



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 27 October 2016¹

Case C-126/15

European Commission

v

Portuguese Republic

(Tax law — Excise duty on manufactured tobacco — Directive 2008/118/EC — Article 7, the first paragraph of Article 9 and Article 39(3) — Marketing and sales restriction — Tax markings — Proportionality)

I – Introduction

1. The question raised by the present proceedings for failure to fulfil obligations which have been brought by the European Commission against the Portuguese Republic is, in essence, whether Directive 2008/118/EC concerning the general arrangements for excise duty² ('the Excise Duty Directive') precludes legislation enacted by a Member State under which the sale of cigarette packets is allowed only within a given period following their release for consumption.

2. That question has arisen in connection with measures which Portugal has adopted to combat the 'forestalling' of tobacco products. This term refers to the practice whereby producers, prior to an imminent rise in excise duty on tobacco, release excessive quantities of goods for consumption at the previous tax rate in order to delay the effective commencement of the higher tax. Such practices reduce tax revenues and the Commission does not dispute that it is in principle permissible for the Member States to take countermeasures.³ In the case of the precautionary measures adopted by Portugal, however, the Commission considers that proportionality has not been maintained.

3. The significance of the dispute extends beyond Portugal, inasmuch as similar rules exist in other Member States. The Commission has thus brought proceedings for failure to fulfil obligations, on the same grounds, against Estonia, too.⁴

1 — Original language: German

2 — 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).

3 — Indeed, the Commission has gone so far as to express the view that the precautionary measures currently in place in the European Union are insufficient; see the Communication of 6 June 2013, COM(2013) 324 final, p. 11.

4 — See MEMO/14/537 of 25 September 2014. Treaty infringement proceedings brought against Hungary (see MEMO/14/293) were discontinued on 29 April 2015 as Hungary has amended its legislation.

II – Legal context

A – *EU law*

4. According to Article 1(1) of the Excise Duty Directive, that directive lays down general arrangements in relation to excise duty. Under subparagraph (c) of that provision, manufactured tobacco is subject to excise duty.

5. Article 7 of the Excise Duty Directive states in extract:

‘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;

...’

6. Article 9 of the Excise Duty Directive 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.’

7. Article 39 of the Excise Duty Directive provides:

‘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

...

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.

...’

B – *Portuguese law*

8. Under Article 110 of the Código dos Impostos Especiais de Consumo, (Portuguese Excise Duty Code, hereinafter ‘CIEC’), retail packets of tobacco products intended for consumption in national territory must have tax markings affixed to them before they are released for consumption.

9. Article 27 of Decree (Portaria) No. 1295/2007 of the Ministry of Finance and Public Administration ('the Decree') lays down the periods during which manufactured tobacco may be marketed and sold. In the case of cigarette packets, that period closes at the end of the third month of the year following that indicated on the tax marking; in the case of smoking tobacco, it closes at the end of the following year; and, in the case of cigars and cigarillos, it closes at the end of the fifth following year.⁵

10. Moreover, in accordance with Article 106 of the CIEC, the release of cigarettes for consumption during the period from 1 September to 31 December of any year is subject to special rules. During that period, traders may not release cigarettes for consumption in excess of certain maximum quantities. The monthly maximum quantity is based on the monthly average volume of cigarettes released for consumption during the immediately preceding twelve months, plus 10%. Derogations from that maximum quantity may be granted on reasoned application.

11. Articles 19 and 20 CIEC contain rules governing the reimbursement of excise duty already levied. The grounds for reimbursement include the destruction of goods under the supervision of the customs authorities.

12. Under Chapter XII, point 4.2.9, of the Excise Duty Handbook published by the tax and customs authority, products which may no longer be sold because the period laid down in Article 27 of the Decree has expired may be re-released for consumption following the affixing of a new tax marking.

13. Under Article 109 of the General Rules on Tax Offences (Regime Geral das Infracções Tributárias), the release of products for consumption in breach of the provisions on the affixing of tax markings or the restrictions on permitted quantities is punishable by a fine of between EUR 250 and EUR 165 000.

III – Pre-litigation procedure and forms of order sought

14. The Commission takes the view that Article 27 of the Decree infringes Article 7, the first paragraph of Article 9 and Article 39(3) of the Excise Duty Directive, since cigarette packets which have already been taxed and released for consumption may no longer be marketed or sold following the expiry of the period laid down in that provision. It therefore brought the present proceedings for failure to fulfil obligations. After issuing a letter of formal notice, on 23 November 2009, and a supplementary letter of formal notice, on 4 June 2010, inviting Portugal to comment on the complaints raised, the Commission, on 22 June 2012, and again — in order to correct certain errors — on 31 May 2013, sent that Member State a reasoned opinion and gave it two months within which to remedy the alleged infringement.

15. Since Portugal did not comply with the reasoned opinion, the Commission brought the present action on 12 March 2015.

16. The Commission claims that the Court should

- declare that, by making packets of cigarettes on which duty has already been levied and which have been released for consumption in a particular year subject to a prohibition on marketing and sale to the public once the excessively short period laid down in Article 27 of the Decree has expired, the Portuguese Republic has failed to comply with Article 7, the first paragraph of Article 9 and Article 39(3) of the Excise Duty Directive, and with the principle of proportionality;
- order the Portuguese Republic to pay the costs.

⁵ — By way of derogation from that provision, Article 28 of the Decree provides that cigarette packets displaying a tax marking valid for 2007 or 2008 may be marketed and sold up until the end of the fifth month of 2008 and the end of the fourth month of 2009.

17. The Portuguese Republic contends that the Court should

- dismiss the action;
- order the European Commission to pay the costs.

18. The Kingdom of Belgium, the Republic of Estonia and the Republic of Poland were granted leave to intervene. They support the forms of order sought by Portugal.

19. The case was examined on the basis of the written documents.

IV – Legal assessment

20. Pursuant to the scheme at issue in the present proceedings, which is provided for in Article 27 of the Decree, the sale of cigarettes is subject in Portugal to a time limit determined by a tax marking affixed to their packaging. Under that scheme, cigarettes may be sold for a maximum period of three months following the end of the year in which they were released for consumption.

A – The first plea: Articles 7 and 9 of the Excise Duty Directive and the principle of proportionality

21. By its first plea, the Commission complains that Article 27 of the Decree infringes Articles 7 and 9 of the Excise Duty Directive and the principle of proportionality. It follows from the abovementioned provisions of that directive that a Member State may not levy on manufactured tobacco any tax additional to the excise duty payable once that tobacco has been released for consumption, and may not restrict its marketing for tax reasons. In the Commission's view, however, that is precisely what happens in Portugal, inasmuch as, pursuant to the contested scheme, cigarette packets can be marketed only for a limited period. This, the Commission submits, constitutes an infringement of Articles 7 and 9 [of the Excise Duty Directive]. While the Commission does not rule out the possibility that that scheme is justified on grounds relating to the public interest, it nonetheless argues that the principle of proportionality has in any event been infringed.

22. Portugal counters that submission with the contention that the scheme at issue does not entail any obligation to pay additional excise duty on goods which have already been released for consumption. Any excise duty which traders have paid on cigarette packets that are no longer saleable because of the corresponding time limit is reimbursed to them. Alternatively, they can re-release the goods by affixing a new tax marking to them and paying the tax rate applicable at that time.

23. In order to assess this first plea, I shall begin by looking at Articles 7 and 9 of the Excise Duty Directive (see section 1 below) before turning next to the principle of proportionality (see section 2 below).

1. Articles 7 and 9 of the Excise Duty Directive

24. Under Article 7 of the Excise Duty Directive, excise duty on manufactured tobacco is to become chargeable at the time, and in the Member State, of release for consumption. As a rule (Article 7(2)(a)), this takes place at the time when excise goods leave a duty suspension arrangement, that is to say when they are removed from the undertaking in which they were produced or from another tax warehouse. The first paragraph of Article 9 further provides that the chargeability conditions and rate of excise duty to be applied are to be those in force on the date on which duty becomes chargeable in the Member State of release for consumption.

25. First of all, contrary to the Commission's submission, Articles 7 and 9 of the Excise Duty Directive do not support the inference that they prohibit the imposition of a time limit on the sale of cigarette packets such as that provided for by the contested Article 27 of the Decree. Rather, Article 7 simply determines the time when excise duty becomes chargeable, while Article 9, on the subject of the conditions of chargeability and the applicable rate of duty, refers to the law of the Member States.

26. Furthermore, in so far as traders re-release packets for consumption after destroying the old tax marking and affixing a new one, that procedure does not constitute an additional tax levy for the purposes of Articles 7 and 9, but the occurrence of a separate chargeable event.

27. Even if it were assumed that a sales restriction constitutes even in principle an infringement of Articles 7 and 9 of the Excise Duty Directive, it is difficult to imagine why, as the Commission submits, there should nonetheless be some scope for justification on grounds relating to the public interest, by analogy with the case-law in the field of the fundamental freedoms. After all, the whole purpose of a harmonising measure is to ensure that the Member States may not in principle derogate from that measure, unless the latter makes express provision to that effect.⁶

28. However, since the first paragraph of Article 9 of the Excise Duty Directive refers, with respect to the conditions governing the chargeability of excise duty and the rate of excise duty to be applied, to the national law applicable at the time when excise duty becomes chargeable, this necessarily implies some degree of normative discretion on the part of the Member States. By the same token, the second paragraph of Article 9 empowers the Member States, in this case explicitly, to lay down the procedure for levying and collecting or, where appropriate, reimbursing or remitting excise duty.

29. In the context of the levying of excise duty on manufactured tobacco, the discretion provided for in the first paragraph of Article 9 of the Excise Duty Directive includes measures to combat the release for consumption of excessive quantities of tobacco products. According to case-law, after all, Member States not only have an entitlement to take measures to protect the rights of the public exchequer.⁷ Rather, Article 4(3) TEU also imposes an obligation on Member States to ensure the effective collection of excise duty.⁸ If the effective collection of excise duty were not guaranteed, traders could for a time evade a higher rate of tax by resorting to forestalling. As the Commission itself correctly states, moreover, such practices constitute a form of abuse. The objective of preventing abusive practices is repeatedly emphasised in the Excise Duty Directive, too.⁹

30. Furthermore, those measures also serve health policy objectives. The level of taxation is an important factor in the price of manufactured tobacco, which in turn has an impact on consumers' smoking habits.¹⁰ Tax legislation therefore plays an important role in combating the consumption of tobacco products and protecting public health.¹¹ The release for consumption of excessive quantities of manufactured tobacco hampers the effective commencement of the higher tax rate and thus, by extension, the intended impact on the price point.

6 — See, for example, within the scope of Article 114 TFEU, the very restrictive conditions applicable to derogatory national legislation which are laid down in paragraph 5 of that provision.

7 — See the judgments in *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 47), *Netto Supermarkt* (C-271/06, EU:C:2008:105, paragraph 20) and *BDV Hungary Trading* (C-563/12, EU:C:2013:854, paragraph 31).

8 — See, to that effect, the judgments in *Commission v Italy* (C-132/06, EU:C:2008:412, paragraph 37) and *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 25).

9 — See recital 31, Article 11 and Article 39(3) of the Excise Duty Directive. See also the judgment in *Heintz van Landewijck* (C-494/04, EU:C:2006:407, paragraph 43).

10 — See recital 16 of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ L 176, p. 24) and the judgments in *Commission v France* (C-197/08, EU:C:2010:111, paragraph 52), *Commission v Austria* (C-198/08, EU:C:2010:112, paragraph 45) and *Commission v Ireland* (C-221/08, EU:C:2010:113, paragraph 54).

11 — See the judgments in *Valeško* (C-140/05, EU:C:2006:647, paragraph 58), *Commission v France* (C-197/08, EU:C:2010:111, paragraph 52), *Commission v Austria* (C-198/08, EU:C:2010:112, paragraph 45) and *Commission v Ireland* (C-221/08, EU:C:2010:113, paragraph 54).

31. Reference must also be made to the World Health Organisation's Framework Convention on Tobacco Control, the signatories to which include the European Union and all its Member States.¹² Article 6 of the Framework Convention requires the Contracting Parties to pursue a tax policy aimed at reducing tobacco consumption. In that regard, the guidelines for the implementation of Article 6 recommend, inter alia, the use of anti-forestalling measures.¹³ While it is correct that those guidelines do not themselves have binding force, they are intended to assist the European Union and the Member States in implementing the Framework Convention.¹⁴

32. Consequently, the Commission's submission to the effect that Article 27 of the Decree constitutes even in principle an infringement of Article 7 and the first paragraph of Article 9 of the Excise Duty Directive cannot be endorsed. Rather, the first paragraph of Article 9 confers [on the Member States] a discretion to adopt anti-forestalling measures in the field of excise duty on manufactured tobacco. In exercising the powers conferred upon them by EU law, however, the Member States must observe the general principles of law, including, in particular, the principle of proportionality,¹⁵ which the Commission considers to have been infringed in the present case. The sales restriction laid down in Article 27 of the Decree therefore infringes the first paragraph of Article 9 of the Excise Duty Directive if it is disproportionate.

2. *The principle of proportionality*

33. The Court usually begins its examination of the proportionality of a measure in the field of indirect taxation by stating that the Member States must employ means which, while enabling them effectively to attain the objectives pursued by their domestic laws, on the one hand, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation, on the other.¹⁶ In accordance with a more precise formulation of the requirements imposed by the principle of proportionality that has been established by case-law, a measure must be appropriate for attaining the legitimate objectives pursued by it and must not go beyond what is necessary to achieve those objectives.¹⁷ When there is a choice between several appropriate measures, recourse must be had to the least onerous; furthermore, the disadvantages caused must not be disproportionate to the aims pursued.¹⁸

34. In the submissions that follow, I shall follow that process of examination and look first at whether the Portuguese scheme is appropriate (see section a below), necessary (see section b below) and proportionate (see section c below).

12 — Approved by Council Decision 2004/513/EC of 2 June 2004 (OJ 2004 L 213, p. 8).

13 — See the 'Guidelines for the implementation of Article 6 of the WHO FCTC', decided upon by the Conference of the Contracting Parties at their sixth meeting in Moscow (2014), FCTC/COP6(5).

14 — See the judgments in *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325 paragraph 111) and *Poland v Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 45).

15 — See the judgments in *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraphs 45 to 48), *Federation of Technological Industries and Others* (C-384/04, EU:C:2006:309, paragraph 30), *Macikowski* (C-499/13, EU:C:2015:201, paragraph 48) and *ROZ-ŚWIT* (C-418/14, EU:C:2016:400, paragraph 20).

16 — See the judgments in *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 46), *Teleos and Others* (C-409/04, EU:C:2007:548, paragraph 52), *X* (C-84/09, EU:C:2010:693, paragraph 36) and *BDV Hungary Trading* (C-563/12, EU:C:2013:854, paragraph 30).

17 — See the judgments in *Maizena and Others* (137/85, EU:C:1987:493, paragraph 15), *United Kingdom v Council* (C-84/94, EU:C:1996:431, paragraph 57), *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 122), *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 67) and *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325 paragraph 165).

18 — See the judgments in *Schröder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 21), *Jippes and Others* (C-189/01, EU:C:2001:420, paragraph 81) and *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 86); see also, to the same effect, the judgment in *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 91).

(a) Whether appropriate

35. The Portuguese scheme is an appropriate means of attaining the legitimate objectives which it pursues. Traders are effectively disincentivised from releasing excessive stocks for consumption because they know that cigarette packets released for consumption in a particular year may be sold only until the end of March the following year.

(b) Whether necessary

36. The Commission disputes the necessity of the measure, however. It must therefore be examined whether the objectives pursued by that scheme could be achieved by more lenient but equally appropriate means.

i) Maximum quantities releasable for consumption

37. First, the Commission takes the view that the rule contained in Article 106 of the CIEC is merely a more lenient measure of the kind mentioned above. That article provides that, during the period from 1 September to 31 December, traders may not release cigarette packets for consumption in excess of certain maximum quantities.

38. That argument is unconvincing, however. That provision could be circumvented by releasing excessive quantities in the period before 1 September. This is borne out, moreover, by the information furnished by Portugal to the effect that above-average quantities of cigarettes are released for consumption in the month of August.

39. Not even a year-long restriction on the quantity of cigarettes which may be released for consumption can be regarded as an equally appropriate but more lenient measure. On the contrary, to impose permanent quantity limits on traders from the very outset would constitute an interference with their freedom of action. Under the system operated in Portugal, on the other hand, it would appear that traders are in principle free to release an unlimited quantity of cigarettes for consumption during the period from January to August, but they know that these may be lawfully sold only until the end of March the following year.

ii) Length of the time limit

40. The Commission further considers that the period within which cigarettes released for consumption in Portugal may be sold is excessively short. It refers in this regard to Directive 2001/37/EC,¹⁹ which lays down new requirements applicable to the labelling of tobacco products and, with respect to cigarettes, imposes a one-year transitional period for compliance with those requirements.²⁰

41. However, a transitional period such as that laid down in the abovementioned directive is by its very nature fundamentally different from the sales restriction at issue here. The new requirements introduced by that directive regularly called for modifications to be made to existing production plants, which justified a certain period of transition. The scheme at issue here, on the other hand, entails no technical modifications to which producers must first adapt. Moreover, a time-limit on sales which expires at the end of the year following the release for consumption, as the Commission implicitly suggests, would make it possible in principle for cigarettes subject to the new tax rate to be

19 — Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001 L 194, p. 26).

20 — See Article 14(2) of the abovementioned directive.

released for consumption no later than a year after the entry into force of the tax increase. Although admittedly more lenient, therefore, this would not be an equally appropriate means of preventing forestalling, since the effectiveness of the rule at issue would be considerably restricted by such long a time-limit.

42. What is more, Portugal counters the Commission's submission by stating that cigarettes placed on the domestic market are, on average, sold within two months. The scheme at issue takes that fact into consideration and allows for the direct sale of the goods in question.

43. In response, the Commission raises the objection that the two-month turnover period is only an average. In this regard, however, it confines itself to making the point that the turnover of smaller, less well-known brands takes longer and the two-month period does not take into account seasonal fluctuations, but does not take the further step of substantiating its argument countering Portugal's submission. In any case, however, the shortest possible time-limit applicable to the sale of cigarettes under the Portuguese scheme, namely three months, affects, at most, only cigarettes which are released for consumption at the very end of a year. The sooner the cigarettes are released, the longer, by extension, there is to sell them. The fact that smoking tobacco and cigars and cigarillos are subject to longer time-limits does not warrant a different conclusion, since those products are different from cigarettes and they each have their own average turnover time.

iii) No significant increases in excise duty on manufactured tobacco

44. The Commission further disputes the necessity of the Portuguese scheme by arguing that there have in any event been no significant increases in excise duty on manufactured tobacco in recent years.

45. As is apparent from the Commission's own application, however, excise duty has increased year on year in recent years and rose by 14.7% between 2009 and 2015. In a market characterised by low margins and high volumes, as the market in cigarettes is, even minor tax increases offer an incentive for traders to avoid the higher duty and secure a competitive advantage.

46. The sales restriction cannot be regarded as necessary, however, if the tax rate remains the same or even goes down. For, in such circumstances, the incentive to amass excessively large stocks is absent from the outset. Since the Portuguese scheme is applicable in those circumstances, too, the Commission's plea is to that extent justified. Portugal's argument that the sales restriction is necessary in those circumstances, too, in order to implement the annual change of tax markings necessary for reasons connected with the prevention of tax evasion, is unconvincing given the longer time-limits applicable to the sale of cigars and cigarillos and smoking tobacco.

(c) Whether proportionate

47. That aside, it falls, finally, to analyse the Commission's arguments relating to the proportionality of the Portuguese scheme *stricto sensu*. After all, even if a measure is necessary and appropriate for the achievement of legitimate objectives, it must not cause any disadvantages which are disproportionate to the aims pursued. It must therefore be ensured that a scheme such as that at issue is not unduly prejudicial to the interests of traders.

i) Irrebuttable presumption

48. The Commission alleges that, by the scheme applicable to cigarette packets not sold by the expiry of the time-limit for selling them, Portugal makes an irrebuttable presumption to the effect that they have been released for consumption in excessive quantities, and there is no way of proving that the contrary is true. In the Commission's submission, an irrebuttable presumption of that kind is

nonetheless untenable in the light of the Court's case-law in the judgment in *Molenheide and Others*.²¹

49. That case concerned national legislation which had the effect of denying the taxpayer the right, integral to the VAT system, to deduct input tax.²² While parallels may be drawn between that case and this, the latter is nevertheless different. Upon application, Portugal reimburses any duty already levied on cigarette packets which are no longer saleable; alternatively, these cigarettes can be re-released for consumption. The capacity to prove that the cigarettes were released for consumption not in excessive quantities but in 'normal' quantities, as the Commission has called for, would require a case-by-case examination and would represent a considerable administrative burden. Such an approach would make the Portuguese scheme significantly more difficult to manage and would, moreover, be fraught with uncertainties, such as how to determine appropriate reference quantities. In its case-law, the Court has, however, recognised that Member States may avail themselves of provisions which can be easily managed and supervised for the purpose of pursuing legitimate objectives.²³

ii) Costs incurred by traders

50. The reference made by the Commission to the costs incurred by traders in this regard does not warrant a different conclusion. It is true that, in the case of cigarette packets which are no longer saleable, producers or importers, notwithstanding the reimbursement of excise duty, which makes up by far the biggest component of the price of cigarettes,²⁴ still incur costs connected with the destruction of the goods or, where appropriate, their repackaging. However, prudent sales planning should ensure that non-saleable residual stocks are largely avoided from the outset. This is particularly true of a market such as the market in cigarettes, which, as Portugal states without contradiction, is characterised by low demand elasticity and well-documented market behaviour. What is more, unsold stocks are not necessarily the result of the time-limit on sales, but may also be the product of inflated pricing.

iii) Disproportionate punitive penalty

51. Finally, there can be no objection, either, to the provision, contested by the Commission and contained in Article 109 of the General Rules on Tax Offences, to the effect that such offences are punishable by fines of up to EUR 165 000. Member States are not only entitled but positively obliged to provide effective punishment for infringements in matters of excise duty.²⁵ The Commission has not alleged that that penalty provision has been disproportionately applied, and no evidence has emerged that that is the case either.

52. The disadvantages caused to traders are not therefore disproportionate to the objectives pursued by the Portuguese scheme. It is rather the case that, considered in its entirety, that scheme strikes an appropriate balance between the interests involved.

21 — See the judgment in *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623).

22 — See the judgments in *BP Supergaz* (C-62/93, EU:C:1995:223, paragraph 18), *Ecotrade* (C-95/07 and C-96/07, EU:C:2008:267, paragraph 39) and *Astone* (C-332/15, EU:C:2016:614, paragraph 30).

23 — See, to that effect, the judgments in *Commission v Italy* (C-110/05, EU:C:2009:66, paragraph 67), *Mickelsson and Roos* (C-142/05, EU:C:2009:336, paragraph 36), *Josemans* (C-137/09, EU:C:2010:774, paragraph 82) and *Commission v Spain* (C-400/08, EU:C:2011:172, paragraph 124).

24 — According to the data provided by Portugal for January 2015, excise duty accounts for 78.08% of the price of cigarettes.

25 — See, in this case explicitly, to that effect Article 20(3) of Directive 92/12/EEC (OJ 1992 L 76, p. 1), which was repealed by the Excise Duty Directive.

(d) Conclusion with respect to the first plea

53. Consequently, the first plea is justified only in so far as Portugal prohibits cigarette packets taxed and released for consumption in a particular financial year from being sold after the expiry of the time-limit laid down in Article 27 of the Excise Duty Directive also in cases where the excise duty on tobacco payable with effect from the following year has not been increased.

B – The second plea: Article 39(3) of the Excise Duty Directive and the principle of proportionality

54. By its second plea, the Commission alleges infringement of Article 39(3) of the Excise Duty Directive. In its submission, the time-limit on sales laid down in Article 27 of the Decree creates obstacles to the free movement of excise goods, since cigarette packets bearing a tax marking for a particular financial year can be sold and marketed only until the end of the third month of the year following that indicated on the tax marking. Concerns about stocks that can no longer be lawfully sold might put importers off making purchases, with a disproportionately adverse effect on trade.

55. Article 39(3) of the Excise Duty Directive provides that, without prejudice to any measures adopted to prevent evasion, avoidance or abuse, the requirement to affix a tax marking to excise goods must not create obstacles to the free movement of those goods.

56. Contrary to the view expressed by the Commission, that provision has not been infringed. The Portuguese scheme at issue provides that the period for the sale of cigarette packets closes at the end of the third month of the year following that indicated on the tax marking. Consequently, the sales restriction contested by the Commission does not result from the use of tax markings but is linked to their use only in so far as reference is made to the year indicated on them. For the purposes of assessing the Portuguese scheme at issue, however, that fact cannot be decisive, since the year of release for consumption could also be made apparent by means other than the tax marking on cigarette packets.

57. Even if Article 27 of the Decree were to be assessed against Article 39(3) of the Excise Duty Directive, it would have to be concluded that there are no disproportionate obstacles to the movement of goods. Regardless of whether the measure at issue, the non-discriminatory application of which has not been called into question in the present case, can even be classified as an obstacle within the meaning of Article 39(3), it certainly serves the pursuit of legitimate objectives and raises, in principle, no concerns from the point of view of its proportionality. It is, on the contrary, specifically intended, not least, to maintain stable market conditions, since it helps to ensure that larger, financially powerful market protagonists in particular do not secure a competitive advantage by recourse to forestalling.²⁶ Ultimately, therefore, the scheme also serves to ensure the functioning of the domestic market.²⁷

58. The second plea is therefore unfounded.

C – Conclusion and costs

59. The action must therefore be upheld in part in relation to the first plea and dismissed as to the remainder.

²⁶ — On the use of forestalling as a targeted means of building market share, see also the ‘Study on the measuring and reducing of administrative costs for economic operators and tax authorities and obtaining in parallel a higher level of compliance and security in imposing excise duties on tobacco products’, H. Stener Pedersen et al, TAXUD/2012/DE/341 (2014) p. 144 et seq., conducted on behalf of the European Commission.

²⁷ — In relation to that objective, see recitals 2 and 8 of the Excise Duty Directive.

60. Under Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs unless, if it appears justified in the circumstances of the case, the Court orders that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party. Since both parties have applied for costs against each other and Portugal has been only partly unsuccessful, I propose that the Commission be ordered to pay half of that Member State's costs. The decision on the costs incurred by the interveners must be made in accordance with Article 140(1) of the Rules of Procedure.

V – Conclusion

61. I therefore propose that the Court should rule as follows:

(1) In so far as cigarette packets released for consumption in a particular financial year may not be marketed or sold to the public after the expiry of the period laid down in Article 27 of Decree No. 1295/2007 even in cases where the rate of excise duty to be applied to cigarettes in respect of the year following the relevant financial year has not been increased, the Portuguese Republic has failed to fulfil its obligations under the first paragraph of Article 9 of Directive 2008/118/EC and infringed the principle of proportionality.

(2) The action is dismissed as to the remainder.

(3) The Portuguese Republic shall bear half of its own costs. The Commission shall bear half of the costs of the Portuguese Republic and its own costs.

(4) The Kingdom of Belgium, the Republic of Estonia and the Republic of Poland shall bear their own costs.