



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

21 December 2023*

(Reference for a preliminary ruling – Free movement of goods – Article 34 TFEU – Quantitative restrictions on importation – Measures having equivalent effect – National legislation limiting the quantity of cigarettes which can be released for consumption during a given period to a maximum corresponding to the monthly average of the quantities released for consumption in the preceding 12 months – Article 36 TFEU – Justification – Combating tax avoidance and abusive practices – Protection of public health – Taxation – Excise duties – Directive 2008/118/EC – Article 7 – Time at which excise duties become chargeable – Release for consumption of excise goods – Article 9 – Chargeability conditions and applicable rate of excise duty – Applicable quantitative limit exceeded – Excess – Application of the rate of excise duty in force on the date on which the declaration of discharge is lodged)

In Case C-96/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 12 January 2022, received at the Court on 11 February 2022, in the proceedings

CDIL – Companhia de Distribuição Integral Logística Portugal S.A.

v

Autoridade Tributária e Aduaneira,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, Z. Csehi, M. Ilešič (Rapporteur), I. Jarukaitis and D. Gratsias, Judges,

Advocate General: P. Pikamäe,

Registrar: L. Carrasco Marco,

having regard to the written procedure and further to the hearing on 22 March 2023,

* * Language of the case: Portuguese.

after considering the observations submitted on behalf of:

- CDIL – Companhia de Distribuição Integral Logística Portugal S.A., by A. Moura Portugal and I. Teixeira, advogados,
- the Portuguese Government, by P. Barros da Costa, A. Rodrigues and N. Vitorino, acting as Agents,
- the European Commission, by M. Björkland, I. Melo Sampaio and F. Thiran, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2023,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 34 TFEU and of Articles 7 and 9 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).
- 2 The request has been made in proceedings between CDIL – Companhia de Distribuição Integral Logística Portugal S.A. ('CDIL') and the Autoridade Tributária e Aduaneira (Tax and Customs Authority, Portugal), concerning an additional demand relating to excise duty payable by CDIL in respect of the release for consumption of cigarettes in Portugal.

Legal framework

European Union law

Directive 2008/118

- 3 Recitals 2, 8, 9 and 31 of Directive 2008/118 stated:

'(2) Conditions for charging excise duty on the goods covered by [Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1)], hereinafter "excise goods", need to remain harmonised in order to ensure the proper functioning of the internal market.

...

- (8) Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at Community level when excise goods are released for consumption and who the person liable to pay the excise duty is.

- (9) Since excise duty is a tax on the consumption of certain goods, duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irretrievably lost.

...

- (31) Member States should be able to provide that goods released for consumption carry tax markings or national identification marks. The use of these markings or marks should not place any obstacle in the way of intra-Community trade.

Since the use of those markings or marks should not give rise to a double taxation burden, it should be made clear that any amount paid or guaranteed to obtain such markings or marks is to be reimbursed, remitted or released by the Member State which issued the marks if excise duty has become chargeable and has been collected in another Member State.

However, in order to prevent any abuse, Member States which issued such markings or marks should be able to make reimbursement, remission or release conditional on the presentation of evidence that they have been removed or destroyed.'

- 4 Article 1(1) of Directive 2008/118 provided:

'This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter "excise goods"):

...

- (c) manufactured tobacco covered by [Council Directive] 95/59/EC [of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40)], [Council Directive] 92/79/EEC [of 19 October 1992 on the approximation of taxes on cigarettes (OJ 1992 L 316, p. 8)] and [Council Directive] 92/80/EEC [of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10)].'

- 5 Article 2 of Directive 2008/118 provided:

'Excise goods shall be subject to excise duty at the time of:

- (a) their production, including, where applicable, their extraction, within the territory of the [European] Community;
- (b) their importation into the territory of the Community.'

- 6 Article 7(1) to (3) of that directive provided:

'1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

2. For the purposes of this Directive, "release for consumption" shall mean any of the following:

- (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;

- (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
- (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
- (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.

3. The time of release for consumption shall be:

- (a) in the situations referred to in Article 17(1)(a)(ii), the time of receipt of the excise goods by the registered consignee;
- (b) in the situations referred to in Article 17(1)(a)(iv), the time of receipt of the excise goods by the consignee;
- (c) in the situations referred to in Article 17(2), the time of receipt of the excise goods at the place of direct delivery.'

7 Article 9 of that directive provided:

'The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place.

Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State. Member States shall apply the same procedures to national goods and to those from other Member States.'

8 The first paragraph of Article 11 of Directive 2008/118 provided:

'In addition to the cases referred to in Article 33(6), Article 36(5), and Article 38(3), as well as those provided for by the Directives referred to in Article 1, excise duty on excise goods which have been released for consumption may, at the request of a person concerned, be reimbursed or remitted by the competent authorities of the Member State where those goods were released for consumption in the situations fixed by the Member States and in accordance with the conditions that Member States shall lay down for the purpose of preventing any possible evasion or abuse.'

9 Article 39(1) and the first subparagraph of Article 39(3) of that directive provided:

'1. Without prejudice to Article 7(1), Member States may require that excise goods carry tax markings or national identification marks used for fiscal purposes at the time when they are released for consumption in their territory, or, in the cases provided for in Article 33(1), first subparagraph, and Article 36(1), when they enter their territory.

...

3. Without prejudice to any provisions they may lay down in order to ensure that this Article is implemented properly and to prevent any evasion, avoidance or abuse, Member States shall ensure that tax markings or national identification marks as set out in paragraph 1 do not create obstacles to the free movement of excise goods.

...’

10 Directive 2008/118 was repealed, with effect from 13 February 2023, by Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (OJ 2020 L 58, p. 4).

11 Article 8 of that directive, which is headed ‘Chargeability conditions and rates of excise duty to be used’, provides:

‘The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place.

Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted, according to the procedure laid down by each Member State. Member States shall apply the same procedures to national goods and to those from other Member States.

By way of derogation from the first paragraph, when excise duty rates are changed, stocks of excise goods already released for consumption may be subject, where appropriate, to an increase in, or a reduction of, the excise duty.’

Portuguese law

12 Article 8 of the Código dos Impostos Especiais de Consumo, (Excise Duty Code; ‘CIEC’) provides, under the heading ‘Chargeability’:

‘1. Duty becomes chargeable in the national territory at the time of release for consumption of goods referred to in Article 5 or at the time of losses which must be taxed under this code.

2. The rate of duty to be used in national territory is that which is in force on the date on which the duty becomes chargeable.’

13 Article 9 of the CIEC, which is headed ‘Release for consumption’, provides:

‘1. For the purposes of the present code, the following shall be regarded as a “release for consumption” of goods which are subject to duty:

(a) the departure of such goods, including irregular departure, from a duty suspension arrangement;

(b) the holding of such goods outside a duty suspension arrangement where the duty payable has not been levied;

(c) the production of such goods outside a duty suspension arrangement where the duty payable has not been levied;

(d) the importation of such goods, unless they are placed, immediately upon importation, under a duty suspension arrangement;

(e) the entry, including irregular entry, of such goods into national territory outside a duty suspension arrangement;

(f) the termination or infringement of the conditions of a tax advantage;

...

2. The time of release for consumption shall be:

(a) in the case of goods moved under a duty suspension arrangement from a tax warehouse to a registered consignee, the time of receipt of the goods by that consignee;

(b) in the case of goods moved under a duty suspension arrangement to one of the consignees referred to in Article 6(1)(a) to (d), the time of receipt of the goods by those consignees;

(c) in the situation referred to in subparagraph (f) of the previous paragraph, the time of the termination of infringement of the conditions of the tax advantage;

(d) in the situation referred to in Article 35(4), the time of receipt of the goods at the place of direct delivery;

...'

14 Article 106 of the CIEC, which is headed 'Special rules concerning release for consumption', provides:

'1. The release for consumption of cigarettes shall be subject to restrictions applicable between 1 September and 31 December of each calendar year.

2. In the period referred to in the preceding paragraph, the release for consumption of cigarettes each month by each economic operator must not exceed the quantitative limits, deriving from the application of a multiplying factor of 10% to the average monthly quantity of cigarettes released for consumption in the 12 months immediately preceding.

3. For the purposes of the preceding paragraph, the calculation of the monthly average shall be based on the total quantity of releases for consumption of cigarettes, non-exempt, between 1 September of the previous year and 31 August of the following year.

4. Each economic operator shall provide to the competent customs office, by 15 September of each year at the latest, an initial declaration indicating its monthly average and setting out the quantitative limit to which it is subject in the restricted period.

5. In exceptional circumstances, duly justified by a sudden and temporary change in the volume of sales, non-compliance with those quantitative limits may be authorised, although they shall not be taken into account for the purpose of calculating the monthly average for the following year.

6. After the expiry of the restricted period and at the latest at the end of January of each year, economic operators shall provide the competent customs office with a declaration of discharge indicating the total quantity of cigarettes actually released for consumption in the restricted period.

7. Tax is due on the amount of cigarettes exceeding the quantitative limit referred to in paragraph 4 at the rate applicable on the date on which the declaration of discharge is lodged,

where it is established that the quantitative limit has been exceeded by comparing the information in that document and the information processed by the administration, without prejudice, where applicable, to the infringement procedure which is required.

8. The rules laid down in this article are individually applicable on mainland Portugal, in the Autonomous Region of the Azores and in the Autonomous Region of Madeira, since the obligations laid down in the preceding paragraphs must be fulfilled at the customs office where the release for consumption is dealt with.'

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

- 15 CDIL, a company incorporated under Portuguese law, is an undertaking which is active in the retail of tobacco products and operates as a warehousekeeper authorised by the Portuguese Tax and Customs Authority in the Autonomous Region of Madeira.
- 16 On 15 September 2010, CDIL lodged, pursuant to Article 106(4) of the CIEC, with the customs office of Funchal (Portugal), an initial declaration indicating the average monthly quantity of cigarettes released for consumption during the immediately preceding 12 months, which is to say between 1 September 2009 and 31 August 2010.
- 17 On 22 September 2010, the Funchal customs office informed CDIL that, on the basis of the information provided, it had been allocated a monthly quantitative limit of 1 644 005 cigarettes for the restricted period from 1 September 2010 to 31 December 2010, calculated in accordance with Article 106(1) and (2) of the CIEC.
- 18 On 18 November 2010, CDIL made a request, pursuant to Article 106(5) of the CIEC, for authorisation not to comply with that quantitative limit.
- 19 On 7 January 2011, the Funchal customs office refused that request on the ground that non-compliance with the quantitative limit in question was not justified by a sudden and temporary change for a limited time in the volume of sales, as required by that provision. CDIL lodged an administrative appeal against that decision, which was also rejected.
- 20 On 18 January 2011, in accordance with Article 106(6) of the CIEC, CDIL lodged a declaration of discharge with the Funchal customs office which, for the period from 1 September to 31 December 2010, declared the release for consumption of a quantity of cigarettes more than three times greater than the quantitative limit which had been set for that period.
- 21 Pursuant to Article 106(7) of the CIEC, CDIL was issued with an additional demand for excise duty amounting to EUR 4 607.69, plus EUR 1.80, based on the number of cigarettes which it had released for consumption during the period from 1 September to 31 December 2010 and which exceeded the quantitative limit provided for in Article 106(2) of the CIEC. In accordance with Article 106(7) of the CIEC, the customs office calculated the excise duty payable on the basis of the rate which was in force on the date on which the declaration of discharge was lodged.
- 22 CDIL challenged the additional demand before the Tribunal Administrativo e Fiscal do Funchal (Administrative and Tax Court, Funchal, Portugal), which dismissed its action by judgment of 24 June 2016.

- 23 CDIL brought an appeal against that judgment before the referring court, the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal).
- 24 Before that court, CDIL, which does not dispute that it exceeded the quantitative limits that were applicable during the period of restrictions at issue, argues that Article 106 of the CIEC does not comply with EU law.
- 25 First, it submits that the imposition of a legal limit on the quantity of cigarettes which can be released for consumption constitutes, in so far as it has the greatest impact, in practice, on cigarettes originating in other Member States, a quantitative restriction on importation which is prohibited by Article 34 TFEU and cannot be justified under Article 36 TFEU.
- 26 Secondly, CDIL submits that the application of the rate of excise duty in force on the date on which the declaration of discharge is lodged infringes Articles 7 and 9 of Directive 2008/118, under which the chargeability conditions and the applicable rate are those in force on the date on which the tobacco is released for consumption.
- 27 The tax and customs authority submits, for its part, that the legislation at issue in the main proceedings does not impose any quantitative restriction or measure having equivalent effect which might impede the free movement of goods between the Member States, given that it applies without distinction to all economic operators.
- 28 It also submits that that legislation complies with Directive 2008/118 in so far as, under that legislation, excise duty becomes chargeable at the time of release for consumption, as required by Articles 7 and 9 of Directive 2008/118.
- 29 In those circumstances, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Do the quantitative limits on the release for consumption established by Article 106 of [the CIEC] constitute quantitative restrictions on imports or measures having equivalent effect within the meaning of Article 34 TFEU, in so far as Article 106 stipulates that, during the last four months of each year, the quantities of cigarettes sold by operators may not exceed the average monthly quantity of cigarettes released for consumption in the 12 months immediately preceding?
- (2) Is it contrary to the rules on the chargeability of excise duty established by Articles 7 and 9 of [Directive 2008/118] to levy tax on any quantities of cigarettes that exceed the quantitative limit on the release for consumption established under Article 106(2) of the CIEC at the rate applicable on the date on which the declaration of discharge is lodged, in accordance with Article 106(7) of the CIEC?’

The questions referred

The first question

- 30 By its first question, the referring court asks, in essence, whether Articles 34 and 36 TFEU are to be interpreted as precluding legislation of a Member State which provides that the quantity of cigarettes released for consumption each month by an economic operator during the period from 1 September to 31 December of each calendar year must not exceed the average monthly quantity of cigarettes released for consumption by that operator during the previous 12 months, plus 10%.
- 31 As a preliminary point, it must be recalled that the free movement of goods between Member States is a fundamental principle of the FEU Treaty which is expressed in the prohibition, set out in Article 34 TFEU, of quantitative restrictions on imports between Member States and all measures having equivalent effect (judgment of 23 March 2023, *Booky.fi*, C-662/21, EU:C:2023:239, paragraph 32 and the case-law cited).
- 32 First, a measure such as that at issue in the main proceedings, which imposes quantitative limits on the release for consumption of cigarettes in the territory of a Member State, does not constitute a ‘quantitative restriction on imports’, within the meaning of Article 34 TFEU, because it does not restrict the quantity of cigarettes which can be imported into that Member State.
- 33 Secondly, in accordance with settled case-law, the prohibition of measures having equivalent effect to quantitative restrictions on imports laid down in Article 34 TFEU covers any measure of the Member States that is capable of hindering, directly or indirectly, actually or potentially, access to the market of a Member State of products originating in other Member States, even if it has neither the object nor the effect of treating goods coming from other Member States less favourably (see, to that effect, judgment of 23 March 2023, *Booky.fi*, C-662/21, EU:C:2023:239, paragraphs 33 and 34 and the case-law cited).
- 34 In the present case, it should be observed that it is in the nature of a measure such as that at issue in the main proceedings, which imposes limits, on the operators concerned, on the quantity of cigarettes that they can release for consumption, to dissuade such operators from importing – or make it less attractive for them to import – into the Member State which has enacted the measure, cigarettes in quantities exceeding the limits imposed.
- 35 Consequently, it is potentially in the nature of such a measure to hinder access to the market of the Member State concerned of cigarettes which might be imported from other Member States, and accordingly it constitutes a measure having equivalent effect to quantitative restrictions within the meaning of Article 34 TFEU and, in principle, is incompatible with the obligations imposed by that article.
- 36 According to settled case-law, national legislation which constitutes a measure having equivalent effect to quantitative restrictions may nonetheless be justified by one of the public-interest grounds set out in Article 36 TFEU or by overriding requirements of general interest. In either case, the national provision must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, in particular, judgment of 23 March 2023, *Booky.fi*, C-662/21, EU:C:2023:239, paragraph 37 and the case-law cited).

- 37 In the present case, it is apparent from the order for reference that the measure at issue in the main proceedings is intended to avoid a situation in which, at a time when the rate of excise duty which will be applicable to cigarettes the following year is already known, the operators release them for consumption, within the meaning of the national legislation at issue in the main proceedings, with a view to building up large stocks of cigarettes on which excise duty is payable at a rate below that which will be applicable in the following year, during which they will actually be marketed. Thus, it appears, subject to verification by the referring court, that the measure is intended to combat tax avoidance and protect the tax receipts of the Portuguese State. According to the Government of that Member State, that measure also pursues a public health objective, in that it seeks to ensure that the increase in the rate of taxation of tobacco products enters into force in an effective manner.
- 38 In that regard, it should be pointed out that, in accordance with settled case-law, the objective of preventing tax evasion and avoidance constitutes an overriding reason in the public interest capable of justifying the imposition of a restriction on the freedoms of movement (judgment of 27 January 2022, *Commission v Spain (Obligation to provide tax information)*, C-788/19, EU:C:2022:55, paragraph 22 and the case-law cited).
- 39 As is apparent from the first paragraph of Article 11 and the first subparagraph of Article 39(3) of Directive 2008/118, and from recital 31 thereof, that objective, together with that of combating potential abuse, is among the objectives pursued by that directive. The Court has held that the release for consumption in excessive quantities of packets of cigarettes at the end of the year in anticipation of an increase in excise duty may constitute a form of abuse that the Member States are entitled to prevent by the appropriate measures (see, to that effect, judgment of 29 June 2017, *Commission v Portugal*, C-126/15, EU:C:2017:504, paragraphs 59 and 60).
- 40 Furthermore, according to equally settled case-law, the protection of human health is among the public interest grounds set out in Article 36 TFEU, the Court having held on numerous occasions that the health and life of humans rank foremost among the assets and interests protected by the Treaty (see, to that effect, judgment of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:776, paragraph 30).
- 41 Subject to verification by the referring court, it thus appears from the material provided to the Court that the legislation at issue in the main proceedings is capable of responding to overriding reasons in the public interest such as to justify, in principle, a restriction on the freedom of movement of goods.
- 42 As is apparent from paragraph 36 of the present judgment, it is still necessary to assess whether a measure such as that at issue in the main proceedings is appropriate for ensuring the attainment of those legitimate objectives and does not go beyond what is necessary in order to attain them.
- 43 In that regard, it is ultimately for the referring court, which alone has jurisdiction to assess the facts in the main proceedings and to interpret the national legislation, to determine whether and to what extent that legislation satisfies those requirements. For that purpose, that court will need to examine objectively, with the help of statistical or ad hoc data or by other means, whether it may reasonably be concluded from the evidence submitted by the authorities of the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it would be possible to attain those objectives by measures less restrictive of the free movement of goods (judgment of 23 March 2023, *Booky.fi*, C-662/21, EU:C:2023:239, paragraph 43 and the case-law cited).

- 44 However, the Court of Justice, which is called on to provide answers of use to that court, may provide guidance based on the documents relating to the main proceedings and on the written observations which have been submitted to it, in order to enable the court in question to give judgment (judgment of 23 March 2023, *Booky.fi*, C-662/21, EU:C:2023:239, paragraph 44 and the case-law cited).
- 45 As regards, in the first place, whether the national legislation at issue in the main proceedings is appropriate for attaining the stated objectives, it should be pointed out that it is such as to dissuade economic operators from accumulating stocks, at the end of the year, in order to neutralise the effects of a future increase in the rate of excise duty, of cigarettes which are actually intended to be marketed the following year. Conversely, if there were no quantitative limits on the cigarettes released for consumption during the restricted period, that would cause the future increase in the rate of excise duty, which generally leads to an increase in the retail price of a packet of cigarettes, to enter into force in an ineffective manner (see, to that effect, judgment of 4 March 2010, *Commission v Ireland*, C-221/08, EU:C:2010:113, paragraph 54 and the case-law cited) and would thus neutralise, at least to a certain extent, the potential dissuasive effect of such an increase on consumers. Accordingly, it must be held that such legislation appears to be appropriate for attaining the objectives of protecting public health and combating tax avoidance or abusive practices.
- 46 In the second place, as regards the assessment of whether a measure such as that at issue in the main proceedings is necessary, it should be observed that, as stated in paragraph 40 of the present judgment, public health ranks foremost among the assets or interests protected by the FEU Treaty, and that it is for the Member States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved, which means that they have a measure of discretion in that regard (see, to that effect, judgment of 1 March 2018, *CMVRO*, C-297/16, EU:C:2018:141, paragraph 64 and the case-law cited).
- 47 Furthermore, it must be observed that the harm occasioned to the free movement of cigarettes by a measure such as that at issue in the main proceedings does not appear to go beyond what is necessary in order for the objectives pursued by that measure to be attained.
- 48 In that regard, it should be observed, first, that the quantitative limit imposed by the national legislation at issue in the main proceedings on each economic operator is determined as a function of the average monthly quantity of cigarettes released for consumption by that operator during the preceding 12 months, plus 10%, and that that legislation is not absolute in nature in that it allows, in Article 106(5) of the CIEC, for derogation from that quantitative limit, in the event of a sudden and temporary change in the volume of sales.
- 49 Secondly, while it is true that that legislation provides, in Article 106(7) of the CIEC, for the possibility of bringing infringement proceedings against an economic operator on the basis that it has exceeded the quantitative limit imposed on it, such a possibility does not, in itself, affect the proportionality of that legislation, provided that the penalties which may be imposed at the conclusion of the proceedings are themselves proportionate.
- 50 That conclusion is not called into question by the fact, referred to by the applicant in the main proceedings, that the legislation at issue in the main proceedings also provides that packets of cigarettes, once released for consumption, cannot be marketed or sold later than the third month of the year following that in which they were released for consumption. On the contrary, such a prohibition reinforces the effectiveness and consistency of that legislation, by providing

economic operators with an incentive not to release excessive quantities of cigarettes for consumption, in a given calendar year, in anticipation of an increase in the excise duty in the following calendar year (see, to that effect, judgment of 29 June 2017, *Commission v Portugal*, C-126/15, EU:C:2017:504, paragraphs 66, 72, 78 and 79).

- 51 Having regard to all of the foregoing considerations, the answer to the first question referred is that Articles 34 and 36 TFEU are to be interpreted as meaning that they do not preclude legislation of a Member State which, in order to combat tax avoidance and abusive practices and to protect public health, provides that the quantity of cigarettes released for consumption each month by an economic operator during the period from 1 September to 31 December of each calendar year must not exceed the average monthly quantity of cigarettes released for consumption by that operator during the previous 12 months, plus 10%.

The second question

- 52 By its second question, the referring court asks, in essence, whether Articles 7 and 9 of Directive 2008/118 are to be interpreted as precluding national legislation under which the quantity of cigarettes exceeding the quantitative limit for release for consumption laid down by that legislation is subject to the rate of excise duty in force on a date after the date of release for consumption.
- 53 As a preliminary observation, it should be pointed out that, in accordance with Article 1(1) of Directive 2008/118, that directive seeks to lay down the general arrangements for excise duties imposed directly or indirectly on the consumption of excise goods, including manufactured tobacco, with the aim, in particular, as is apparent from recital 8 of that directive, of ensuring that the concept, and conditions for chargeability, of excise duty are identical in all Member States (judgment of 9 June 2022, *IMPERIAL TOBACCO BULGARIA*, C-55/21, EU:C:2022:459, paragraph 38 and the case-law cited), and thus ensuring the proper functioning of the internal market through the free movement, within the European Union, of the goods concerned (see, to that effect, judgment of 13 January 2022, *MONO*, C-326/20, EU:C:2022:7, paragraph 28).
- 54 In particular, Article 2 of Directive 2008/118 provides that the chargeable event, for the purposes of that directive, is constituted by the production in the territory of the European Union of excise goods or by their importation into that territory (see, to that effect, judgment of 9 June 2022, *IMPERIAL TOBACCO BULGARIA*, C-55/21, EU:C:2022:459, paragraph 39 and the case-law cited).
- 55 However, under Article 7(1) of that directive, excise duty becomes chargeable at the time of release for consumption of the excise goods and in the Member State in which that release takes place.
- 56 In accordance with the objective, set out in recital 8 of Directive 2008/118, of harmonising the time at which excise duty becomes chargeable and thus ensuring the proper functioning of the internal market, Article 7(2) of that directive lists the situations in which there is a ‘release for consumption’ within the meaning of that directive.
- 57 Under Article 7(2)(a) of that directive, that concept of ‘release for consumption’ includes, amongst other things, any departure, including irregular departure, of excise goods from a duty suspension arrangement, as defined in Article 4(7) of that directive (judgment of 9 June 2022, *IMPERIAL TOBACCO BULGARIA*, C-55/21, EU:C:2022:459, paragraph 40 and the case-law cited).

- 58 It is a feature of such an arrangement that the excise duty on the products covered by it is not yet payable, despite the fact that the chargeable event for taxation purposes has already taken place. Consequently, as regards excise goods, that system operates by postponing the chargeability of that duty until one of the conditions of chargeability is met (judgment of 9 June 2022, *IMPERIAL TOBACCO BULGARIA*, C-55/21, EU:C:2022:459, paragraph 42 and the case-law cited).
- 59 Since excise duty is, as recital 9 of Directive 2008/118 points out, a tax on consumption, the time at which it becomes chargeable must, in principle, be very close to the date of consumption of the excise goods (see, to that effect, judgment of 9 June 2022, *IMPERIAL TOBACCO BULGARIA*, C-55/21, EU:C:2022:459, paragraph 57 and the case-law cited).
- 60 In that context, it should be observed that, under the first paragraph of Article 9 of Directive 2008/118, the chargeability conditions and rate of excise duty to be applied are those in force on the date on which duty becomes chargeable in the Member State of release for consumption. The second paragraph of Article 9 of that directive provides, furthermore, that excise duty shall be levied and collected and, where appropriate, reimbursed or remitted, according to the procedure laid down by each Member State.
- 61 Thus, in so far as the first paragraph of Article 9 of that directive refers to the national law in force on the date on which the excise duties fall due, in order, inter alia, to determine the conditions of chargeability of excise duty, this necessarily implies that the Member States have some regulatory power in that field (see, to that effect, judgment of 29 June 2017, *Commission v Portugal*, C-126/15, EU:C:2017:504, paragraph 61).
- 62 That being so, in accordance with the objective, pursued by Directive 2008/118, of harmonising the time at which excise duty becomes chargeable in order to ensure the proper functioning of the internal market, as referred to in paragraphs 53, 55 and 56 of the present judgment, the ‘chargeability conditions’ referred to in the first paragraph of Article 9 of that directive must necessarily be distinguished from the conditions relating to the very concept of chargeability, which, as stated in recital 8 of that directive, must be the same in all Member States.
- 63 As is apparent from the wording of Article 7(1) and of the first paragraph of Article 9 of that directive, the latter conditions concern the time at which excise duty becomes chargeable, the Member State in which they can be collected and the relevant date for determining the applicable rate of excise duty.
- 64 It follows that the first paragraph of Article 9 of Directive 2008/118 cannot be interpreted as permitting Member States to derogate from those conditions, in particular the one relating to the relevant date for determining the applicable rate of excise duty.
- 65 Accordingly, since that provision requires that date to correspond to the date on which the excise duty becomes chargeable, and since, as observed in paragraph 55 of the present judgment, Article 7(1) of Directive 2008/118 clearly and unconditionally requires that the duty become chargeable at the time of release for consumption of the excise goods, the applicable rate of excise duty must necessarily be that in force at the time of release for consumption.
- 66 As the Advocate General observed in points 52 and 53 of his Opinion, that interpretation is supported by the provisions of Chapter V of Directive 2008/118, which expressly set out, under the chapter heading ‘Movement and taxation of excise goods after release for consumption’, the situations in which excise duty on goods already released for consumption is chargeable after the

date of release for consumption. Those provisions govern situations in which excise goods which have been released for consumption in one Member State are subsequently moved to another Member State. However, as the Advocate General observed in point 53 of his Opinion, it is common ground that the measure at issue in the main proceedings does not relate to any of those situations.

- 67 Accordingly, the Member States may not, under the framework established by Article 7(1) and the first paragraph of Article 9 of Directive 2008/118, as it stood while in force, before being repealed and replaced by Directive 2020/262 – of which the third paragraph of Article 8 amends Article 9 of Directive 2008/118 in this regard – provide that the rate of excise duty applicable to cigarettes released for consumption in breach of the quantitative limit laid down by national legislation is that which is in force on a date after the date of their release for consumption.
- 68 While it is true that, as observed in paragraphs 38 and 39 of the present judgment, Directive 2008/118 does not prevent the Member States from adopting measures seeking to combat fraud, tax avoidance and potential abuse, it nevertheless remains the case that their regulatory power to adopt such measures may not be exercised so as to infringe the provisions of that directive, and in particular Article 7(1) and the first paragraph of Article 9 thereof, otherwise the objective of harmonisation pursued by the EU legislature and reflected, in particular, in recital 8 of that directive, would be undermined.
- 69 In the light of all the considerations set out above, the answer to the second question referred is that Articles 7 and 9 of Directive 2008/118 are to be interpreted as meaning that they preclude national legislation under which the quantity of cigarettes exceeding the quantitative limit for release for consumption laid down by that legislation is subject to the rate of excise duty which is in force on a date after the date of release for consumption.

Costs

- 70 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 (Fifth Chamber) hereby rules:

1. Articles 34 and 36 TFEU

must be interpreted as meaning that they do not preclude legislation of a Member State which, in order to combat tax avoidance and abusive practices and to protect public health, provides that the quantity of cigarettes released for consumption each month by an economic operator during the period from 1 September to 31 December of each calendar year must not exceed the average monthly quantity of cigarettes released for consumption by that operator during the previous 12 months, plus 10%.

2. Articles 7 and 9 of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC

must be interpreted as meaning that they preclude national legislation under which the quantity of cigarettes exceeding the quantitative limit for release for consumption laid

down by that legislation is subject to the rate of excise duty which is in force on a date after the date of release for consumption.

[Signatures]