



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

6 April 2017^{*i}

(Reference for a preliminary ruling — Directive 2011/64/EU — Article 2(1)(c) — Article 5(1)(a) — Definitions of ‘smoking tobacco’, ‘tobacco which has been cut or otherwise split’ and ‘industrial processing’)

In Case C-638/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), made by decision of 29 October 2015, received at the Court on 30 November 2015, in the proceedings

Eko-Tabak s. r. o.

v

Generální ředitelství cel,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Chamber, J.-C. Bonichot and A. Arabadjiev (Rapporteur),
Judges,

Advocate General, N. Wahl,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 26 October 2016,

after considering the observations submitted on behalf of:

- the Czech Government, by T. Müller, M. Smolek and J. Vláčil, acting as Agents,
- the Spanish Government, by V. Ester Casas, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Albenzio, avvocato dello Stato,
- the European Commission, by F. Tomat and Z. Malůšková, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2016,

gives the following

* Language of the case: Czech.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 2011 L 176, p. 24).
- 2 The request has been made in proceedings between Eko-Tabak s. r. o. and Generální ředitelství cel (General Directorate of Customs, Czech Republic) concerning the confiscation of goods considered to be manufactured tobacco subject to excise duty.

Legal context

EU law

- 3 Recitals 2, 3, 8 and 9 of Directive 2011/64 state:
 - ‘(2) The Union’s fiscal legislation on tobacco products needs to ensure the proper functioning of the internal market and, at the same time, a high level of health protection, as required by Article 168 of the Treaty on the Functioning of the European Union, 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.
 - (3) One of the objectives of the Treaty on European Union is to maintain an economic union, whose characteristics are similar to those of a domestic market, within which there is healthy competition. As regards manufactured tobacco, achievement of this aim presupposes that the application in the Member States of taxes affecting the consumption of products in this sector does not distort conditions of competition and does not impede their free movement within the Union....
 - (8) In the interests of uniform and fair taxation, a definition of cigarettes, cigars and cigarillos and of other smoking tobacco should be laid down so that, respectively, rolls of tobacco which according to their length can be considered as two cigarettes or more are treated as two cigarettes or more for excise purposes, a type of cigar which is similar in many respects to a cigarette is treated as a cigarette for excise purposes, smoking tobacco which is similar in many respects to fine-cut tobacco intended for the rolling of cigarettes is treated as fine-cut tobacco for excise purposes, and tobacco refuse is clearly defined. ...
 - (9) As far as excise duties are concerned, harmonisation of structures must, in particular, result in competition in the different categories of manufactured tobacco belonging to the same group not being distorted by the effects of the charging of the tax and, consequently, in the opening of the national markets of the Member States.’
- 4 Article 1 of that directive provides:

‘This Directive lays down general principles for the harmonisation of the structure and rates of the excise duty to which the Member States subject manufactured tobacco.’

5 Article 2(1) of that directive provides:

‘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.’

6 Article 5 of that directive is worded as follows:

‘1. 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.

2. Smoking tobacco in which more than 25% by weight of the tobacco particles have a cut width of less than 1.5 millimetre shall be deemed to be fine-cut tobacco for the rolling of cigarettes.

...’

Czech law

7 Article 101 of zákon č. 353/2003 Sb., o spotřebních daních (Law No 353/2003 on excise duties) in the version applicable to the dispute in the main proceedings (‘the Law on excise duties’), headed ‘Manufactured tobacco subject to excise duty’, provides:

‘(1) Manufactured tobacco shall be subject to excise duty.

(2) For the purposes of this Law, manufactured tobacco shall mean cigarettes, cigars, cigarillos and smoking tobacco.

(3) For the purposes of this Law:

...

(c) smoking tobacco shall mean:

- 1. tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing;
- 2. tobacco refuse prepared for sale to the final consumer which does not fall under subparagraphs (a) or (b) and which can be smoked; or
- 3. smoking tobacco in which more than 25% by weight of the tobacco particles have a cut width of less than 1.5 millimetre; this shall be deemed to be fine-cut tobacco for the rolling of cigarettes.

...

6. For the purposes of this Law, smoking tobacco shall additionally mean a product fully or partially containing substances other than tobacco and complying with the other conditions referred to in paragraph (3)(c), with the exception of the products referred to in paragraph (8), or any product not referred to in paragraph (3)(c) if it is intended for a purpose other than smoking and, at the same time, that product is capable of being smoked and has been prepared for sale to the final consumer.

...'

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

- 8 By a decision of 14 November 2013, varied on 29 May 2014, the Celní úřad pro Jihočeský kraj (South Bohemian Region Customs Office, Czech Republic) ordered the confiscation of a number of products belonging to Eko-Tabak, on the ground that these constituted smoking tobacco within the meaning of Article 101(6) of the Law on excise duties and, accordingly, were subject to excise duty. It is apparent from information supplied by the referring court that those products are dried, flat, irregular, partly stripped leaf tobacco and/or parts thereof which have undergone primary drying and controlled dampening, which contain glycerine allowing the dampness and elasticity of the leaves to be maintained so that they will not break when handled, and which, while not intended for smoking, are capable of being smoked after simple processing, for example, by means of crushing or hand-cutting. Those products were, in their entirety, intended for sale to the final consumer.
- 9 Eko-Tabak brought an action against that decision before the Krajský soud v Českých Budějovicích (Regional Court of České Budějovice, Czech Republic), arguing that the definition of the products falling within the scope of the last clause of Article 101(6) of the Law on excise duties unlawfully broadened the list of manufactured tobacco products set out in Directive 2011/64.
- 10 By decision of 30 January 2015, that court dismissed Eko-Tabak's action, finding that the definition laid down in the final clause of Article 101(6) of the Law on excise duties did not go beyond the scope of Directive 2011/64, in so far as the spirit and purpose of that directive was to make liable to duty products which, without being intended for smoking, were nonetheless capable of being smoked, and also to avoid the circumvention of tax legislation or EU law.
- 11 Eko-Tabak brought an appeal against that judgment before the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic). The company argued, inter alia, that Directive 2011/64 contained no category of manufactured tobacco corresponding to that laid down in the final clause of Article 101(6) of the Law on excise duties and that the condition that the product concerned can be smoked must be fulfilled from the moment that that product is placed in a shop for the purpose of sale. Moreover, the fact that a tobacco product can be smoked is not sufficient for it to be considered to be manufactured tobacco within the meaning of the directive. The condition that the product concerned can be smoked is only one of the conditions that must be fulfilled by a tobacco product in order for that product to be classified as 'smoking tobacco', within the meaning of the directive.
- 12 Although it is apparent from the decision to refer that Article 101 of the Law on excise duties serves to transpose Articles 2 and 5 of Directive 2011/64 into the Czech legal order, the Nejvyšší správní soud (Supreme Administrative Court) has doubts as to whether products such as those at issue in the main proceedings constitute manufactured tobacco to which that directive applies. If the answer to that question is in the negative, the referring court seeks to establish whether Articles 2 and 5 of the directive preclude a Member State from imposing duty on such products.

- 13 In that regard, the referring court notes that the Court of Justice has not yet given a ruling on the interpretation of either Article 2(1)(c)(ii) or Article 5 of Directive 2011/64 concerning the definition of ‘smoking tobacco’.
- 14 The referring court considers, moreover, that manufactured tobacco, within the meaning of Directive 2011/64, is characterised principally by the fact that it can be smoked. That characteristic would also enable different groups or types of manufactured tobacco to be defined.
- 15 In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Where dried, flat, irregular, partly stripped leaf tobacco and/or parts thereof which have undergone primary drying and controlled dampening and [which contain glycerine] are capable of being smoked after simple processing (by means of crushing or hand-cutting), can they be regarded as manufactured tobacco within the meaning of Article 2(1)(c)(ii) or, as the case may be, Article 5(1)(a) of [Directive 2011/64]?
- (2) If the answer to the first question is in the negative, does Article 5, in conjunction with Article 2, of [Directive 2011/64] preclude national legislation of a Member State which extends excise duty on manufactured tobacco to tobacco that is not referred to in Articles 2 and 5 of [Directive 2011/64] and that, while not intended for smoking, can be smoked (is capable of and appropriate for being smoked) and has been processed for sale to the final consumer?’

Consideration of the questions referred

- 16 By its first question the referring court asks, in essence, whether Article 2(1)(c) and Article 5(1) of Directive 2011/64 must be interpreted as meaning that dried, flat, irregular, partly stripped leaf tobacco and/or parts thereof which have undergone primary drying and controlled dampening, which contain glycerine and which are capable of being smoked after simple processing by means of crushing or hand-cutting, fall within the definition of ‘smoking tobacco’ for the purpose of those provisions.
- 17 In that regard, it should be noted that, as follows from Article 1, the purpose of Directive 2011/64 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. That directive 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.
- 18 It is apparent, in addition, from recital 3 of Directive 2011/64 that the directive seeks to ensure that the application in the Member States of taxes affecting the consumption of products in the manufactured tobacco sector does not distort conditions of competition and does not impede their free movement within the European Union. In particular, it is stated, in essence, in recital 8 of that directive, that products which are similar in many respects to products covered by that directive are to be treated in the same way, while recital 9 of the directive states that harmonisation of excise duty structures must result in competition in the different categories of manufactured tobacco belonging to the same group not being distorted by the effects of the charging of the tax and, consequently, in the opening of the national markets of the Member States.
- 19 Article 2(1) of Directive 2011/64 divides manufactured tobacco subject to harmonisation under that directive into three categories, the first concerning cigarettes, the second, cigars and cigarillos, the third, smoking tobacco.

- 20 As regards smoking tobacco in particular, it is apparent from the wording of Article 2(1)(c)(i) and (ii) of that directive that that category is divided into two subcategories headed ‘fine-cut tobacco for the rolling of cigarettes’ and ‘other smoking tobacco’, respectively.
- 21 For its part, Article 5(1) and (2) of Directive 2011/64 sets out the definitions of ‘smoking tobacco’ and ‘fine-cut tobacco for the rolling of cigarettes’, respectively. Accordingly, the first of those definitions encompasses both ‘tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing’ and ‘tobacco refuse put up for retail sale which does not fall under [the definition of cigarettes or that of cigars and cigarillos] and which can be smoked’.
- 22 In the present case, it is not disputed that the tobacco products at issue in the main proceedings fall neither within the definition of ‘fine-cut tobacco for the rolling of cigarettes’, within the meaning of Article 2(1)(c)(i) and of Article 5(2) of Directive 2011/64, nor that of ‘tobacco refuse’, within the meaning of Article 5(1)(b) of that directive.
- 23 Therefore, in order to determine whether those products fall within the subcategory ‘other smoking tobacco’, under Article 2(1)(c)(ii) of Directive 2011/64, it is necessary to examine whether they constitute ‘smoking tobacco’, in the light of the definition in Article 5(1)(a) of that directive.
- 24 Having regard to the objectives of that directive, referred to in paragraphs 17 and 18 of the present judgment, the definition of ‘smoking tobacco’ cannot be construed narrowly.
- 25 It is apparent from the wording of Article 5(1)(a) of Directive 2011/64 that it requires that two cumulative conditions are met, namely, first, that the tobacco be cut or otherwise split, twisted or pressed into blocks and, secondly, that it is capable of being smoked without further industrial processing.
- 26 Concerning the first condition, it is not apparent from the decision to refer that the tobacco at issue in the main proceedings is twisted or pressed into blocks.
- 27 It is necessary, therefore, to determine whether that tobacco may be regarded as being cut or otherwise split, within the meaning of Article 5(1)(a) of Directive 2011/64.
- 28 In that regard, there being no definition of the words ‘cut’ and ‘split’ in that directive, it is necessary, in order to determine the scope of those words, to refer to their usual and everyday accepted meanings (see, to that effect, judgment of 16 July 2015, *Sommer Antriebs- und Funktechnik*, C-369/14, EU:C:2015:491, paragraph 46 and the case-law cited). Those words, the usual meaning of which is very wide, refer, inter alia, as regards the first, to the result of the process of removing a part or a piece of something with a sharp instrument, and, as regards the second, to the result of the process of breaking up or dividing something.
- 29 Consequently, in so far as the products at issue in the main proceedings consist, according to the information provided by the referring court, of tobacco leaves which have been partly stripped, those products must be regarded as tobacco which has been cut or otherwise split, within the meaning of Article 5(1)(a) of Directive 2011/64.
- 30 Concerning the concept of ‘industrial processing’, used in Article 5(1)(a), this commonly refers to the transformation, usually on a large scale and by a standardised process, of raw materials into tangible goods.

- 31 It follows from the case-law of the Court of Justice, in essence, that simple handling intended to make an unfinished tobacco product capable of being smoked, such as merely inserting a roll of tobacco into a cigarette tube, is not ‘industrial processing’ (see, by analogy, judgments of 24 September 1998, *Brinkmann*, C-319/96, EU:C:1998:429, paragraphs 18 and 20, and of 10 November 2005, *Commission v Germany*, C-197/04, EU:C:2005:672, paragraphs 31 and 32).
- 32 In those circumstances, manufactured tobacco which is ready, or can easily be made ready, by non-industrial means, to be smoked must be considered to be capable of being smoked without further ‘industrial processing’, within the meaning of Article 5(1)(a) of Directive 2011/64.
- 33 In the present case, as is apparent from the decision to refer, the products at issue in the main proceedings have undergone primary drying and controlled dampening, contain glycerine and are capable of being smoked after simple processing by means of crushing or hand-cutting. Subject to verification by the referring court, it therefore appears that those products also satisfy the second condition referred to in paragraph 25 of the present judgment and, therefore, fall within the definition of ‘smoking tobacco’ laid down in Article 5(1)(a) of Directive 2011/64.
- 34 In those circumstances, as they do not constitute fine-cut tobacco for the rolling of cigarettes, within the meaning of Article 2(1)(c)(i) of that directive, such products must then be regarded as falling within the definition of ‘other smoking tobacco’, within the meaning of Article 2(1)(c)(ii) of that directive.
- 35 In the light of all the foregoing considerations, the answer to the first question is that Article 2(1)(c) and Article 5(1) of Directive 2011/64 must be interpreted as meaning that dried, flat, irregular, partly stripped leaf tobacco and/or parts thereof which have undergone primary drying and controlled dampening, which contain glycerine and which are capable of being smoked after simple processing by means of crushing or hand-cutting, fall within the definition of ‘smoking tobacco’ for the purpose of those provisions.
- 36 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

- 37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 2(1)(c) 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 must be interpreted as meaning that dried, flat, irregular, partly stripped leaf tobacco and/or parts thereof which have undergone primary drying and controlled dampening, which contain glycerine and which are capable of being smoked after simple processing by means of crushing or hand-cutting, fall within the definition of ‘smoking tobacco’ for the purpose of those provisions.

[Signatures]

i — The wording of paragraph 29 of this judgment has been amended after it was first put online.