



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

29 June 2017*

(Failure of a Member State to fulfil obligations — Excise duty on cigarettes — Directive 2008/118/EC — Chargeability — Place and time duty falls due — Tax markings — Free movement of goods subject to excise duty — Temporal limit on the marketing and sale of packets of cigarettes — Principle of proportionality)

In Case C-126/15,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 12 March 2015,

European Commission, represented by F. Tomat and G. Braga da Cruz, acting as Agents,

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes, N. Silva Vitorino and A. Cunha, acting as Agents,

defendant,

supported by:

Kingdom of Belgium, represented by M. Jacobs and J.-C. Halleux, acting as Agents,

Republic of Estonia, represented by K. Kraavi-Käerdi, acting as Agent,

Republic of Poland, represented by B. Majczyna, acting as Agent,

interveners,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, M. Berger, A. Borg Barthet (Rapporteur), E. Levits and F. Biltgen, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Portuguese.

after hearing the Opinion of the Advocate General at the sitting on 27 October 2016,
gives the following

Judgment

- 1 By its application, the European Commission asks the Court for a declaration that, by subjecting packets of cigarettes on which duty has already been levied and which have been released for consumption in a particular year to a prohibition on marketing and sale to the public once the excessively short period laid down in Article 27 of the Portaria No 1295/2007 do Ministério das Finanças e da Administração Pública (Decree No 1295/2007 of the Ministry for Finance and Public Administration) of 1 October 2007 (Diário da República, 1st Series, No 189 of 1 October 2007), in the version applicable to the present action ('Decree No 1295/2007') has expired, the Portuguese Republic has failed to comply with Article 7, the first paragraph of Article 9 and Article 39(3) 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), and with the principle of proportionality.

Legal context

EU law

- 2 According to recital 31 of Directive 2008/118:

'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 these 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, remittance or release conditional on the presentation of evidence that they have been removed or destroyed.'

- 3 Article 7(1) and (2) of Directive 2008/118 provides:

'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.’

4 Article 9, first paragraph, of that directive states:

‘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.’

5 Under Article 11, first paragraph, of Decision 2008/118:

‘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.’

6 Article 39 of that directive is worded as follows:

‘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.

...’

Portuguese law

7 Article 106 of the Código dos Impostos Especiais de Consumo, (Portuguese Excise Duty Code, hereinafter ‘CIEC’) provides:

‘1. The release for consumption of cigarettes shall be subject to the rules on limitation applicable in the period 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 applicable in its case in the limitation period.

5. In exceptional circumstances, duly justified by the sudden change for a limited time of the volume of sales, the failure to comply with those quantitative limits may be authorised, although they shall not be taken into account for the purpose of calculating the average month for the following year.

6. After the expiry of the limitation period and at the latest at the end of the month 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 limitation period.

7. The amount of cigarettes exceeding the quantitative limit referred to in paragraph 4 are subject to the payment of tax 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 the comparison of the information in that document and that 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, the Autonomous Region of the Azores and the Autonomous Region of Madeira, since the obligations laid down in the preceding paragraph must be fulfilled at the customs office where the release for consumption is dealt with.'

8 Article 27 of Decree No 1295/2007 is worded as follows:

'For the purpose of Article 93(7) of the [CIEC], manufactured tobacco products may be marketed and sold to the public within the following time limits:

- (a) Packets of cigarettes: until the end of the third month of the year following that which appears on the mark affixed;
- (b) Fine cut tobacco for rolling cigarettes and other smoking tobaccos: until the end of the year following that which corresponds to the mark affixed;
- (c) Cigars and cigarillos: until the end of the fifth year after that which appears on the mark affixed.'

9 Article 109 of the Regime Geral das Infrações Tributárias (General Rules on Tax Offences) ('the GRTO') provides:

'1. The facts described in Article 96 of this Law which do not constitute a criminal offence on account of the value of the tax revenue or of the goods which are the subject of the offence or, irrespective of those values, where they are the result of negligence, are punishable by a fine of EUR 500 to EUR 165 000.

2. The following acts are punishable by a fine of EUR 250 to EUR 165 000:

...

- (o) refusing, hindering or preventing the monitoring of the conditions for trading, in particular, not providing to the competent authorities the information required by law;
- (p) release for consumption, despatch, hold or market products contrary to the rules relating to the marking, c, holding or marketing, in particular, as regards the quantitative limits laid down by the [CIEC] and the complementary legislation;

...

4. An attempt shall be punishable.'

- 10 In accordance with point 4.2.9 of Chapter XII of the Excise Duty Handbook, 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.

Pre-litigation procedure

- 11 On 23 November 2009, the Commission opened infringement proceedings against the Portuguese Republic under Article 226 EC (now Article 258 TFEU), sending that Member State a letter of formal notice in which it stated that the Portuguese Republic had failed to fulfil its obligations pursuant to the principle of proportionality applied in the light of Article 6 and Article 21(2) of 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), by subjecting manufactured tobacco products already taxed and released for consumption to a prohibition on marketing and sale after a specific period of the year following that which appears on the tax marking affixed, in accordance with Articles 27 and 28 of Decree No 1295/2007 ('the letter of formal notice of 23 November 2009').
- 12 By letter of 12 January 2010, the Portuguese Republic rejected the complaints raised by the Commission.
- 13 On 4 June 2010, the Commission sent the Portuguese Republic a supplementary letter of formal notice.
- 14 The Commission repeated the position set out in the letter of formal notice of 23 November 2009, taking the view, in substance, that the Portuguese Republic had failed to fulfil its obligations pursuant to the principle of proportionality and Article 7, Article 9, first paragraph, and Article 39(3) of Directive 2008/118, which had in the meantime repealed and replaced Directive 92/12.
- 15 By letter of 25 August 2010, the Portuguese Republic again rejected the complaints raised by the Commission.
- 16 On 22 June 2012, the Commission sent the Portuguese Republic a reasoned opinion in which it concluded that that Member State had failed to fulfil its obligations pursuant to the principle of proportionality and Article 7, Article 9, first paragraph, and Article 39(3) of Directive 2008/118, by subjecting packets of cigarettes already taxed and released for consumption to a ban on marketing and sale to the public after excessively short time limits laid down in Article 27 of Decree No 1295/2007, ending in the year following that appearing on the tax marking. The Commission called on the Portuguese Republic to take the measures necessary to comply with that reasoned opinion within a period of two months.
- 17 By letter of 3 August 2012, the Portuguese Republic responded to that reasoned opinion, claiming essentially that the Commission's arguments were unfounded.
- 18 On 31 May 2013, the Commission sent a supplementary reasoned opinion to the Portuguese Republic intended to correct certain errors in the reasoned opinion of 22 June 2012, but containing essentially the same conclusion as that in the latter opinion. The Commission also called on the Portuguese Republic to take the measures necessary to comply with that reasoned opinion within two months.
- 19 By letter of 3 July 2013, the Portuguese Republic responded to the supplementary reasoned opinion by again challenging the substance of the Commission's position.
- 20 In those circumstances, the Commission decided to bring the present action.

The action

The first plea: infringement of Articles 7 and 9 of Directive 2008/118 and the principle of proportionality

Arguments of the parties

- 21 By its first plea in law, the Commission claims that once tobacco products are placed on the market the tax legislation of the European Union does not authorise Member States to subject those products, taking account of the date of release for consumption, to an excise duty in addition to the tax levied or to limit their distribution for tax reasons. In Portugal, under Article 27(a) of Decree No 1295/2007, the packets of cigarettes bearing a particular excise marking may only be sold and marketed until the end of the third month of the year following that during which they were released for consumption ('the contested measure').
- 22 In the first place, the Commission considers that even if that provision pursues a legitimate objective, in the present case the prevention of tax evasion and tax avoidance, it does not comply with the principle of proportionality.
- 23 That provision is based on the irrefutable presumption that all the packets of cigarettes which are not sold after the expiry of the time limit laid down must be regarded as having been released for consumption in excessive quantities in anticipation of the increase of the excise rate. By not allowing for the opportunity to adduce evidence to the contrary, that presumption is disproportionate in relation to the objective pursued.
- 24 The Commission adds that the measures laid down in Article 106 of the CIEC already authorise the limitation of the quantity of cigarettes which may be placed on the Portuguese market by the same economic operator in the period between 1 September and 31 December of each calendar year.
- 25 According to the Commission, in order for the contested provision to be justified by the objective of combating tax evasion and tax avoidance, the increase in excise duty on cigarettes should be quite substantial. The excise duty on cigarettes has not been significantly increased in recent years in Portugal. According to the data concerning cigarettes in the most popular price category (MPPC), the price for 1 000 cigarettes increased from EUR 170 in 2009 to EUR 195 in 2014, which represents an increase of 14.7% in a five-year period, that is an increase of EUR 3.4 to 3.9 per packet of 20 cigarettes.
- 26 Second, the Commission takes the view that the time limit laid down by the Portuguese legislation does not take sufficiently into account the retention periods for the different products nor the seasonal variations in turnover.
- 27 The time limit laid down in Article 27(a) of Decree No 1295/2007 is excessively short, in particular for cigarettes of less well known brands for which, in general, a longer period is necessary to attain the anticipated turnover. In that regard, the Commission refers to Article 14 of 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), which provides that tobacco products other than cigarettes which do not comply with the provisions of that directive may continue to be marketed for two years after the date of entry into force of that directive, against one year for cigarettes. It states that those periods have been fixed in order to take account of seasonal variations in the turnover of those products.

- 28 The Commission also points out that the difference existing between the time limit for marketing and sales of packets of cigarettes laid down in Article 27(a) of Decree No 1295/2007, and those for marketing and sales of other tobacco products laid down in Article 27(b) and (c) thereof, highlight the disproportionate nature of the contested measure.
- 29 Third, the Commission claims that that measure gives rise to additional costs and losses for economic operators, since after the expiry of the time limit laid down in Article 27(a) of Decree No 1295/2007, the only economically viable solution available to them is the destruction of unsold packets, which adds to the disproportion between the objectives pursued and the effects of the contested measure.
- 30 Fourth, the Commission considers that, although the protection of public health is a legitimate objective pursued by the contested measure, the latter goes beyond what is necessary to achieve that objective. To date, the Portuguese Republic has failed to demonstrate how that measure has contributed until now to the reduction of tobacco consumption.
- 31 Fifth, the Commission does not understand how that measure is able to contribute to combating illegal tobacco trade and safeguarding tax revenue.
- 32 Sixth, the Commission takes the view that the fines provided for by Portuguese legislation of up to EUR 165 000 for failure to comply with Article 27 of Decree No 1295/2007 may be disproportionate in some circumstances, particularly if account is taken of the minimal increases in excise duty in Portugal in recent years and the restrictions relating to the placing on the market of cigarettes provided for in Article 106 of the CIEC.
- 33 In its defence, the Portuguese Republic contends that Article 27 of Decree No 1295/2007, in so far as it is based on reasons of public interest, complies with Articles 7 and 9 of Directive 2008/118 and the principle of proportionality.
- 34 As a preliminary point, the Portuguese Republic explains that the Portuguese tax marking system is based principally on the fact that the background colour of the marking is changed each year. It is essentially that characteristic which stabilises that system and enables it to achieve the objectives mentioned. Thus, according to the Portuguese legislation, a tobacco product released for consumption in 2015 had to bear the marking corresponding to that year and, in principle, could be marketed until 31 December 2015, since from 1 January 2016 a new tax marking with a different background colour was applicable. Articles 27 and 28 of Decree No 1295/2007 provide for an exception to that principle by authorising the marketing and retail sale of tobacco products after the end of the year corresponding to the marking affixed. Thus, in practice the annual tax marking is valid for 15 months.
- 35 In the first place, as regards the prevention of tax evasion and tax avoidance, the Portuguese Republic states that the quantitative limits provided for in Article 106 CIEC are not sufficient on their own to achieve that objective. If only those limits existed, it would be easy for operators with substantial economic power to release massive amounts of packets of cigarettes for consumption before the beginning of the limitation period, for example in July and August and to use products in stock in order to supply the market in the following year.
- 36 The contested measure also prevents a distortion of competition between large and small operators. If Article 27(a) of Decree No 1295/2007 did not prohibit the sale and marketing of packets of cigarettes after the expiry of the time limit it lays down, operators with a substantial economic capacity would enjoy a major competitive advantage, since, in the following year, they would have cheaper products as compared with those of competitors with a lesser financial capacity.
- 37 Second, the three month time limit is largely sufficient, according to the data available to the Portuguese administration, since the average period for rotation of stocks of cigarettes is two months.

- 38 Therefore, the Portuguese Republic contends that if at the end of March of each year there are tobacco products in stock, that is not due to the fact that the time limit laid down by Article 27(a) of Decree No 1295/2007 is excessively short, as the Commission wrongly submits, but to the fact that before the beginning of the limitation period operators have made excessive releases of products for consumption, with the aim of building up sufficient stocks in order to continue the following year and during the maximum period authorised to market the products bearing the previous year's marking.
- 39 Third, as regards the costs borne by operators as a result of the contested measure, the Portuguese Republic disputes the allegations made in that regard by the Commission. As excise duties, which represent 78.08% of the price of cigarettes, are reimbursed if cigarettes not sold within the time limit laid down by Article 27(a) of Decree No 1295/2007 are destroyed, the costs of the destruction are not very high with regard to the cost of the products leaving the factory.
- 40 The Portuguese Republic states that according to the data available to it, several operators have the practice of returning to their tax warehouse products which can no longer be marketed under Article 27 of Decree No 1295/2007 so that a new tax marking can be affixed to them together with a new retail price. Those operations generate only minimal costs as they do not require complex technology.
- 41 Fourth, the Portuguese Republic states that although the contested measure pursues objectives relating to the generation of tax revenue, it is also consistent with the objective of protecting public health, in particular, the reduction in the consumption of tobacco products.
- 42 Fifth, as regards combating illegal trade in tobacco, the Portuguese Republic states that that objective depends to a large extent on the marking system, of which the contested measure is an essential element. It points out in that regard that the change each year of the background colour of the tax marking yields good results in so far as it makes the reproduction of the tax marking more difficult and prevents abuse.
- 43 Sixth, as regards the application of sanctions in the event of failure to comply with Article 27 of Decree No 1295/2007 of up to EUR 165 000, the Portuguese Republic claims that the amount of the fine imposed is adjusted in accordance with the seriousness of the offence committed by the perpetrator of the offence and its economic situation, and adds that that amount must, as far as possible, exceed the economic benefit the perpetrator of the offence derives from it.
- 44 In its rejoinder, the Commission maintains its position.
- 45 As regards the objective of preventing tax evasion, it notes that Decree No 1295/2007 applies in all cases, irrespective of changes to the level of taxation of cigarettes, which suffices to show the disproportionate nature of the contested measure.
- 46 The Commission states that, although the maximum time limit for turning over packets of cigarettes is, according to the data relied on by the Portuguese Republic, two months, that time limit is only an average period.
- 47 As far as concerns the costs borne by operators, the Commission questions the merits of the Portuguese Republic's assertion that it is economically viable to re-release for consumption packets of cigarettes which remain unsold at the end of the time limit laid down in Article 27(a) of Decree No 1295/2007. Such an assertion contradicts the position adopted by that Member State in the administrative phase of the procedure and is based on facts subsequent to the expiry of the period prescribed in the supplementary reasoned opinion, that is 1 August 2013.

- 48 In any event, the Commission recalls that the costs arising from the contested measure related to the process of reaffixing the tax markings on packets of cigarettes remains the responsibility of operators, even though the increase in excise duty is low or even non-existent, which shows the disproportionate nature of that measure.
- 49 In its rejoinder, the Portuguese Republic observes that, in so far as the Commission takes the view that the time limit of three months laid down in Article 27(a) of Decree No 1295/2007 is ‘too short’, the latter implicitly accepts that a time limit must exist for the marketing in a given year of packets of cigarettes bearing a tax marking corresponding to the previous year. However, the Commission has not provided any indication as to what would, in its view, constitute a reasonable time limit.
- 50 Regarding the costs borne by economic operators as a result of the contested measure, the Portuguese Republic acknowledges that its position has changed since the administrative phase of the procedure. However, that change is due to a change in the factual circumstances, in so far as, during that phase, the Portuguese authorities had not dealt with any requests to affix new tax markings on packets of cigarettes. It is only from 2014 that such requests have been made, as authorised by an administrative circular of 20 December 2012.
- 51 In their statements in intervention, the Kingdom of Belgium, the Republic of Estonia and the Republic of Poland support the arguments of the Portuguese Republic.
- 52 In its submissions in response to the statements in intervention of the Kingdom of Belgium, the Republic of Estonia and the Republic of Poland, the Commission maintains its position.

Findings of the Court

- 53 By its first plea in law, the Commission submits essentially that Article 27(a) of Decree No 1295/2007 infringes Article 7 and 9, first paragraph, of Directive 2008/118 and the principle of proportionality, in that it provides that packets of cigarettes, once they have been placed on the Portuguese market, cannot be marketed or sold after the third month of the year following that in which they were released for consumption.

– The infringement of Articles 7 and 9 of Decision 2008/118

- 54 First, it must be recalled that, under Article 7 of Directive 2008/118, excise duty becomes chargeable at the time, and in the Member State, of release for consumption. 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.
- 55 It follows from those provisions that although EU law determines the time at which the excise duties become chargeable, it refers to the law of the Member States for the establishment of the conditions of chargeability and the rate of excise duty.
- 56 Therefore, and contrary to the Commission’s arguments, it cannot be inferred from those provisions that the Member States are prohibited from imposing temporal limits on the sale of cigarettes which have been lawfully placed on the market, as the Advocate General observed in point 25 of his Opinion.
- 57 Nor can the Commission legitimately argue that the effect of Article 27 of Decree No 1295/2007 is to force economic operators to pay a supplementary excise duty on packets of cigarettes which have already been lawfully released for consumption. It is clear from the documents before the Court that, if on expiry of the period prescribed in Article 27, those operators have packets of cigarettes which

they have not been able to sell, they may either request the reimbursement of previously paid excise duties or re-release the products concerned for consumption by affixing a new tax marking under customs supervision, that operation being the chargeable event giving rise to the tax.

- 58 It follows that the Commission's argument that Article 27(a) of Decree No 1295/2007 infringes Article 7 and Article 9, first paragraph, of Directive 2008/118 per se cannot be accepted.
- 59 Second, it must be observed that the Member States have a legitimate interest in taking appropriate steps to protect their financial interests (judgment of 10 July 2008, *Sonowska*, C-25/07, EU:C:2008:395, paragraph 22 and the case-law cited) and that the prevention of possible tax evasion, avoidance and abuse is an objective pursued by Directive 2008/118, as is clear from recital 31 and Article 11 and Article 39(3), first paragraph thereof.
- 60 It is common ground that the contested measure is a measure intended to prevent 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. Moreover, as the Commission expressly acknowledges in its pleadings, such releases for consumption in excessive quantities, in anticipation of a future increase in the rate of excise duty, constitute a form of abuse that the Member States are entitled to prevent by the appropriate measures.
- 61 Since Article 9, first paragraph, of Directive 2008/118 refers to the national law in force on the date on which the excise duties fall due, in order to determine the conditions of chargeability and the rate of excise duty, such as a right recognised to the Member States necessarily implies that they have the possibility to adopt measures such as that laid down in Article 27(a) of Decree No 1295/2007.
- 62 However, as the Advocate General pointed out in point 32 of her Opinion, in the exercise of the powers conferred on them by EU law, the Member States must comply with the general principles of law among which are, in particular, the principle of proportionality which the Commission considers has been breached in the present case.
- 63 Therefore, it must be examined whether the contested measure is disproportionate and whether, on that ground, it breaches Article 9, first paragraph, of Directive 2008/118.

– *Breach of the principle of proportionality*

- 64 It must be recalled that the Member States must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant EU legislation (see, to that effect, judgments of 18 December 1997, *Molenheide and Others*, C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623, paragraph 46, and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 29 and the case-law cited). The case-law of the Court states in that regard that, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgments of 12 July 2001, *Jippes and Others*, C-189/01, EU:C:2001:420, paragraph 81, and of 9 March 2010, *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 86).
- 65 First, as far as concerns the objectives pursued by the contested measure, the Portuguese Republic argues that it also pursues the prevention of tax evasion and tax avoidance, the maintenance of healthy competition, the protection of public health and combating illegal trade in tobacco. It is not disputed that those objectives are legitimate.

- 66 Second, as far as concerns the appropriate nature of the contested measure, it must be stated that the prohibition on marketing and sales of packets of cigarettes after March of the year following that in which they were released for consumption has the effect of removing any incentive for economic operators to release excessive quantities of tobacco products in anticipation of a future increase of excise duty, because they will be obliged to remove unsold packets from the market after that period. To the contrary, the absence of contested measure would prevent or delay the future increase in the rate of excise duty from taking effect, which gives rise generally to an increase in the retail sale price of packets of cigarettes.
- 67 Therefore, that measure is appropriate to achieve legitimate objectives that are combating tax evasion and tax avoidance and the protection of public health. As regards the latter objective, it must be added that the Court has already held that fiscal legislation is an important and effective instrument for discouraging consumption of tobacco products and, therefore, for the protection of public health (judgments of 5 October 2006, *Valeško*, C-140/05, EU:C:2006:647, paragraph 58 and of 4 March 2010, *Commission v France*, C-197/08, EU:C:2010:111, paragraph 52).
- 68 That measure also prevents operators with substantial economic power from enjoying a competitive advantage by oversupplying the market as compared with competitors with a lesser financial capacity and, therefore, helps to ensure healthy competition.
- 69 However, the Portuguese Republic does not explain clearly enough how the prohibition on marketing and selling products, which have already been legally subject to excise duty after the expiry of a specific period, helps to combat the illegal trade in tobacco. Therefore, it cannot be held that that measure is appropriate to combat illegal trade of that sort.
- 70 Third, as far as concerns the need for the contested measure, it must be pointed out that, according to established case-law, it is for the Commission to prove the alleged failure to fulfil obligations. It is the Commission which must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (judgment of 24 November 2016, *Commission v Spain*, C-461/14, EU:C:2016:895, paragraph 50 and the case-law cited).
- 71 In that connection, first, as far as concerns the Commission's argument that the quantitative limits on the release for consumption of cigarettes, provided for in Article 106 of the CIEC, already constitute in themselves a measure sufficient to achieve the objectives pursued, it must be observed that, by virtue of that provision, release for consumption of cigarettes cannot, in the period between 1 September and 31 December inclusive of each calendar year, exceed the quantitative limits deriving from the application of a multiplying factor of 10% to the monthly amount of cigarettes released for consumption in the course of the preceding year.
- 72 However, it must be stated that that provision may be circumvented by an economic operator which chooses to release excessive quantities of cigarettes for consumption in the period before 1 September. In that connection, as is clear from the data provided by the Portuguese Republic, releases for consumption of cigarettes increased, in August 2014 by 241% as compared with the monthly average. Therefore, it does not appear that the quantitative limits laid down in Article 106 CIEC are sufficient in themselves to effectively combat the release for consumption of excessive quantities of cigarettes in anticipation of an increase in the rate of excise duty.
- 73 Second, as regards the Commission's argument based on the three-month time limit laid down by the contested measure, it must be stated that the Commission does not dispute the need to set a time limit in order to achieve the objectives pursued, but criticises the Portuguese Republic for setting a time limit which is too short. In that regard, it refers to Directive 2001/37 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.

- 74 In that connection, it must be observed that a period of sale which is extended until the end of the year following that in which cigarettes are released for consumption would have the result that the new rate of excise duty would apply to the cigarettes released for consumption, at the latest, only one year after the entry into force of the tax increase. As the Advocate General observed in substance in paragraph 41 of her Opinion, such a long period of sale would substantially reduce the effectiveness of Article 27 of Decree No 1295/2007.
- 75 Moreover, in answer to the Portuguese Republic's argument that the three-month time limit is sufficient, given that the average length of the turnover of stock of cigarettes is two months, the Commission simply asserts that that is an average period and that time limit does not take account of seasonal variations or the fact that the turnover is longer for cigarettes of lesser known brands, without presenting any detailed argument in support of its arguments explaining what, in its view, would be a reasonable time limit.
- 76 Furthermore, it must be held that, in any event, the three-month time limit during which cigarettes may be marketed and sold concerns only those which were released for consumption at the end of December of the previous calendar year. In the case where cigarettes are released for consumption in January or February of the same year as that corresponding to the tax marking affixed, they may be sold until March of the following year, which leaves a period of 14 to 15 months to dispose of them. Thus, the earlier in the year the cigarettes are released for consumption the longer the time limit for disposing of them.
- 77 Furthermore, the fact that Article 27 of Decree No 1295/2007 lays down longer time limits for fine-cut tobacco for rolling cigarettes and other smoking tobacco and for cigars and cigarillos does not challenge that finding since those products are different from ordinary cigarettes in that they each have their own turnover period.
- 78 Third, as regards the Commission's argument based on the lack of any significant increase in excise duty on tobacco products in Portugal in recent years, it must be observed that the contested measure applies in all cases, including in the case in which the rate of excise duty decreases or stays the same. In such circumstances, the incentive for economic operators to supply excessive quantities of cigarettes during a specific year is minimal or non-existent, since the excise duty that they have to pay in the following year will not have increased. Consequently, in such circumstances, the contested measure does not appear necessary to achieve the objectives pursued.
- 79 Contrary to the Portuguese Republic's submissions, the objectives pursued could be achieved in a manner which is less restrictive and just as appropriate if the contested measure applied only in the case of an increase in the rate of excise duty on cigarettes. In the absence of any increase, the incentive for economic operators to release excessive quantities of cigarettes for consumption, in order to avoid paying higher excise duties is non-existent.
- 80 It follows that, in so far as the contested measure also applies in the absence of any increase in excise duty, the first plea in law is well-founded, as the Advocate General observed, in paragraph 46 of her Opinion. For the remainder of the plea in law, it follows from the foregoing considerations that the arguments relied on by the Commission regarding the need for that measure cannot be accepted.
- 81 Fourth, it must be ascertained whether the contested measure adversely affects the interests of the economic operators in a disproportionate manner.
- 82 First, as regards the Commission's argument relating to the existence of an irrebuttable presumption, according to which all packets of cigarettes which are not sold after the expiry of the time limit laid down in Article 27 of Decree No 1295/2007 must be regarded as having been released for consumption in excessive quantities, the Commission refers in that regard to the judgment of 18 December 1997, *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96,

EU:C:1997:623), in which the Court held, as regards the protective attachment of a refundable value added tax credit, that an irrebuttable presumption would go beyond what is necessary to ensure effective recovery and would undermine the principle of proportionality, in that it would not allow the taxable person to adduce evidence in rebuttal for consideration by the judge hearing attachment proceedings.

- 83 However, it should be noted that the contested measure is different to that at issue in the case which gave rise to the judgment of 18 December 1997, *Molenheide and Others* (C-286/94, C-340/95, C-401/95 and C-47/96, EU:C:1997:623) since, in the present case, in cases where packets of cigarettes are unsold on the expiry of the time limit referred to in Article 27 of Decree No 1295/2007, the economic operators concerned may either request the reimbursement of the excise duty previously paid if those packets are destroyed under customs supervision, or re-release them for consumption by affixing a new tax marking under customs supervision. Consequently, that judgment is not relevant.
- 84 Moreover, as the Advocate General observed in paragraph 49 of her Opinion, giving economic operators the opportunity 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. According to the case-law of the Court, Member States cannot be denied the possibility of attaining an objective such as combating tax evasion and tax avoidance, and the protection of public health and healthy and fair competition by the introduction of general and simple rules which will be easily understood and applied by drivers and easily managed and supervised by the competent authorities (see, to that effect, judgments of 10 February 2009, *Commission v Italy*, C-110/05, EU:C:2009:66, paragraph 67, and of 24 March 2011, *Commission v Spain*, C-400/08, EU:C:2011:172, paragraph 124).
- 85 Therefore, the argument relating to the existence of an irrebuttable presumption cannot be accepted.
- 86 Second, as regards the Commission's argument relating to the costs that economic operators must bear as a result of the contested measure, it is clear from the file that, since December 2012, economic operators which have not managed to sell all the packets of cigarettes released for consumption on the expiry of the time limit laid down by Article 27(a) of Decree No 1295/2007 can choose between the destruction of those goods accompanied by the reimbursement of the tax paid, which represents 78.08% of the price of the cigarettes, and their re-release for consumption by affixing new tax markings.
- 87 In that regard, although it is common ground that those two types of operations generate costs for the economic operators, the Commission has failed to establish that those costs are disproportionate as compared with the legitimate objectives pursued by the contested measure.
- 88 Economic operators must only bear those costs if they release excessive quantities of packets of cigarettes for consumption. It is not disputed that the market for cigarettes is characterised by a relatively stable demand and by the fact that economic operators are familiar with the behaviour of that market. Furthermore, the rate of excise duty applicable in a particular year is known in advance, that is on 15 October of the previous year. It follows that economic operators are able to make well-informed predictions regarding the demand for cigarettes so as to avoid the excessive accumulation of stocks which might require them to withdraw unsold packets of cigarettes from the market and, therefore, to bear the costs related to their destruction or re-packaging. Therefore, the Commission's argument relating to the costs generated by the contested measure must be dismissed.
- 89 Third, the Commission's argument that the sanctions laid down in Article 109 of the GRTU are disproportionate on the ground that they may be up to EUR 165 000, it must be stated that, pursuant to the provisions laid down in Article 109 of the GRTU, cited by the Commission, the offences

mentioned therein are punishable by a fine of EUR 250 to EUR 165 000 or EUR 500 to EUR 165 000. The Commission has not established or even alleged that the system of fines has been applied disproportionately.

- 90 It follows that the disadvantages caused to operators are not disproportionate to the objectives pursued by the contested measure, as the Advocate General observed in paragraph 52 of her Opinion.
- 91 Having regard to all of the foregoing considerations, the first complaint is unfounded in that the contested measure also applies in the absence of any increase in the rate of excise duty taking effect in the year following that which appears on the tax marking affixed. Therefore, the first complaint must be dismissed for the remainder.

The second plea in law: infringement of Article 39(3) of Directive 2008/118 and of the principle of proportionality

Arguments of the parties

- 92 The Commission submits that the contested measure also infringes Article 39(3) of Directive 2008/118, as it creates impediments to the free movement of goods subject to excise duty. The fear on the part of importers of being unable, in the case of an increase in excise duty, to sell cigarettes within the period laid down in Article 27(a) of Decree No 1295/2007 may dissuade them from making normal purchases, in particular from other Member States, and therefore affect trade at a level which goes beyond what is necessary to combat, in particular, the release for consumption of excessive quantities of cigarettes before the increase of excise duty.
- 93 The Portuguese Republic considers that the contested measure does not give rise to any discrimination between national products and those from other Member States. It explains, supported in that regard by the Republic of Estonia and the Republic of Poland, that that measure is fully justified by the objectives of protecting public health, protecting competition, the prevention of tax evasion and tax avoidance, and that it does not go beyond what is necessary to guarantee the attainment of those objectives.

Findings of the Court

- 94 It must be recalled that, according to Article 39(3) of Directive 2008/118, 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 must ensure that tax markings or national identification marks do not create obstacles to the free movement of excise goods.
- 95 It must be stated that Article 27(a) of Decree No 1295/2007 merely provides that cigarette packets may be marketed and sold until the end of the third month of the year following that which appears on the tax marking affixed. Such a temporal limitation on the marketing and sale of cigarettes, complained of by the Commission, is not therefore a consequence of the use of a tax marking and linked to their use only in so far as reference is made to the year indicated on them, as the Advocate General points out in paragraph 56 of her Opinion. Moreover, the year of release for consumption could also be made apparent by means other than the tax marking on cigarette packets.
- 96 Since the present action for infringement only refers to Article 27(a) of Decree No 1295/2007, the assessment of its compliance with EU law cannot, therefore, be measured against Article 39 of Directive 2008/118.
- 97 Therefore, the second plea in law cannot not be accepted.

- 98 It follows from all of the foregoing considerations that the present action can be upheld only in so far as the contested measure also applies in the absence of any increase in excise duty taking effect the year following that indicated on the tax marking. It must be dismissed for the remainder.
- 99 In so far as packets of cigarettes 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 has infringed the principle of proportionality.

Costs

- 100 Under Article 138(3) of the Rules of Procedure of the Court, 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.
- 101 In the present case, the Commission and the Portuguese Republic have each applied for costs. Since the Portuguese Republic has been only partly unsuccessful in the action for annulment, in light of the circumstances of the case, the Commission must be ordered to pay half of the costs incurred by that State.
- 102 In accordance with Article 140(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings shall bear their own costs.

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

1. **Declares that, by providing that cigarettes released for consumption in a given year may no longer be marketed or sold to the public after the expiry of the time limit laid down in Article 27(a) of the Portaria No 1295/2007 do Ministério das Finanças e da Administração Pública (Decree No 1295/2007 of the Ministry for Finance and Public Administration) of 1 October 2007, in the version applicable to the present action, where there is no increase in the excise duty on those products taking effect the following year, the Portuguese Republic has failed to fulfil its obligations under Article 9, first paragraph of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC and the principle of proportionality;**
2. **Dismisses the action as to the remainder;**
3. **Orders the Portuguese Republic to bear half of its own costs;**
4. **Orders the European Commission to bear its own costs and to pay half of the costs incurred by the Portuguese Republic;**
5. **Orders the Kingdom of Belgium, the Republic of Estonia and the Republic of Poland to bear their own costs.**

[Signatures]