In Joined Cases 177 and 178/82

REFERENCE to the Court under [Article 267 TFEU] by the Arrondissementsrechtbank [District Court], Utrecht, for a preliminary ruling in the criminal proceedings pending before that court against

JAN VAN DE HAAR AND KAVEKA DE MEERN BV

on the interpretation of [the second and third paragraphs of Article 4(3) TEU, Articles 34 and 101 TFEU],

THE COURT (First Chamber),

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: G. Reischl
Registrar: P. Heim

gives the following

JUDGMENT

Decision

1 By judgments of 1 June 1982, which were received at the Court on 14 July 1982, the Arrondissementsrechtbank, Utrecht, referred to the Court for a preliminary ruling under [Article 267 TFEU] a series of questions on the interpretation of [the second and third paragraphs of Article 4(3) TEU, Articles 34 and 101 TFEU].

2 Those questions arose in the context of criminal proceedings brought by the Officier van Justitie, Utrecht, against Kaveka de Meern BV, a company whose business is, in particular, the wholesale of tobacco products, and against its former general manager, Jan van de Haar.

3 The first sentence of Article 30 of the "Wet op de Accijns van Tabaksfabrikaten [Law on the excise duty on tobacco products, hereinafter referred to as "the Tobacco Excise Law"] 1964 provides as follows:

"It shall be an offence to sell, offer for sale or supply tobacco products to persons other than resellers at a price lower than that appearing on the excise label."

4 The accused are charged, *inter alia,* with having infringed the aforementioned provision by offering for sale tobacco products to persons other than resellers at prices lower than those appearing on the excise labels.

5 It appears from the documents before the Court that Kaveka's customers are resellers and persons who use the tobacco products which they buy for their own needs in the framework of their business or trade. Kaveka's business practice is not to check at the cash desk whether the customer is a reseller of the tobacco products which he has in his trolley. The company consciously takes the risk that the buyer will not use the goods purchased by him for business or trade purposes. Kaveka operates a system of entrance cards under which businesses and institutions such as old peoples' homes can buy tobacco products from them.

6 The accused contended before the national judge that the alleged offences are not punishable since Article 30 of the Tobacco Excise Law is contrary to [the second and third paragraphs of Article 4(3) TEU, Articles 34 and 101 TFEU]. They contend that the abuse of a dominant

Robert Schütze European Union Law Lisbonised Cases

position entailed by the compulsory price system may affect trade between Member States and impede imports. In addition, the fact that the excise duty is subject to an absolute minimum leads to the formation of an absolute minimum selling price, which is contrary to [Article 34 TFEU].

7 The questions submitted by the Arrondissementsrechtbank, Utrecht, are as follows:

"1 . In several decisions on [Article 34 TFEU] the Court of Justice has declared that any commercial provision adopted by the Member States which is capable of hindering intra-[Union] trade, directly or indirectly, actually or potentially, is to be considered a measure having an effect equivalent to quantitative restrictions. This formulation appears to come very close to what the Court has said with regard to the concept of 'agreements . . . which may affect trade between Member States' within the meaning of [Article 101(1) TFEU] in Cases 56 and 58/64 (*Consten and Grundig v Commission* [1966] ECR 299) and in Case 56/65 (*Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235), although the term used in those cases is 'may affect' trade between Member States whereas, for example, in the *Dassonville* judgment the term 'hinder' is used. In a case where the national court has to judge whether a legal provision of a Member State which applies without distinction to imported and domestic products is a measure having equivalent effect within the meaning of [Article 34 TFEU], must it in its judgment take into acccount the case-law of the Court of Justice concerning [Article 101 TFEU] and more particularly the interpretation given by the Court to the expression 'may affect trade between Member States', from which it is clear that the criteria bringing the case within the prohibition of [Article 101(1) TFEU] are satisfied if it is established that a commercial provision is likely to deflect trade from its natural course, or must the national court give a more independent meaning to [Article 34 TFEU] to the effect that such a legal provision only constitutes a restriction on trade and thus a measure having equivalent effect within the meaning of [Article 34 TFEU] if the court is able to find on the basis of the factual circumstances that the importation of goods from other Member States may be restricted by that legal provision?

2. Must a legal provision of a Member State which applies without distinction to domestic and imported products also be regarded as a measure having equivalent effect within the meaning of [Article 34 TFEU] where it is clear that that provision restricts imports into a Member State only to a very small degree and other possibilities remain for the marketing of products from other Member States?

3. Must the national court in its inquiry into the restrictive effects on trade of a legal provision which applies without distinction to the importation of products from other Member States and the marketing of domestic products have regard solely to the effects of that legal provision or must it also take account of the fact that other restraints on trade exist on the relevant market as a result of the tax laws of the Member States and the differences between them?

4. Does it make any difference to the reply to be given to the previous question if in the opinion of the national court the relevant legal provision has, taken by itself, no restrictive effect at all on trade?

5. If, as a result of a legal provision of a Member State, a system of vertical price-fixing exists to which all the traders concerned are bound and departure from which constitutes an offence, can an individual who has infringed such a provision rely before the national courts upon the incompatibility of that national provision with [the third paragraph of Article 4(3) TEU], in conjunction with [Article 101 TFEU]?"

The first and second questions

8 In the first question the national court asks whether, for the purpose of assessing, in the light of [Article 34 TFEU], rules applicable both to imported and to domestic products, the criteria developed by the Court of Justice regarding [Article 101 TFEU], in particular with regard to the concept of effect on trade between Member States, should also be taken into account, or whether [Article 34 TFEU] is to be interpreted independently, only coming into consideration when it is established that the rules in question are of such a nature as to restrict imports. The second question seeks to ascertain, more particularly, whether such rules are even to be considered a measure having equivalent effect within the meaning of [Article 34 TFEU] where it is clear that they restrict imports only to a very small degree and other possibilities remain for the marketing of imported products.

9 The accused in the main proceedings and, to a certain extent, the Commission contend that [Articles 34 and 101 TFEU] cannot be interpreted differently with regard to the concept of effect on trade between Member States. The Netherlands Government, on the other hand, argues that [Articles 34 and 101 TFEU] should be interpreted independently of each other.

10 At the hearing, however, the Commission qualified the view it had expressed in its written observations, and pointed out that, while the effects of national measures or agreements between undertakings which relate to the same economic facts must be analysed in the same way, the legal consequences may be different because the provisions at issue have their own internal logic and must be interpreted independently of each other.

11 It is important to bear in mind the context in which those two provisions of the Treaty are situated. [Article 101 TFEU] belongs to the rules on competition which are addressed to undertakings and associations of undertakings and which are intended to maintain effective competition in the common market. As the Court has held in previous judgments, that provision only comes into consideration with regard to agreements, decisions or practices restricting competition which appreciably affect intra-[Union] trade.

12 [Article 34 TFEU], on the other hand, belongs to the rules which seek to ensure the free movement of goods and, to that end, to eliminate measures taken by Member States which might in any way impede such free movement. Thus the Court has held that a national provision which is capable of hindering intra-[Union] trade, directly or indirectly, actually or potentially, must be regarded as a measure having an effect equivalent to a quantitative restriction.

13 It must be emphasized in that connection that [Article 34 TFEU] does not distinguish between measures having an effect equivalent to quantitative restrictions according to the degree to which trade between Member States is affected. If a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantitative restriction, even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways.

14 The reply to the first and second questions must therefore be that [Article 34 TFEU], which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of [Article 101 TFEU], which seeks to maintain effective competition between undertakings. A court called upon to consider whether national legislation is compatible with [Article 34 TFEU] must decide whether the measure in question is capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade. That may be the case even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways.

Third and fourth questions

15 These questions concern the compatibility with [Article 34 TFEU] of a national legislative provision such as Article 30 of the Netherlands Tobacco Excise Law, in so far as it imposes,

Robert Schütze European Union Law Lisbonised Cases

in the case of sales to the consumer, a selling price fixed by the manufacturers or importers. The national court wishes to ascertain, in particular, whether the issue of compatibility must be resolved in the light of the effects of such a provision taken in isolation or whether account should be taken of the existence of other hindrances to trade caused by the differing fiscal legislation of the Member States, even though the provision at issue is not in itself deemed to have any restrictive effect on trade.

16 The national court states that in order to ensure the levying of excise duties on tobacco products a system of excise labels is operated. Retail sales of tobacco products must be made at the price appearing on the excise label. The price is freely determined by the importer or by the domestic manufacturer. The importer is free to determine his prices without reference to the foreign manufacturer. The assortment of excise labels offers many possibilities and in practice permission to alter the price on the label is always granted on request. Excise labels are obtainable by any person, subject to the conditions laid down by revenue law, the principal requirement being one of registration.

17 The Tobacco Excise Law permits a foreign producer to market the same tobacco product in the Netherlands at different prices. However, it does not appear that in practice the same brand has been imported by more than one firm.

18 The prohibition laid down in Article 30 of the Tobacco Excise Law applies without distinction to domestic and imported products. Competitive pricing in respect of a particular product at the retail stage is therefore impossible. Competition is, however, possible at the intermediate stage as a result of various reductions and discounts. Furthermore, competition is also possible by means of advertising and promotions. The introduction of new brands is increasingly based on quality and taste.

19 In its judgment of 24 January 1978 (Case 82/77, *Openbaar Ministerie v van .... Tiggele,* [1978] ECR 25), the Court held that, whilst national price control rules applicable without distinction to domestic products and imported products cannot. In general produce an effect equivalent to quantitative restrictions within the meaning of [Article 34 TFEU], they may do so in certain specific cases. Thus imports may be impeded when, for example, a national authority fixes prices or profit margins at such a level that imported products are placed at a disadvantage in relation to identical domestic products, either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out.

20 As regards the fixing of prices and the taxation of tobacco products, the Court held, in its judgment of 16 November 1977 (Case/13/77, *INNO v ATAB,* [1977] ECR 2115), that in the present state of [Union] law it is for each Member State to choose its own method of fiscal control over tobacco products on sale in its territory and that a system whereby the prices are freely chosen by the manufacturer or the importer as the case may be and imposed on the consumer by a national legislative measure, and whereby no distinction is made between domestic products and imported products, generally has exclusively internal effects.

21 However, as the Court pointed out in the same judgment, the possibility cannot be excluded that in certain cases such a system may be capable of affecting intra-[Union] trade. If therefore imports and exports of tobacco products are subject to obstacles due to the different methods of fiscal control used by the Member States to ensure collection of the taxes on those products, it is necessary to decide whether such a system of fixed prices imposed on the consumer for reasons of fiscal control is or is not of itself of such a nature as to allow imported products to be profitably marketed or to allow a possible competitive advantage to be obtained as a result of the lower production costs of imported products compared to domestic products.

22 Consequently, in order to decide whether legislation of a Member State which, as regards the sale of tobacco products to the consumer, imposes a fixed price freely chosen by the manufacturer or importer constitutes a measure having an effect equivalent to a quantitative restriction, the national court must investigate whether, having regard to the fiscal restraints on trade in the products concerned, such a system of imposed prices is in itself likely to hinder, directly or indirectly, actually or potentially, trade between Member States.

Fifth question

23 In its fifth question the national court asks whether a private individual may rely, before a national court, on the incompatibility of a national provision with the provisions of the second paragraph of [the second and third paragraphs of Article 4(3) TEU] and [Article 101 TFEU] read together.

24 Whilst it is true that Member States may not enact measures enabling private undertakings to escape the constraints imposed by [Article 101 TFEU], the provisions of that article belong to the rules on competition "applying to undertakings" and are thus intended to govern the conduct of private undertakings in the common market. They are therefore not relevant to the question whether legislation such as that involved in the cases before the national court is compatible with [Union] law.

Costs

25 The costs incurred by the Commission of the European [Union], which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the prosecutions pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Arrondissementsrechtbank, Utrecht, by judgments of 1 June 1982, hereby rules:

1.[Article 34 TFEU], which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of [Article 101 TFEU], which seeks to maintain effective competition between undertakings. A court called upon to consider whether national legislation is compatible with [Article 34 TFEU] must decide whether the measure in question is capable of hindering, directly or indirectly, actually or potentially, intra- [Union] trade. That may be the case even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways.

2. In order to decide whether legislation of a Member State which, as regards the sale of tobacco products to the consumer, imposes a fixed price freely chosen by the manufacturer or importer constitutes a measure having an effect equivalent to a quantitative restriction, the national court must investigate whether, having regard to the fiscal restraints on trade in the products concerned, such a system of imposed prices is in itself likely to hinder, directly or indirectly, actually or potentially, trade between Member States.

3. The provisions of [Article 101 TFEU] are not relevant to the question whether legislation such as that involved in the cases before the national court is compatible with [Union] law.

Robert Schütze European Union Law Unboxed Cases

Koopmans	O'Keeffe	Bosco

Delivered in open court in Luxembourg on 5 April 1984.

J. A. Pompe Deputy Registrar	T. Koopmans President of the First Chamber

Robert Schütze European Union Law Lisbonised Cases