



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

16 September 2020*

(Reference for a preliminary ruling – Structure and rates of excise duty applied to manufactured tobacco – Directive 2011/64/EU – Article 2(2) – Article 5(1) – Concept of ‘Products consisting in whole or in part of substances other than tobacco’ – Concept of ‘Smoking tobacco’ – Water-pipe tobacco)

In Case C-674/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), made by decision of 4 September 2019, received at the Court on 10 September 2019, in the proceedings

‘Skonis ir kvapas’ UAB

v

Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos,

other party:

Vilniaus teritorinė muitinė,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský and N. Wahl (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Lithuanian Government, by V. Kazlauskaitė-Švenčionienė and R. Butvydytė, acting as Agents,
- the Spanish Government, by M.J. Ruiz Sánchez, acting as Agent,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Portuguese Government, by P. Barros da Costa, A. Homem, L. Inez Fernandes and N. Vitorino, acting as Agents,

* Language of the case: Lithuanian.

– the European Commission, by J. Jokubauskaitė and C. Perrin, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(2) and Article 5(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) and of certain provisions of the Combined Nomenclature ('the CN') set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EU) No 1006/2011 of 27 September 2011 (OJ 2011 L 282, p. 1), Commission Implementing Regulation (EU) No 927/2012 of 9 October 2012 (OJ 2012 L 304, p. 1), Commission Implementing Regulation (EU) No 1001/2013 of 4 October 2013 (OJ 2013 L 290, p. 1) and Commission Implementing Regulation (EU) No 1101/2014 of 16 October 2014 (OJ 2014 L 312, p. 1).
- 2 The request has been made in proceedings between 'Skonis ir kvapas' UAB and the Muitinės departamentas prie Finansų ministerijos (Customs Department under the Ministry of Finance, Lithuania) concerning the decision of the latter, first, to issue Skonis ir kvapas with an additional assessment of EUR 1 308 750.28 in respect of excise duty and of EUR 274 837.74 in respect of import value added tax (VAT) on water-pipe tobacco imported and released for consumption between 2012 and 2015 and, secondly, to impose on it a fine of EUR 158 359.

Legal context

European Union law

- 3 Recital 2 of Directive 2011/64 states:

'The [European] Union's fiscal legislation on tobacco products needs to ensure the proper functioning of the internal market and, at the same time, a high level of health protection, as required by Article 168 [TFEU], bearing in mind that tobacco products can cause serious harm to health and that the Union is Party to the World Health Organisation's Framework Convention on Tobacco Control (FCTC). Account should be taken of the situation prevailing for each of the various types of manufactured tobacco.'

- 4 Article 2(1) and (2) of that directive provides:

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

- (a) cigarettes;
- (b) cigars and cigarillos;
- (c) smoking tobacco:
 - (i) fine-cut tobacco for the rolling of cigarettes;
 - (ii) other smoking tobacco.

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

Notwithstanding the first subparagraph, products containing no tobacco and used exclusively for medical purposes shall not be treated as manufactured tobacco.'

5 Under Article 5(1) of Directive 2011/64:

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

- (a) tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing;
- (b) tobacco refuse put up for retail sale which does not fall under Article 3 and Article 4(1) and which can be smoked. For the purpose of this Article, tobacco refuse shall be deemed to be remnants of tobacco leaves and by-products obtained from tobacco processing or the manufacture of tobacco products.'

Lithuanian law

6 Article 3(27) of the Lietuvos Respublikos akcizų įstatymas (Law of the Republic of Lithuania on Excise Duty) of 30 October 2001 (Žin., 2001, No 98-3482), in the version applicable to the dispute in the main proceedings ('the Law on Excise Duty'), provides:

“Smoking tobacco” means the following products:

- (1) tobacco which has been stemmed, cut or otherwise split, twisted or pressed into blocks (cubes), and is capable of being smoked without any further industrial processing;
- (2) tobacco refuse (remnants of tobacco leaves and by-products obtained from tobacco processing or the manufacture of tobacco products) put up for retail sale, which does not come within the categories of [cigars, cigarillos or cigarettes] and which is capable of being smoked.'

7 Article 3(35) of that law states:

'Products consisting in part of substances other than tobacco but otherwise conforming to the criteria [for classification as cigars or cigarillos] shall be treated as cigars and cigarillos.'

8 Article 3(36) of the Law on Excise Duty states:

'Products consisting in whole or in part of tobacco substitutes but otherwise conforming to the criteria set out in [Article 3(27) of the Law on Excise Duty] shall be treated as ... smoking tobacco. These provisions shall not apply to products containing no tobacco and used for medical purposes.'

9 Article 31(2) of the Law on Excise Duty provides:

'Excise duty levied on smoking tobacco shall be at the rate of EUR 54.16 per kilogram of the product.'

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

10 Skonis ir kvapas is a company established in Lithuania and engaged in, inter alia, the retail sale of a range of tobacco products.

- 11 To that end, between 2012 and 2015, it imported into Lithuania, in packs of 50 or 250 g, water-pipe tobacco consisting of several substances, namely tobacco (which makes up 24% thereof), sugar syrup (47%), glycerine (27%), flavourings (2%) and potassium sorbate (less than 1 g per kg).
- 12 In the declarations of the applicant in the main proceedings, that water-pipe tobacco was classified, under the CN in force during the relevant period, under subheading 2403 11 00 00, as ‘water-pipe tobacco’ and under the additional national code X203 as ‘smoking tobacco subject to excise duty as laid down in Article 31(2) of the Law on Excise Duty’.
- 13 The Vilniaus teritorinė muitinė (customs authority for the Vilnius region, Lithuania) (‘the regional customs authority’) examined the electronic import declarations submitted by the applicant in the main proceedings and established that the net weight of the water-pipe tobacco declared did not correspond to the data contained on the invoices or in the packaging documents. The applicant in the main proceedings had declared only the weight of the tobacco contained in the imported water-pipe tobacco, that is to say, the weight of one of the components of that water-pipe tobacco, and not the net weight of the imported water-pipe tobacco in its entirety.
- 14 The regional customs authority took the view that, in accordance with the provisions of national law, the water-pipe tobacco at issue in the main proceedings in its entirety – and not merely the tobacco contained therein – had to be regarded as smoking tobacco subject to excise duty. Consequently, in the tax inspection report, it calculated that the applicant in the main proceedings would additionally have to pay excise duty of EUR 1 308 750.28 and import VAT of EUR 274 837.74. It also ordered the payment of interest of EUR 512 513 for late payment of the excise duty and of EUR 43 532 for late payment of the VAT, and of a fine of EUR 158 359.
- 15 The applicant in the main proceedings challenged that tax inspection report by lodging a complaint with the Customs Department under the Ministry of Finance, which, by decision of 14 November 2017, upheld the report and refused to accede to the request of the applicant in the main proceedings that it be exempted from the late-payment interest and the fine.
- 16 The applicant in the main proceedings appealed against that decision to the Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Tax Disputes Commission, Government of the Republic of Lithuania). That commission confirmed the amount of excise duty and VAT established in the tax report but exempted the applicant in the main proceedings from the late-payment interest.
- 17 An action challenging that decision and those of the regional customs authority and of the Customs Department under the Ministry of Finance was brought before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), which, by judgment of 7 June 2018, upheld those decisions. The applicant in the main proceedings lodged an appeal against that judgment before the referring court, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania).
- 18 First, the referring court states that it must determine whether Article 2(2) of Directive 2011/64 is to be construed as meaning that water-pipe tobacco, such as that under consideration in the main proceedings, consisting of tobacco, which makes up 24% thereof, and other substances such as sugar syrup, glycerine, flavourings and preservative, is to be regarded as a product ‘consisting ... in part of substances other than tobacco’ within the meaning of that provision.
- 19 Secondly, it states that it must decide whether, in the case where the tobacco contained in a blend intended for smoking, such as water-pipe tobacco, satisfies the criteria listed in Article 5(1) of Directive 2011/64, that entire blend is to be regarded as smoking tobacco, irrespective of the other substances contained therein.

- 20 Thirdly, the referring court takes the view that, if that question is answered in the negative, it will have to answer the question of whether, in order for the water-pipe tobacco at issue in the main proceedings to be regarded as smoking tobacco for the purpose of its taxation in respect of excise duty, it is necessary to ascertain whether that product, made by blending fine-cut tobacco with other liquid and normally fine substances, satisfies the condition set out in Article 5(1)(a) of Directive 2011/64.
- 21 Fourthly, the referring court explains that, if the second question is answered in the negative and the first and third questions are answered in the affirmative, it will be necessary to determine whether the provisions in tariff heading 2403 of the CN must be construed as meaning that such components of water-pipe tobacco as sugar syrup, flavourings and glycerine are not to be treated as ‘tobacco substitutes’.
- 22 It is in those circumstances that the Lietuvos vyriausiosios administracinės teisės (Supreme Administrative Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Article 2(2) of Directive [2011/64] to be construed as meaning that water-pipe tobacco, such as that under consideration in the present case (that is to say, consisting of tobacco (up to 24%), sugar syrup, glycerine, flavourings and preservative), is to be regarded as “consisting ... in part of substances other than tobacco” for the purposes of the application of that provision?
- (2) Is Article 5(1) of Directive 2011/64, including in those cases in which it is to be read together with Article 2(2) of that directive, to be construed as meaning that, in the case where the tobacco contained in a blend intended for smoking – in this case, water-pipe tobacco (the contested product in the case under examination) – satisfies the criteria listed in Article 5(1) of Directive 2011/64, that entire blend is to be regarded as smoking tobacco, irrespective of the other substances contained therein?
- (3) If the second question is answered in the negative, is Article 2(2) and/or Article 5(1) of Directive 2011/64/ to be construed as meaning that the entire contested product, such as that in the main proceedings, made by blending fine-cut tobacco with other liquid and normally fine substances (sugar syrup, glycerine, flavourings and preservative), is to be treated as “smoking tobacco” for the purposes of the application of that directive?
- (4) If the second question is answered in the negative and the first and third questions are answered in the affirmative, are the provisions in heading 2403 of the CN to be construed as meaning that such components of water-pipe tobacco as (1) sugar syrup, (2) flavourings and/or (3) glycerine are not to be treated as “tobacco substitutes”?’

Consideration of the questions referred

The first and second questions

- 23 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 2 and 5 of Directive 2011/64 must be construed as meaning that water-pipe tobacco, consisting of tobacco, which makes up 24% thereof, and other substances such as sugar syrup, glycerine, flavourings and preservative, is to be regarded as a ‘product consisting ... in part of substances other than tobacco’ and as ‘smoking tobacco’ within the meaning of those provisions and is therefore to be regarded, in its entirety and irrespective of the substances other than tobacco contained therein, as smoking tobacco subject to excise duty on tobacco.

- 24 In that regard and as a preliminary point, it should be noted that the provisions of Directive 2011/64 do not explicitly refer to water-pipe tobacco.
- 25 However, Article 2(1) of that directive defines, for the purposes of its application, the concept of ‘manufactured tobacco’ and divides manufactured tobacco subject to harmonisation under that directive into three categories, the first concerning cigarettes, the second cigars and cigarillos, and the third smoking tobacco. The products covered by each of those categories are defined in Articles 3 to 5 of Directive 2011/64 on the basis of their individual characteristics.
- 26 Furthermore, Article 2(2) of that directive treats products consisting in whole or in part of substances other than tobacco, but otherwise conforming to the criteria set out in Article 3 or Article 5(1) of Directive 2011/64, as cigarettes and smoking tobacco. Moreover, the latter provision defines the concept of ‘smoking tobacco’.
- 27 As regards, in the first place, the interpretation of Article 2(2) of Directive 2011/64 and of the concept of ‘products consisting ... in part of substances other than tobacco’ within the meaning of that provision, it should be borne in mind that, according to the case-law of the Court, in order to ensure that Directive 2011/64 is applied in a uniform fashion, the terms in it must be interpreted independently, on the basis of the wording of the provisions in question and of the scheme and aims of that directive (judgment of 11 April 2019, *Skonis ir kvapas*, C-638/17, EU:C:2019:316, paragraph 25 and the case-law cited).
- 28 As regards the wording of Article 2(2) of Directive 2011/64, the EU legislature has not specified the nature of the substances other than tobacco that are covered by that provision, with the result that the concept of ‘products consisting ... in part of substances other than tobacco’ does not exclude any substance which could be blended with tobacco, nor does it require that the tobacco be blended with certain substances.
- 29 As regards the scheme of Article 2(2) of Directive 2011/64, it should be noted that the first subparagraph of that provision seeks to lay down a general rule that products consisting in whole or in part of substances other than tobacco, but otherwise conforming to the criteria for cigarettes and smoking tobacco set out in Article 3 and in Article 5(1) of that directive, are to be treated as cigarettes and smoking tobacco. In accordance with the second subparagraph of Article 2(2) of Directive 2011/64, the only products which are not covered by that rule are those which, firstly, do not contain tobacco and, secondly, are used exclusively for medical purposes (see, by analogy, judgment of 30 March 2006, *Smits-Koolhoven*, C-495/04, EU:C:2006:218, paragraph 18).
- 30 It follows that a product may come within the scope of that directive and be subject to excise duty on tobacco without, however, consisting exclusively of tobacco.
- 31 As regards the objectives of Directive 2011/64, the purpose of that directive, as is apparent from Article 1 thereof, is 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, has the objective of ensuring the proper functioning of the internal market and, at the same time, a high level of health protection (see, to that effect, judgments of 9 October 2014, *Yesmoke Tobacco*, C-428/13, EU:C:2014:2263, paragraphs 23, 35 and 36, and of 6 April 2017, *Eko-Tabak*, C-638/15, EU:C:2017:277, paragraph 17).
- 32 In order to ensure, first, the proper functioning of the internal market and neutral conditions of competition in the tobacco sector and, secondly, a high level of protection for human health, all tobacco products capable of being smoked should be treated as cigarettes and smoking tobacco. Such products are in competition with cigarettes and smoking tobacco and are likely to be covered by health protection policy on tobacco control.

- 33 Moreover, by virtue of Article 2(13) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1), water-pipe tobacco is deemed to be a tobacco product for smoking.
- 34 Furthermore, inasmuch as, according to the documents before the Court, the heating and burning of all the substances contained in water-pipe tobacco, such as that at issue in the main proceedings, produces smoke to be inhaled, such a characterisation applies to that product.
- 35 It follows that the concept of a product ‘consisting ... in part of substances other than tobacco’ within the meaning of Article 2(2) of Directive 2011/64 must be construed as including water-pipe tobacco, such as that at issue in the main proceedings, consisting of tobacco, sugar syrup, glycerine, flavourings and preservative.
- 36 As regards, in the second place, the interpretation of Article 5(1)(a) of Directive 2011/64, it should be noted that the wording of that provision requires, for the purpose of classifying tobacco as ‘smoking tobacco’, that two cumulative conditions be met, namely, first, that the tobacco be cut or otherwise split, twisted or pressed into blocks and, secondly, that it be capable of being smoked without further industrial processing.
- 37 As regards the first condition, it would appear to follow from the documents before the Court that the water-pipe tobacco at issue in the main proceedings is tobacco that has been cut or otherwise split, twisted or pressed into blocks, this, however, being a matter for the referring court to ascertain.
- 38 As regards the second condition, water-pipe tobacco, such as that at issue in the main proceedings, is capable of being smoked without further industrial processing.
- 39 In that regard, it is important to bear in mind that the Court has already stated that simple handling intended to make an unfinished tobacco product capable of being smoked is not industrial processing and that industrial processing refers, by contrast, to the transformation, usually on a large scale and by a standardised process, of raw materials into tangible goods (judgment of 6 April 2017, *Eko-Tabak*, C-638/15, EU:C:2017:277, paragraphs 30 to 32).
- 40 Water-pipe tobacco, however, is a product which does not require, in order to be smoked, any transformation by a standardised process of raw materials into tangible goods.
- 41 Accordingly, water-pipe tobacco, such as that at issue in the main proceedings, is capable of meeting the two cumulative conditions laid down in Article 5(1)(a) of Directive 2011/64 and necessary for classification as ‘smoking tobacco’.
- 42 As regards the question of whether water-pipe tobacco, such as that at issue in the main proceedings, must be regarded, in its entirety and irrespective of the substances other than tobacco contained therein, as smoking tobacco, it should be noted that, as the European Commission and the Portuguese Government have rightly observed, Directive 2011/64 treats all products consisting in part of substances other than tobacco as smoking tobacco without distinguishing between those different substances or providing for the taxation only of the tobacco contained in those products.
- 43 Accordingly, it follows from Articles 7 to 12 of that directive that the amount of excise duty on cigarettes is not defined by disregarding substances and elements other than tobacco that are contained in cigarettes.

- 44 Similarly, as regards manufactured tobacco other than cigarettes referred to in Articles 13 and 14 of Directive 2011/64, the EU legislature has made no provision for the exemption of the weight of substances other than tobacco from the excise duty on those products.
- 45 Lastly, all the substances contained in water-pipe tobacco are heated and smoked as components of a single product. Consequently, such a product must, for the purposes of Directive 2011/64, be regarded in its entirety as smoking tobacco and be subject as such to the excise duty on tobacco.
- 46 It follows that Article 5(1) of Directive 2011/64 must be construed as meaning that, in the case where the tobacco contained in a blend intended for smoking, such as water-pipe tobacco, meets the conditions set out in that provision, such a blend must be regarded, in its entirety and irrespective of the substances other than tobacco contained therein, as smoking tobacco.
- 47 In the light of all the foregoing considerations, the answer to the first and second questions is that Articles 2 and 5 of Directive 2011/64 must be construed as meaning that water-pipe tobacco, consisting of tobacco, which makes up 24% thereof, and other substances such as sugar syrup, glycerine, flavourings and preservative, must be regarded as a product ‘consisting ... in part of substances other than tobacco’ and as ‘smoking tobacco’ within the meaning of those provisions and must therefore be regarded, in its entirety and irrespective of the substances other than tobacco contained therein, as smoking tobacco subject to the excise duty on tobacco.

The third and fourth questions

- 48 In view of the answer given to the first and second questions, there is no need to answer the third and fourth questions.

Costs

- 49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

Articles 2 and 5 of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco must be construed as meaning that water-pipe tobacco, consisting of tobacco, which makes up 24% thereof, and other substances such as sugar syrup, glycerine, flavourings and preservative, must be regarded as a product ‘consisting ... in part of substances other than tobacco’ and as ‘smoking tobacco’ within the meaning of those provisions and must therefore be regarded, in its entirety and irrespective of the substances other than tobacco contained therein, as smoking tobacco subject to the excise duty on tobacco.

[Signatures]