 13 May 2015, in the criminal proceedings against

Etablissements Fr. Colruyt NV,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, J.C. Bonichot and C.G. Fernlund, Judges,

Advocate General: N. Wahl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 February 2016,

after considering the observations submitted on behalf of:

— Etablissements Fr. Colruyt NV, by R. Verstraeten and H. De Bauw, advocaten,

— the Belgian Government, initially by N. Zimmer, J. Van Holm and M. Jacobs, and subsequently J. Van Holm and M. Jacobs, acting as Agents, and A. Fromont, advocaat,

— the French Government, by G. de Bergues, D. Colas, J. Bousin and S. Ghiandoni, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes, A. Brigas Afonso and M. Rebelo, acting as Agents,

— the European Commission, by E. Manhaeve, H. van Vliet and F. Tomat, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 April 2016,

* Language of the case: Dutch.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 15(1) 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), read in conjunction with Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Article 34 TFEU, and of Article 101 TFEU read in conjunction with Article 4(3) TEU.

2 The request has been made in the criminal proceedings brought against Établissements Fr. Colruyt NV ('Colruyt') concerning the sale by Colruyt of tobacco products at a unit price below the price indicated by the manufacturer or importer on the revenue stamp affixed to those products.

Legal context

EU law

3 Recitals 2, 3, 9 and 10 of Directive 2011/64 state:

'(2) The 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 ...

(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.'

4 Article 1 of that directive, in Chapter 1, entitled 'Subject-matter', 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.'

5 The first subparagraph of Article 7(1) of Directive 2011/64 provides:

'Cigarettes manufactured in the Union and those imported from third countries shall be subject to an ad valorem excise duty calculated on the maximum retail selling price, including customs duties, and also to a specific excise duty calculated per unit of the product.'

6 Article 15(1) of that directive is worded as follows:

‘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.’

Belgian Law

7 Article 7(2*bis*)(1) of the Wet betreffende de bescherming van de gezondheid van de gebruikers op het stuk van de voedingsmiddelen en andere producten (Law on the protection of consumer health in relation to foodstuffs and other goods, *Belgisch Staatsblad* (*Official Journal*) of 8 April 1977, p. 4501), of 24 January 1977, at the date of the facts in the main proceedings (‘the Law on Health Protection’), provides:

‘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.’

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

8 Colruyt operates a chain of supermarkets in Belgium under the same name.

9 Following an investigation by the federale overheidsdienst van volksgezondheid (Federal Public Service for Public Health, Belgium), the openbaar ministerie (the Public Prosecution Service, Belgium) found that Colruyt made use, in its supermarkets, of tobacco advertising measures prohibited under Article 7(2*bis*)(1) of the Law on Health Protection. Colruyt is thereby alleged to have sold a variety of tobacco products:

— at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products;

— with a quantity discount, which was marked by a yellow and red background on the display rail;

— with a temporary general discount of 3% to all customers ;

— with a general discount of 3% to a specific category of persons, namely the members of youth movements by means of the ‘camping discount’ (‘*kampkorting*’).

10 By a judgment of the correctionele rechtbank te Brussel (Criminal Court, Brussels, Belgium) of 10 May 2013, Colruyt was ordered to pay, inter alia, a fine of EUR 270 000 for breach of the provision in question.

11 Colruyt brought an appeal against that judgment before the hof van beroep te Brussel (Court of Appeal, Brussels, Belgium), submitting, in particular, that the prohibition on applying retail prices which are lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to the tobacco products is incompatible with Article 15(1) of Directive 2011/64, Article 34 TFEU and Article 101 TFEU read in conjunction with Article 4(3) TEU.

12 In those circumstances the hof van beroep te Brussel (Court of Appeal, Brussels) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 15(1) of Directive 2011/64, whether or not read in conjunction with Articles 20 and 21 of the [Charter], 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], 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?’

Admissibility of the request for a preliminary ruling

13 The Belgian Government submits that the request for a preliminary ruling is inadmissible on the ground that, first, Article 7(2*bis*)(1) of the Law on Health Protection bears no relation to the purpose of the main proceedings, since the retail selling prices of tobacco products in Belgium are governed by other Belgian law provisions. It submits, secondly, that the interpretation of Directive 2011/64 is irrelevant in resolving the present dispute, because Article 7(2*bis*)(1) is not intended to transpose that directive into Belgian law. It submits, thirdly, that the order for reference does not fulfil the conditions laid down in Article 94 of the Rules of Procedure of the Court, since it neither contains sufficient information on the legal and factual context of the dispute nor a statement of the precise reasons which prompted the referring court to inquire about the interpretation of the provisions of EU law. The French Government has also raised doubts as to the admissibility of the request for a preliminary ruling.

14 In that regard, it should be borne in mind that, according to settled case-law of the Court, 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 for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU 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 (judgment of 16 July 2015, *Sommer Antriebs- und Funktechnik*, C-369/14, EU:C:2015:491, paragraph 32 and the case-law cited).

15 As regards the first plea of inadmissibility in respect of the request for a preliminary ruling, it is sufficient to note that, in the context of the procedure laid down in Article 267 TFEU, it is not for the Court to rule on the interpretation of national laws or regulations or to decide whether the referring court’s interpretation of them is correct (judgment of 7 October 2010, *dos Santos Palhota and Others*, C-515/08, EU:C:2010:589, paragraph 18).

16 As regards the second plea of inadmissibility raised by the Belgian Government, it is not obvious that the situation at issue in the main proceedings is excluded from the scope of Directive 2011/64 or, at the very least, that Article 7(2*bis*)(1) of the Law on Health Protection would in no way be capable of rendering certain provisions of that directive ineffective and that the interpretation of that directive requested bears no relation to the actual facts of the main action or its purpose. In addition, that objection of inadmissibility relates to the substance of the first question referred for a preliminary ruling.

17 As regards the third plea of inadmissibility, it must be found that the referring court has, in the present case, set out the legal and factual context of the dispute in the main proceedings sufficiently precisely in order to enable the Court to give a useful answer to the questions submitted to it and the interested parties referred to in Article 23 of the Statute of the Court of Justice to submit observations. In addition, it is apparent from the order for reference that the referring court is uncertain as to whether the national legislation in the main proceedings is compatible with the provisions of EU law whose interpretation is sought and that, if that legislation were not compatible with those provisions, the allegations against Colruyt would be considered unfounded.

18 Having regard to the foregoing, it must be held that the request for a preliminary ruling is admissible.

Consideration of the questions referred

The first question

19 By its first question the referring court asks, in essence, whether Article 15(1) of Directive 2011/64, read in conjunction with Articles 20 and 21 of the Charter, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibits retailers from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products.

20 As is apparent from Article 1, Directive 2011/64 is designed to lay down general principles for the harmonisation of the structure and rates of the excise duty to which the Member States subject manufactured tobacco. Directive 2011/64 falls, therefore, within the European Union's fiscal legislation on tobacco products, which, in the words of recital 2 of that directive, is designed to ensure the proper functioning of the internal market.

21 It is apparent, in addition, from recital 3 of Directive 2011/64 that, in order to achieve that aim, that directive seeks to ensure that the application in the Member States of taxes affecting the consumption of products in the manufactured tobacco sector does not distort conditions of competition and does not impede their free movement within the European Union. In particular, recital 9 of that directive states that harmonisation of excise duty structures must 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.

22 It follows from the foregoing that Directive 2011/64 is designed to ensure the proper functioning of the internal market as regards the application in the Member States of the excise duty on products in the manufactured tobacco sector.

23 The first subparagraph of Article 15(1) of that directive must be interpreted in the light of that aim. It provides that manufacturers or, where appropriate, their representatives or authorised agents in the European Union, and importers of tobacco from third countries are to 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 aim being to ensure effective competition between them.

24 The Court has held that that provision seeks, first, to ensure that the determination of the tax base of the proportional excise duty on tobacco products, that is the maximum retail selling price of those products, is subject to the same rules in all the Member States and, secondly, to maintain the freedom of the economic operators, by which they may make effective use of the competitive advantage resulting from any lower cost prices (see, by analogy, judgment of 4 March 2010, *Commission* v *France*, C-197/08, EU:C:2010:111, paragraph 36).

25 In addition, the provision is part of the machinery for the taxation of tobacco, which implies that the price determined by the manufacturer or the importer and approved by the public authorities is binding as a maximum price and must be observed as such at every stage of the distribution chain until it is sold to the consumer in order to ensure that the integrity of tax revenue is not undermined by the exceeding of imposed prices (see, to that effect, judgment of 4 March 2010, *Commission* v *France*, C-197/08, EU:C:2010:111, paragraph 43).

26 The first subparagraph of Article 15(1) of Directive 2011/64 is, therefore, designed to ensure that the application of the rules relating to the excise duty on tobacco products does not harm the imperative needs of competition which imply, as is clear from recital 10 of that directive, a system of prices, formed freely by the producers or importers, for all groups of manufactured tobacco.

27 Consequently, the Court has held, in essence, that Article 15(1) of Directive 2011/64 cannot be interpreted as precluding legislation whereby a selling price, namely the price stated on the tax label, is imposed for the sale to the consumer of imported or home-produced tobacco products, provided that that price has been freely determined by the manufacturer or importer (see, by analogy, judgment of 16 November 1977, *GB-Inno-BM*, 13/77, EU:C:1977:185, paragraphs 63 and 64).

28 As regards the case at issue in the main proceedings, a provision of national legislation such as Article 7(2*bis*)(1) of the Law on Health Protection, which, according to the information provided by the referring court, prohibits retailers, inter alia, from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products, results indeed — having regard to the specific features of the machinery for the taxation of tobacco — in the price affixed to that stamp being imposed on those operators as regards the sale of those products to the consumer. However, it is not apparent from the documents submitted to the Court that that provision is intended to govern the setting of the price indicated by the producer or importer on the revenue stamp nor indeed that that provision concerns in any other manner the application of the excise duty on tobacco products.

29 Consequently, such a national provision is not encompassed by the situation referred to in Article 15(1) of Directive 2011/64. That article does not, therefore, preclude such a provision.

30 That interpretation is not called in question by Colruyt's argument, according to which not allowing retailers the freedom, under Article 15(1), to set the sales price of tobacco products to the consumer, constitutes unjustified discrimination, contrary to Articles 20 and 21 of the Charter, as between retailers who are also importers and those which are not. Those provisions of the Charter cannot, in any event, result in the scope of Directive 2011/64 being extended to the setting of the minimum price charged by retailers, which is not, as a rule, concerned by the application of the excise duty on tobacco products.

31 It follows from all the foregoing considerations that the answer to the first question is that Article 15(1) of Directive 2011/64 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits retailers from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products, in so far as that price has been freely determined by the manufacturer or importer.

The second question

32 By its second question the referring court asks, in essence, whether Article 34 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibits retailers from selling tobacco products at a retail price which is lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products.

33 Article 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect. In accordance with settled case-law, all measures of a Member State 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 (judgments of 11 July 1974, *Dassonville*, 8/74, EU:C:1974:82, paragraph 5, and 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 31).

34 Hence, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect to quantitative restrictions even if those rules apply to all products alike (see, to that effect, judgment of 20 February 1979, *Rewe-Zentral*, '*Cassis de Dijon*', 120/78, EU:C:1979:42, paragraphs 6, 14 and 15).

35 The application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of that case-law, 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 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 access any more than it impedes the access of domestic products (judgment of 10 February 2009, *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 36).

36 Consequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 34 TFEU, as are the measures referred to in paragraph 34 of the present judgment. 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 (see, to that effect, judgment of 10 February 2009, *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 37).

37 In that regard, in so far as the national provisions on tobacco product pricing, such as those in Article 7(2*bis*)(1) of the Law on Health Protection, do not concern the characteristics of those goods, but solely the arrangements under which they may be sold, they must be regarded as concerning selling arrangements (see, by analogy, judgment of 30 April 2009, *Fachverband der Buch- und Medienwirtschaft*, C-531/07, EU:C:2009:276, paragraph 20).

38 As to whether such provisions fulfil the conditions set out in paragraph 35 above, it must be found, first, that a national provision such as Article 7(2*bis*)(1) of the Law on Health Protection, which prohibits retailers from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products, applies to all relevant traders operating within the national territory.

39 Secondly, since that provision does not concern the determination by importers of the products from other Member States of the price indicated on the revenue stamp and those importers remain free to set that price, it is not of such a kind as to prevent access to the Belgian market of tobacco products from another Member State or to impede access any more than it impedes the access of domestic tobacco products.

40 Consequently, such legislation does not constitute a measure having an effect equivalent to quantitative restrictions on imports, prohibited by Article 34 TFEU.

41 In the light of the foregoing considerations, the answer to the second question is that Article 34 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits retailers from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products, in so far as that price has been freely determined by the importer.

The third question

42 By its third question the referring court asks, in essence, whether Article 101 TFEU, read in conjunction with Article 4(3) TEU, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which prohibits retailers from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products.

43 As is apparent from the Court's settled case-law, although Article 101 TFEU is concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, that article, read in conjunction with Article 4(3) TEU, which lays down a duty of cooperation between the European Union and the Member States, none the less requires the latter 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 (judgment of 4 September 2014, *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 and the case-law cited).

44 Article 101 TFEU, read in conjunction with Article 4(3) TEU, is 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 (judgment of 4 September 2014, *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).

45 However, rules such as those which are not intended to compel suppliers and retailers to conclude agreements or to take any other action of the kind referred to in Article 101(1) TFEU but which, on the contrary, entrust to the public authorities responsibility for fixing prices to the consumer do not infringe that provision, read in conjunction with Article 4(3) TEU (see, to that effect, judgment of 29 January 1985, *Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers*, 231/83, EU:C:1985:29, paragraphs 17 and 18). Similarly, rules which lay down a prohibition

which is self-sufficient neither require nor favour the conclusion of anti-competitive agreements (see, to that effect, judgment of 17 November 1991, *Ohra Schadeverzekeringen*, C-245/91, EU:C:1993:887, paragraph 11).

46 As has been found in paragraph 28 above, a provision of national legislation such as Article 7(2*bis*)(1) of the Law on Health Protection results in a sale price being imposed on retailers, for the sale of tobacco products to the consumer, namely, that indicated by the manufacturer or importer on the revenue stamp affixed to those products. Such legislation neither requires nor encourages the adoption of agreements between suppliers and retailers, but is self-sufficient since the direct effect of the legislation is to set the price charged by retailers. In addition, it is not apparent from the file that the adoption of Article 7(2*bis*)(1) of the Law on Health Protection was preceded by an agreement on sale prices imposed in the tobacco products sector.

47 In addition, Article 7(2*bis*)(1) does not delegate to private operators responsibility for setting the price charged by retailers or for taking other decisions affecting the economic sphere.

48 In those circumstances, legislation such as that at issue in the main proceedings is not capable of rendering Article 101(1) TFEU ineffective.

49 It follows from the foregoing considerations that the answer to the third question is that Article 101 TFEU, read in conjunction with Article 4(3) TEU, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits retailers from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products.

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 (Sixth Chamber) hereby rules:

1. **Article 15(1) of Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits retailers from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products, in so far as that price has been freely determined by the manufacturer or importer.**

2. **Article 34 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits retailers from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products, in so far as that price has been freely determined by the importer.**

3. **Article 101 TFEU, read in conjunction with Article 4(3) TEU, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits retailers from selling tobacco products at a unit price lower than the price indicated by the manufacturer or importer on the revenue stamp affixed to those products.**

[Signatures]