Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

22 September 2016*

(Failure of a Member State to fulfil obligations — Free movement of goods — Article 34 TFEU — Quantitative restrictions on imports — Measures having equivalent effect — Precious metals hallmarked in a third country in accordance with Netherlands legislation — Import into the Czech Republic after being put into free circulation — Refusal to recognise the hallmark — Consumer protection — Proportionality — Admissibility)

In Case C-525/14,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 20 November 2014,

European Commission, represented by P. Němečková, E. Manhaeve and G. Wilms, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Czech Republic, represented by M. Smolek, T. Müller, J. Vláčil and J. Očková, acting as Agents,

defendant,

supported by:

French Republic, represented by D. Colas and R. Coesme, acting as Agents,

intervener,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, C. Toader, A. Rosas, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Aleksejev, Administrator,

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

after hearing the Opinion of the Advocate General at the sitting on 3 May 2016,

gives the following

* Language of the case: Czech.

Judgment

1 By its application, the European Commission claims that the Court should declare that, by refusing to recognise certain Netherlands hallmarks, in particular hallmarks of the WaarborgHolland assay office ('WaarborgHolland hallmarks'), the Czech Republic has failed to fulfil its obligations under Article 34 TFEU.

Pre-litigation procedure and procedure before the Court

2 Since it considered that the practice of the Puncovní úřad (Assay Office, Czech Republic, 'the Czech assay office') of refusing to recognise the hallmarks of WaarborgHolland, an independent assay office established in the Netherlands with branches in third countries, and consequently of requiring the precious metals in question to be marked with an additional Czech hallmark, was contrary to Article 34 TFEU, the Commission by letter of 30 September 2011 gave the Czech Republic formal notice to submit observations.

3 In its reply of 30 November 2011, the Czech Republic did not dispute that it did not recognise those hallmarks. It submitted, however, that the present case concerned the free movement of services, not of goods, and that the refusal of recognition was justified by the fact that it was not possible to distinguish, among those hallmarks, those affixed outside the territory of the EU from those affixed within EU territory.

4 After considering the arguments of the Czech Republic in that letter, the Commission on 30 May 2013 sent the Czech Republic a reasoned opinion, in which it maintained in particular that the provisions of the FEU Treaty on the free movement of goods apply to products in free circulation in the EU, and thus also to products originating in third countries that have been regularly imported into a Member State in accordance with the requirements of Article 29 TFEU. The Commission requested the Czech Republic to take the necessary measures to comply with Article 34 TFEU within two months from the date of receipt of the reasoned opinion.

5 In its reply of 23 July 2013, the Czech Republic maintained its position, claiming in particular that the refusal to recognise the WaarborgHolland hallmarks was justified by the need to protect consumers. Since it was not satisfied by that answer, the Commission decided to bring the present action.

6 By application lodged at the Court Registry on 26 February 2015, the French Republic sought leave to intervene in the present case in support of the form of order sought by the Czech Republic. By decision of 24 March 2015, the President of the Court granted leave.

The request to reopen the oral procedure

7 Following the delivery of the Advocate General's Opinion, the Czech Republic, by document lodged at the Court Registry on 18 May 2016, asked the Court to reopen the oral procedure, submitting essentially that 'a substantial part [of the Opinion] is based on several incorrect assumptions'.

8 It should, however, be recalled, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice make no provision for the parties to submit observations in response to the Advocate General's Opinion (judgments of 17 July 2014, *Commission* v *Portugal*, C-335/12, EU:C:2014:2084, paragraph 45, and of 4 May 2016, *Commission* v *Austria*, C-346/14, EU:C:2016:322, paragraph 23).

9 Secondly, in accordance with Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the oral part of the procedure to be reopened, in particular if it considers that it lacks sufficient information, or where a party, after the close of that part of the procedure, has 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 parties.

10 In the present case the Court, after hearing the Advocate General, considers that it has all the information necessary to give judgment and that the case does not have to be examined in the light of a new fact which is of such a nature as to be a decisive factor for its decision or of an argument which has not been debated before it.

11 Consequently, there is no need to order the oral part of the procedure to be reopened.

The action

Admissibility

Arguments of the parties

12 The Czech Republic submits that the action is inadmissible in so far as it alleges a breach of Article 34 TFEU with reference to 'certain Netherlands hallmarks'. That expression and the words 'in particular' in the form of order sought by the Commission show that the subject matter of the dispute concerns other Netherlands hallmarks as well as those of WaarborgHolland. In the pre-litigation procedure and in the application the Commission sought to prove the alleged failure to fulfil obligations only as regards the WaarborgHolland hallmarks. It is not material that the dispute concerns, in the abstract, the non-recognition of precious metals for which it is not possible to determine whether they have been hallmarked in a third country or in the territory of the EU. It must therefore be found that the application lacks clarity and precision and that the action is therefore admissible only in so far as it concerns the WaarborgHolland hallmarks.

13 The Commission submits that its action is admissible in its entirety. In the letter of formal notice it informed the Czech Republic in general terms that it was obliged under Article 34 TFEU to accept goods which had been controlled and hallmarked in accordance with the legislation of a Member State of the European Economic Area (EEA) and lawfully marketed in any Member State of the EEA. In the reasoned opinion it claimed, in addition, that the Czech Republic was failing to fulfil its obligations under Article 34 TFEU on the ground that it 'does not recognise certain Netherlands hallmarks'. That wording was repeated in the form of order sought in the application and was not challenged by the Czech Republic.

Findings of the Court

14 Since the Court can examine of its own motion whether the conditions laid down in Article 258 TFEU for bringing an action for failure to fulfil obligations are satisfied (judgment of 14 January 2010, *Commission* v *Czech Republic*, C-343/08, EU:C:2010:14, paragraph 25 and the case-law cited) and the action is directed not against a national law or regulation but against a practice of the Czech assay office, it should be recalled, as a preliminary point, that an administrative practice of a Member State can be made the object of an action for failure to fulfil obligations when it is, to some degree, of a consistent and general nature (judgments of 29 April 2004, *Commission* v *Germany*, C-387/99, EU:C:2004:235, paragraph 42 and the case-law cited, and of 5 March 2009, *Commission* v *Spain*, C-88/07, EU:C:2009:123, paragraph 54).

15 In the present case, the Czech Republic does not deny that the practice of the Czech assay office referred to by the Commission, whose existence the Commission has shown by producing as annexes to its application two communications from the president of that office, satisfies those criteria. Nor does the Czech Republic dispute that the practice may be attributed to it. On the other hand, it contests the admissibility of the action, in that it lacks clarity and precision.

16 In accordance with Article 120(c) of the Rules of Procedure and the related case-law, an application initiating proceedings must state the subject matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a complaint (judgments of 11 July 2013, *Commission* v *Czech Republic*, C-545/10, EU:C:2013:509, paragraph 108 and the case-law cited, and of 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 141).

17 It is also settled case-law that, in an action under Article 258 TFEU, the letter of formal notice sent by the Commission to the Member State and the reasoned opinion issued by the Commission delimit the subject matter of the dispute, so that it cannot afterwards be extended. The opportunity for the Member State concerned to submit its observations, even if it chooses not to make use of it, is an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the action brought by the Commission must be based on the same complaints as those in the letter of formal notice initiating the pre-litigation procedure (judgments of 29 September 1998, *Commission* v *Germany*, C-191/95, EU:C:1998:441, paragraph 55, and of 10 September 2009, *Commission* v *Portugal*, C-457/07, EU:C:2009:531, paragraph 55 and the case-law cited).

18 The reasoned opinion and the action brought under Article 258 TFEU must therefore set out the complaints coherently and precisely, in order for the Member State and the Court to be able to appreciate exactly the scope of the breach of EU law complained of, a condition which is necessary to enable the Member State to put forward its defence and the Court to determine whether there is a breach of obligations as alleged (judgments of 14 October 2010, *Commission* v *Austria*, C-535/07, EU:C:2010:602, paragraph 42, and of 3 March 2011, *Commission* v *Ireland*, C-50/09, EU:C:2011:109, paragraph 64 and the case-law cited).

19 In the present case, in so far as, by using the words ‘certain Netherlands hallmarks’ in the form of order sought in its application, the Commission seeks to include in its action Netherlands hallmarks other than those explicitly mentioned in the application, namely the WaarborgHolland hallmarks, the application does not satisfy the requirements of the Rules of Procedure and the case-law cited in paragraph 16 above, as the identity of those other hallmarks is not specified in the application and the use of the word ‘certain’ means that the action cannot be directed against all Netherlands hallmarks.

20 Moreover, while the letter of formal notice referred generally to the application to precious metals of Article 34 TFEU and the related case-law, it referred expressly only to the WaarborgHolland hallmarks. As to the form of order sought in the application, while, like the operative part of the reasoned opinion, it refers to ‘certain Netherlands hallmarks’, the reasons in the opinion related only to the WaarborgHolland hallmarks. Consequently, the requirements defined by the case-law cited in paragraphs 17 and 18 above cannot be regarded as satisfied either.

21 In those circumstances, the Commission’s action must be dismissed as inadmissible in so far as it relates to the alleged refusal to recognise Netherlands hallmarks other than those affixed by WaarborgHolland.

Substance

Arguments of the parties

22 The Commission submits that the affixing in the Czech Republic to certain precious metals imported from other Member States of an additional hallmark, despite the fact that those precious metals have already been hallmarked in accordance with Netherlands legislation and marketed in the EU, constitutes an unjustified restriction of the free movement of goods.

23 It argues that the Czech Republic is wrong to submit that, to benefit from the principle of mutual recognition, precious metals originating in third countries must not only have been put into free circulation in the EU but also then been marketed in a Member State, which must furthermore be the Member State under whose legislation the hallmark has been affixed, in this case the Kingdom of the Netherlands. It follows from the Court's case-law that, where goods coming from a third country have been put into free circulation in the EU, they must be treated in the same way as goods originating in the EU. Free movement of goods therefore applies to precious metals hallmarked in a third country by a subsidiary of an assay office established in a Member State, in this case the Kingdom of the Netherlands, and in free circulation in the EU.

24 Marketing in accordance with the law in force is one of the requirements of putting into free circulation, and thus a condition for obtaining the status of EU goods, not an additional stage necessary for the principle of mutual recognition to apply. Moreover, the Member State of putting into free circulation may be different from the State whose legislation governed the hallmarking of the metals concerned. That position is borne out in particular by Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (OJ 2008 L 218, p. 21) and Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (OJ 2008 L 218, p. 30).

25 Where, therefore, precious metals have been put into free circulation, the fact that they were not hallmarked in EU territory is immaterial.

26 Further, the Commission observes that, according to the case-law of the Court, the Member States may not require a fresh hallmark to be affixed to goods imported from another Member State in which they were lawfully marketed and hallmarked in accordance with the legislation of that State, where the information provided by the hallmark is equivalent to that prescribed by the Member State of import and intelligible to consumers of that State. In the present case, the WaarborgHolland hallmarks, even if applied in a third country, comply with Netherlands legislation and the information they provide is equivalent to that prescribed by the Czech Republic and intelligible to consumers of that State.

27 In addition, the Czech Republic has not shown that the restriction in question is appropriate for attaining the objective of consumer protection it pursues and does not go beyond what is necessary to attain it. The Commission submits that WaarborgHolland is an assay office subject to Netherlands law and supervision by the Netherlands public authorities and accredited by the Netherlands accreditation body within the meaning of Regulation No 765/2008, and those public authorities exercise control over the branches of their assay offices both in the Member States and in third countries.

28 The Czech Republic submits that, in so far as the action is admissible, it is not well founded. In the first place, after specifying that the hallmarks referred to in its observations are the WaarborgHolland ones only, it submits that precious metals hallmarked in a third country do not benefit from the free movement of goods guaranteed by Article 34 TFEU even if they have been hallmarked in accordance with the legislation of a Member State.

29 For the principle of mutual recognition to be applicable, two consecutive stages have to be followed, namely the putting of the goods into free circulation in the EU within the meaning of Article 29 TFEU, which involves compliance with the import formalities and the levying of any customs duties or charges having equivalent effect which are payable in the Member State concerned, and then the marketing of the goods in the market of that Member State in accordance with its non-tariff legislation. In the present case, that sequence has not been followed, since, although the precious metals in question were indeed hallmarked in accordance with Netherlands legislation, that was done in a third country and they were not marketed in Netherlands territory.

30 In the second place, as regards the restriction of the free movement of precious metals hallmarked in the Netherlands, the Czech Republic argues that this is justified by the need to protect consumers and is proportionate to that objective. The Czech Republic submits that it is not possible to distinguish those precious metals from those to which the same hallmarks have been affixed in a third country. The affixing of an additional Czech hallmark is thus the only means by which the Czech Republic can monitor the entry into the EU market of goods hallmarked in third countries. The possibility of the Netherlands authorities monitoring hallmarking in third countries is insufficient, as is the monitoring of samples and hallmarking in those third countries. The Czech Republic also observes that, as regards the hallmarking of articles made from precious metals, there is no system of recognition in the EU of the conformity assessment bodies of third countries.

31 The French Republic, intervening in support of the Czech Republic, argues primarily that the application to hallmarked precious metals of the principle of mutual recognition is subject to an additional condition that does not apply to other kinds of products, namely the condition that the hallmarking is performed in the territory of the Member State of export by an independent body established in that Member State. That condition may be explained by the particular nature of hallmarking, which derives from the regalian prerogative of guaranteeing fineness. Consequently, an article hallmarked in the territory of a Member State other than the Member State of export or in the territory of a third country, as with the WaarborgHolland hallmarks in the present case, does not benefit from the principle of mutual recognition. Merely putting such an article into free circulation in a Member State is not sufficient. The alleged breach of Article 34 TFEU has not therefore been established.

32 In the alternative, the French Republic submits that, assuming that the principle of mutual recognition does apply, the restriction of the free movement of goods deriving from the Czech authorities' refusal to recognise the WaarborgHolland hallmarks is consistent with Article 34 TFEU, as it is justified by the objective of protecting consumers and ensuring fair trading and is proportionate to that objective.

33 In reply, the Commission submits in particular that it does not appear from the case-law of the Court that, to benefit from the principle of mutual recognition, the hallmarking must physically take place in the territory of the Member State under whose legislation the hallmark is affixed. Moreover, in accordance with Regulation No 765/2008, the Member States are obliged to recognise the equivalence of the services supplied by an assay office accredited under that regulation, even if the branch of the accredited assay office which has affixed the hallmark is not situated in the territory of the Member State concerned or in that of the EU. The Commission points out that the independence of the Netherlands assay offices or of the Netherlands accreditation body is not contested, and that the guarantees of independence provided by the control office accredited by the Member State of export need not necessarily be the same as those laid down by the Member State of import.

Findings of the Court

34 According to settled case-law of the Court, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the EU must be considered to be measures having an effect equivalent to quantitative restrictions on imports within the meaning of Article 34 TFEU (judgments of 11 July 1974, *Dassonville*, 8/74, EU:C:1974:82, paragraph 5, and of 16 January 2014, *Juvelta*, C-481/12, EU:C:2014:11, paragraph 16).

35 Obstacles to the free movement of goods resulting, in the absence of harmonisation of national legislations, from the application by a Member State to goods coming from other Member States, in which they are lawfully manufactured and marketed, of rules relating to conditions with which those goods must comply, even if those rules apply without distinction to all products, therefore constitute measures having equivalent effect prohibited by Article 34 TFEU, unless their application can be justified by an objective of public interest capable of taking precedence over the free movement of goods (see, to that effect, judgments of 20 February 1979, *Rewe-Zentral ('Cassis de Dijon')*, 120/78, EU:C:1979:42, paragraph 8; of 15 September 1994, *Houtwipper*, C-293/93, EU:C:1994:330, paragraph 11; and of 16 January 2014, *Juvelta*, C-481/12, EU:C:2014:11, paragraph 17).

36 It should also be recalled that, in accordance with Article 28(2) TFEU, the prohibition of quantitative restrictions between Member States provided for in Articles 34 to 37 TFEU is to apply to products originating in the Member States and to products coming from third countries which are in free circulation in the Member States. Under Article 29 TFEU, products coming from a third country are to be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

37 The Court has concluded that, as regards free movement of goods within the EU, goods in free circulation are definitively and wholly assimilated to goods originating in the Member States and that the provisions of Article 34 TFEU consequently apply without distinction to products originating in the EU and products put into free circulation in any of the Member States, whatever the real origin of the products (see, to that effect, judgments of 15 December 1976, *Donckerwolcke and Schou*, 41/76, EU:C:1976:182, paragraphs 17 and 18; of 18 November 2003, *Budějovický Budvar*, C-216/01, EU:C:2003:618, paragraph 95, and of 16 July 2015, *UNIC and Uni.co.pel*, C-95/14, paragraph 41).

38 However, it also follows from the Court's case-law that placing on the market is a stage subsequent to import. Just as a product lawfully manufactured within the EU may not be placed on the market on that ground alone, the lawful import of a product does not mean that it will automatically be allowed onto the market. A product coming from a third country which is in free circulation is thus assimilated to products originating in the Member States as regards the elimination of customs duties and quantitative restrictions between Member States. Where, however, there is no EU legislation harmonising the conditions of marketing of the products concerned, the Member State in which they are put into free circulation may prevent their being placed on the market if they do not satisfy the conditions laid down for that purpose under national law in compliance with EU law (judgments of 30 May 2002, *Expo Casa Manta*, C-296/00, EU:C:2002:316, paragraphs 31 and 32, and of 12 July 2005, *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2005:449, paragraph 95).

39 As the Advocate General observes, in essence, in points 57 and 58 of his Opinion, it follows from the above that, contrary to the Commission's argument, the principle of mutual recognition established by the case-law cited in paragraph 35 above cannot apply to trade within the EU in goods originating in third countries and in free circulation where they have not, before being exported to a Member State other than that in which they are in free circulation, been lawfully marketed in the territory of a Member State.

40 In the present case, it is common ground that the action does not concern the refusal by the Czech Republic to recognise the WaarborgHolland hallmarks, and the additional hallmarking which could be required as a consequence, in the case of the direct import into its territory of precious metals marked with WaarborgHolland hallmarks affixed outside the territory of the EU. Nor does the action concern hallmarks covered by the Convention on the Control and Marking of Articles of Precious Metals, signed in Vienna on 15 November 1972 and amended on 18 May 1988, or hallmarks covered by bilateral treaties on the mutual recognition of hallmarks applied to articles of precious metals concluded between certain Member States and third countries, such as those mentioned by the Advocate General in point 30 of his Opinion.

41 On the other hand, by this action the Commission contests the compatibility with Article 34 TFEU of the Czech practice of not recognising the WaarborgHolland hallmarks, which are assay marks, and consequently of requiring an additional hallmarking of the precious metals concerned, on the import into the Czech Republic of precious metals marked with those hallmarks which have either been lawfully both hallmarked and marketed in the territory of the Netherlands or the territory of another Member State or else have been hallmarked in the territory of a third country in accordance with Netherlands legislation and are in free circulation in a Member State other than the Czech Republic, whether this is the Kingdom of the Netherlands or another Member State.

42 The Court has previously held that national legislation that requires articles of precious metal imported from other Member States, in which they are lawfully marketed and hallmarked in accordance with the legislation of those States, to be given an additional hallmark in the Member State of import has the effect of rendering imports more difficult and costly, and thus constitutes a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 34 TFEU (see, to that effect, judgments of 21 June 2001, *Commission* v *Ireland*, C-30/99, EU:C:2001:346, paragraph 27, and of 16 January 2014, *Juvelta*, C-481/12, EU:C:2014:11, paragraphs 18 and 20).

43 That is also the case of the practice at issue. By virtue of that practice, precious metals marked with the WaarborgHolland hallmarks from a Netherlands assay office, whether they have been lawfully both hallmarked and marketed in the territory of the Netherlands or in that of another Member State or have been hallmarked in the territory of a third country in accordance with Netherlands legislation and put into free circulation in a Member State, and whether or not they have been lawfully marketed in the territory of a Member State, may be marketed in the territory of the Czech Republic only after they have been the object of an additional control and hallmarking in the Czech Republic, which is liable to make the import of those products into the territory of the Czech Republic from other Member States more difficult and costly.

44 That practice is therefore prohibited by Article 34 TFEU unless it can be objectively justified.

45 It follows from consistent case-law of the Court that national legislation which constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 34 TFEU may be justified on one of the public interest grounds set out in Article 36 TFEU or in order to meet imperative requirements (judgments of 10 February 2009, *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 59 and the case-law cited, and of 6 September 2012, *Commission* v *Belgium*, C-150/11, EU:C:2012:539, paragraph 53).

46 In the present case, the Czech Republic relies on an imperative requirement of the need to ensure protection of consumers.

47 On this point, the Court has previously held that the requirement that an importer must have articles of precious metals marked with a hallmark indicating their fineness is in principle such as to ensure effective protection for consumers and to promote fair trading (judgments of 21 June 2001, *Commission* v *Ireland*, C-30/99, EU:C:2001:346, paragraph 29, and of 16 January 2014, *Juvelta*, C-481/12, EU:C:2014:11, paragraph 21).

48 However, in that context, the Court has also held that a Member State may not require a fresh hallmark to be affixed to products imported from another Member State in which they have been lawfully marketed and hallmarked in accordance with the legislation of that State, where the information provided by the hallmark, in whatever form, is equivalent to that prescribed by the Member State of import and intelligible to consumers of that State (judgments of 21 June 2001, *Commission* v *Ireland*, C-30/99, EU:C:2001:346, paragraph 30, and of 16 January 2014, *Juvelta*, C-481/12, EU:C:2014:11, paragraph 22).

49 In the present case, there is no issue as to the equivalence between the information provided by the WaarborgHolland hallmarks and that prescribed by the Czech Republic for its own hallmarks or as to its intelligibility to consumers in that State, which the Czech Republic does not contest, but there is an issue as to the level of guarantee provided by hallmarking in the territory of third countries by the branches of a Netherlands assay office, in this case WaarborgHolland, which is authorised under Netherlands law to exercise at least some of its hallmarking activities outside the territory of the EU.

50 The Czech Republic, supported by the French Republic, submits that such a hallmark affixed outside EU territory, even if the hallmarking is done by the branches of an independent assay office which is authorised under the law of its own Member State to carry on part of its activities in the territory of third countries, does not provide sufficient guarantees to be regarded as equivalent to a hallmark affixed by an independent body of a Member State in the territory of that Member State. According to the Czech Republic and the French Republic, the reliability of such hallmarking outside EU territory cannot be guaranteed, in view of the obstacles to the exercise by that body's own Member State of sufficient control over its activities carried on in the territory of third States.

51 It must be recalled that, as regards the requirement that a hallmark must be affixed by a legal person satisfying certain requirements as to competence and independence, the Court has indeed previously held that a Member State cannot, by arguing that the guarantee function of the hallmark can be ensured only by action by the competent body of the Member State of import, prevent the marketing in its territory of articles of precious metals hallmarked in the Member State of export by an independent body. The existence of double controls in the Member State of export and the Member State of import cannot be justified if the results of the control carried out in the Member State of origin satisfy the requirements of the Member State of import. The Court has also held that the hallmark's guarantee function is satisfied if it is affixed by an independent body in the Member State of export (see, to that effect, judgment of 15 September 1994, *Houtwipper*, C-293/93, EU:C:1994:330, paragraphs 17 to 19).

52 However, on account of the risk of fraud on the market for articles of precious metals, where small changes in the quantity of precious metal may have a very great impact on the manufacturer's profit margin, the Court has acknowledged that in the absence of EU legislation the choice of appropriate measures to deal with that risk is for the Member States, who have a wide discretion (see, to that effect, judgment of 15 September 1994, *Houtwipper*, C-293/93, EU:C:1994:330, paragraphs 21 and 22).

53 In this context, the Court has taken the view that, while the choice between prior control by an independent body and a scheme allowing manufacturers in the Member State of export to hallmark the goods in question themselves is within the discretion of each Member State, a Member State whose legislation requires the hallmark to be affixed by an independent body cannot prevent the marketing in its territory of articles of precious metals imported from other Member States where those articles have in fact been hallmarked by an independent body in the Member State of export. The Court has also stated that the guarantees of independence provided by the body of the Member State of export need not necessarily coincide with those laid down in the national legislation of the Member State of import (see, to that effect, judgments of 15 September 1994, *Houtwipper*, C-293/93, EU:C:1994:330, paragraphs 20, 22, 23 and 27, and of 16 January 2014, *Juvelta*, C-481/12, EU:C:2014:11, paragraphs 36 and 37).

54 The Court has not yet ruled, however, on hallmarks affixed in the territory of third countries. In this respect, having regard to the risk of fraud in the market for precious metals and the wide discretion which the Court has acknowledged that the Member States enjoy in the choice of appropriate measures for dealing with that risk, it must be accepted that, in the absence of EU legislation in the matter, a Member State is entitled, in connection with the fight against fraud undertaken in order to ensure the protection of consumers in its territory, not to allow its own assay office or offices, or other bodies which that Member State may authorise to affix its hallmarks to precious metals, to affix those hallmarks in the territory of third countries.

55 It follows that, in the present state of EU law and apart from the cases that may be governed by an international agreement, which as noted in paragraph 40 above are not the subject of the present action, a Member State is in principle entitled, in accordance with the case-law cited in paragraph 52 above, not to consider that hallmarks affixed in the territory of third countries offer a level of protection of consumers equivalent to the hallmarks affixed by independent bodies in the territory of the Member States.

56 The Commission cannot rely to any purpose on Regulation No 765/2008 to submit that, since WaarborgHolland is a conformity assessment body accredited by the Netherlands accreditation body under that regulation, the Czech Republic is required in all cases to accept in its territory the precious metals hallmarked by that assessment body where they are imported from another Member State, without being entitled to carry out a control or an additional hallmarking.

57 First, while Article 7(1) of Regulation No 765/2008 provides that, where a conformity assessment body requests accreditation, it must in principle do so with the national accreditation body of the Member State in which it is established, the regulation is silent as to the question of the territory in which the conformity assessment bodies may or must exercise their activities and as to the extent to which the accreditation issued to them by the national accreditation body under the regulation may or may not, or must or must not, cover also the activities of conformity assessment bodies exercised by their branches in the territory of third countries. Secondly, moreover, whether or not the Czech practice contested by the Commission complies with Regulation No 765/2008 is not the subject of the present action.

58 It must be stated, however, that the exercise of the power recognised in paragraph 55 above as belonging to the Member States cannot be justified if, in accordance with the case-law cited in paragraph 51 above, the results of the control carried out in the Member State from which the precious metals are exported meet the requirements of the Member State of import.

59 That is necessarily so in the present case with the precious metals hallmarked by WaarborgHolland in Netherlands territory and lawfully marketed there or in the territory of another Member State, in accordance with the settled case-law of the Court referred to in paragraph 53 above.

60 That is also so with the precious metals bearing WaarborgHolland hallmarks affixed in a third country which have been put into free circulation in the EU and, before being exported to the Czech Republic, were lawfully marketed in the territory of a Member State which, like the Czech Republic, has chosen not to allow its own assay office or offices, or other bodies it may authorise to affix its hallmarks to precious metals, to affix those hallmarks in the territory of third countries. In that case, the control exercised by such a Member State when the precious metals concerned are marketed in its territory must be regarded as satisfying the requirements of the Czech Republic, since in that case the two Member States are pursuing equivalent levels of consumer protection.

61 The conclusion must be that, in the cases identified in paragraphs 59 and 60 above, the Czech Republic's refusal to recognise the WaarborgHolland hallmarks cannot be justified, and the alleged failure to fulfil obligations is therefore made out.

62 On the other hand, it follows from the above considerations that, with respect to precious metals marked with a WaarborgHolland hallmark in the territory of a third country which have been put into free circulation in the EU and are exported to the Czech Republic without first having been lawfully marketed in a Member State, and with respect to such goods which after being put into free circulation have been lawfully marketed in a Member State which does not require precious metals to be hallmarked by an independent body, or in a Member State which requires such hallmarking but allows it to be done in the territory of third countries, the results of the control exercised by the Member State from which the precious metals are exported cannot satisfy the requirements of the Czech Republic.

63 While, however, the Czech practice at issue is thus capable of being justified in part, in particular because the precious metals concerned may not correspond to the conditions of lawful marketing in a Member State, for that justification to be accepted it is also necessary that the practice is appropriate for attaining that objective and does not go beyond what is necessary to attain it (see, to that effect, judgments of 10 February 2009, *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 59 and the case-law cited, and of 16 January 2014, *Juvelta*, C-481/12, EU:C:2014:11, paragraph 29).

64 It is common ground that the Czech practice at issue concerns precious metals bearing WaarborgHolland hallmarks generally, not only precious metals bearing WaarborgHolland hallmarks affixed in the territory of third countries, without distinguishing according to the circumstances in which the precious metals are exported to the Czech Republic, in particular whether they are exported to the Czech Republic after merely being put into free circulation in another Member State or after also being lawfully marketed in another Member State.

65 The Czech Republic claims that it is impossible to distinguish among the WaarborgHolland hallmarks between those which have been affixed in the territory of third countries and those which have been affixed in the EU, since the hallmarks are identical wherever they have been affixed. That circumstance is not, however, such as to allow it to be considered that, in so far as that practice is capable of being justified, it is proportionate to the objective pursued.

66 It would be possible, for instance by requiring from the importer into the Czech Republic documentary evidence to show the place where the hallmark in question was affixed and, as the case may be, the place where the precious metals concerned were put into free circulation and lawfully marketed in the EU, to limit the refusal to recognise the WaarborgHolland hallmarks solely to circumstances in which an additional control of the precious metals by the Czech authorities is actually justified by the protection of consumers, which would be a measure less prejudicial to the free movement of goods than the general refusal to recognise those hallmarks and the additional hallmarking of all precious metals marked with those hallmarks.

67 The fact that in such a case the final consumer would not himself be able to ascertain whether the WaarborgHolland hallmark affixed to precious metal had been affixed in the territory of a third country or in the EU, and could consequently be led into error as to its quality, cannot, contrary to the submissions of the Czech Republic, establish that the practice at issue is proportionate, unless it were supposed that such a consumer could not rely on the competent authorities of the Member State of consumption as regards their control of the quality of the products that that State admits to its market, which cannot be accepted.

68 It must therefore be found that, because of its general and systematic nature, in so far as the Czech practice at issue is capable of being justified by the protection of consumers, it is not proportionate to the objectives it pursues.

69 In the light of all the above considerations, it must be held that, by refusing to recognise the WaarborgHolland hallmarks, the Czech Republic has failed to fulfil its obligations under Article 34 TFEU, and the remainder of the action must be dismissed.

Costs

70 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first sentence of Article 138(3), the parties are to bear their own costs where each party succeeds on some and fails on other heads. Since the Commission's action is inadmissible in part, it must be decided that the Commission and the Czech Republic are to bear their own costs.

71 Pursuant to Article 140(1) of those Rules, which provides that Member States which have intervened in the proceedings are to bear their own costs, the French Republic is to be ordered to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by refusing to recognise the hallmarks of the WaarborgHolland assay office, the Czech Republic has failed to fulfil its obligations under Article 34 TFEU;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission, the Czech Republic and the French Republic to bear their own costs.**

[Signatures]