

Kluwer Competition Law Blog

Does the restriction upon the retail sale of tobacco products below the minimum prices set by manufacturers or importers on the tax stamp breach competition law?

Eleonora Mateina (Tsvetkova, Bebov and Partners) · Thursday, May 19th, 2016

On 21 April 2016, the Advocate General Nils Wahl issued his Opinion in Case C-221/15 – a proceeding initiated by a request for preliminary ruling from the Brussels Court of Appeal. The case concerns the compliance of the prohibition upon retailers to sell tobacco products below the price indicated on the tax stamps by manufacturers and importers of tobacco products with the principle of free movement of goods within the European Union (“EU”) as well as with EU competition law. Mr. Wahl suggests that the European Court of Justice (the “**Court of Justice**”) accept that as far as manufacturers and importers are free to determine the retail prices of their tobacco products, the restriction upon retailers to sell tobacco products below the prices indicated on the tax stamps could hardly be seen as problematic.

The facts and the legal acts

The proceedings before the Court of Justice had been initiated after an appeal of the decision of a first instance court in Belgium by the supermarket chain “Colruyt Group” before the Brussels Court of Appeal. The core of the dispute is the prohibition of any action directly or indirectly promoting tobacco products in Belgium. The negative reaction of the Belgian authorities was provoked when the supermarkets of Colruyt Group offered a discount to members of youth groups as well as discounts for quantity. The discounts actually resulted in a retail price of tobacco products below the price on the tax stamps indicated by the manufacturers or the importers of the respective tobacco product.

Belgian authorities alleged that such promotion activity contradicts the provision prohibiting any marketing activities related to tobacco products. The Belgian first instance court agreed. “Colruyt Group” challenged the decision before the Brussels Court of Appeal on the ground that Belgian law is incompatible with the principle of free movement of goods, with Council Directive 2011/64/EU on the structure and rates of excise duty applied to manufactured tobacco, as well as with Art. 34 (quantitative restrictions on imports and other equivalent measures) and Art. 101 (prohibited agreements) of the Treaty for Functioning of the European Union (“**TFEU**”). Following the appeal, the second instance court requested the Court of Justice to rule on the following preliminary questions: (i) Does Article 15(1) of Directive 2011/64/EU, whether or not read in conjunction with Articles 20 and 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000, preclude a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than

the price that the manufacturer/importer has affixed to the revenue stamp?; **(ii)** Does Article 34 TFEU preclude a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price that the manufacturer/importer has affixed to the revenue stamp?; and **(iii)** Does Article 4(3) [TEU], (6) read in conjunction with Article 101 TFEU, preclude a national measure which requires retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price that the manufacturer/importer has affixed to the revenue stamp?

Suggested answers and reasoning

In respect of the **first question**, the Advocate General suggests the Court of Justice to provide a negative answer, i.e. that the member states are not precluded to oblige the retailers to respect minimum prices by prohibiting the application of a price for tobacco products which is lower than the price that the manufacturer or the importer has indicated on the tax stamp. Under Art. 15 (1) of Directive 2011/64/EU the manufacturers and importers of tobacco products should be free to determine the maximum retail selling price for each of their products for each member state where the products are to be released for consumption. In Mr. Wahl's view, Belgian law does not impose restrictions on manufacturers and importers of tobacco products to determine freely the maximum retail price of the tobacco products they are producing or importing. Therefore, **(i)** they are able to compete on prices, since they can offer prices lower than the maximum value set by Belgian authorities and simultaneously **(ii)** the rules for determination of the tax base of proportional excise duties are the same in all member states. With regard to the retailers, the Advocate General considers that they are outside the scope of Directive 2011/64/EU.

Concerning the **second question**, Mr. Wahl suggest the Court to rule that Art. 34 TFEU does not prevent the member states from prohibiting the retailers to sell the tobacco products at prices lower than those indicated on the tax stamps. According to the Advocate General's Opinion, Art. 34 prohibiting any quantitative restrictions on imports or measures having equal effect does not apply since there are no specific restrictions imposed on any economic operator manufacturing, importing or selling tobacco products, i.e. all market players are treated equally under Belgian law. This approach of the Advocate General follows the judgment in case C-267/91 ("**Keck and Mithouard**"), where the Court accepted that national measures prohibiting certain selling arrangements do not constitute breach of Art. 34 TFEU as far as such restrictions are applicable to all participants on the respective market. Mr. Wahl admits that retailers' options available for competition on prices are considerably restricted, but that they are not eliminated. As a remedy, the Advocate General suggests retailers to negotiate lower prices with manufacturers and importers of tobacco products.

With regard to the **third question** – potential breach of Art. 101 TFEU, Mr. Wahl considers there is no indication that Belgium requires or encourages adoption of agreements, decisions or actions contrary to the above article. Consequently, the Advocate General rejects the argument for breach of Art. 101 TFEU, unfortunately without in-depth analysis of the argument.

Conclusion

It is a well-established trend in and outside the European Union to (over-)regulate the tobacco sector due to health considerations and to the controversial character of the products sold. Despite the facts that **(i)** the Advocate General's Opinion is not mandatory for the Court of Justice; **(ii)** the sections dedicated to competition concerns have not been entirely elaborated from a legal and

economic point of view and (iii) not all member states prohibit the marketing activities related to tobacco products, manufacturers and importers of tobacco products in the member states will not be wrong to take into consideration the Opinion when preparing their discount programs, since the national regulators and legislators may adopt some elements of its reasoning.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

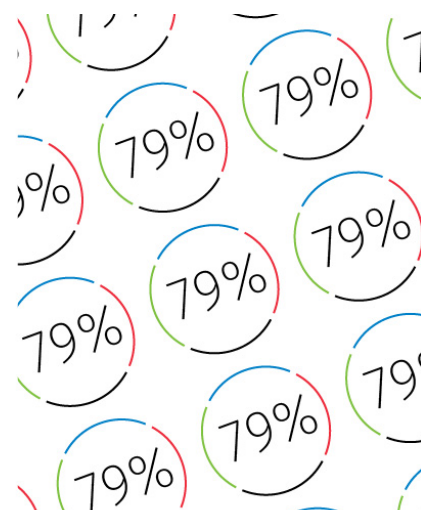
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Thursday, May 19th, 2016 at 1:43 pm and is filed under [Source: OECD“>Antitrust, European Union](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.

