

# The CJEU Assesses Another Minimum Pricing Measure Without Properly Contextualising it

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Case C-221/15 *Criminal proceedings against Etablissements Fr. Colruyt NV* [2016]  
ECLI:EU:C:2016:704

## I. Background

Minimum unit pricing (MUP) has been available to policy makers as a public health intervention for several decades. However, MUP only appears to have attracted intense scrutiny in recent years, in response to the (successful) efforts of the Scottish Government to apply it to alcoholic beverages.<sup>1</sup> The heterogeneous nature of the alcoholic beverages market and the many and varied types of consumers and consumption patterns for alcoholic beverages<sup>2</sup> have made attempts to introduce MUP for alcohol an extremely controversial topic.<sup>3</sup>

In comparison, MUP of other products such as tobacco, which has been employed far longer in comparison and has generated far more case law,<sup>4</sup> has not attracted the same level of academic or public scrutiny that minimum unit pricing of alcohol is now attracting. This may change following the latest judgment on MUP for tobacco that has recently been handed down by the Court of Justice of the European Union (CJEU) in *Etablissements Fr. Colruyt*.<sup>5</sup> The aim of this contribution is to assess the quality and significance of this judgement.

The case was referred to the CJEU for a preliminary ruling by the Belgian Court of Appeal, in the

course of criminal proceedings against Colruyt, a supermarket chain operator, who was alleged to have breached the 1977 Law on the protection of consumer health in relation to foodstuffs and other goods. Colruyt was found to be selling tobacco products at unit prices lower than those indicated by the manufacturer or importer on the revenue stamp fixed to each tobacco product, with quantity and general discounts, and with discounts to members of a youth movement. In doing so, Colruyt was found by the Belgian court at first instance to have breached the general prohibition laid down by the 1977 Law on all communication or acts that are directly or indirectly aimed at promoting sales of tobacco products.

The Belgian rule, designed to protect consumer health by, amongst other things, preventing the price of tobacco products from being used as a marketing tool, has solid grounding in the available evidence on promotional pricing of tobacco products. In an era where stringent control of tobacco products and tobacco producers is high on the global agenda,<sup>6</sup> and where considerable legislation has already been introduced to prevent tobacco producers from advertising their products to consumers,<sup>7</sup> the retail environment is becoming an increasingly crucial frontier of tobacco control.<sup>8</sup> Price promotion at point of sale

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1 For background, see: Srinivasa Katikireddi et al, "Understanding the Development of Minimum Unit Pricing of Alcohol in Scotland: A Qualitative Study of the Policy Process" (2014) 9(3) PLOS ONE e91185. The legitimacy of the Scottish policy was recently upheld in *The Scotch Whisky Association and Others v Lord Advocate* [2016] CSIH 77.

2 See Peter Anderson and Ben Baumberg, *Alcohol in Europe: A Public Health Perspective* (Institute of Alcohol Studies 2006), p. 75.

3 See for example: Shona Hilton et al, 'Implications for alcohol minimum unit pricing advocacy: What can we learn for public health from UK newsprint coverage of key claim-makers in the policy debate' (2014) 102 *Social Science and Medicine* 157.

4 See for example: Case C-13/7 *GB-INNO-BM* [1977] ECLI:EU:C:1977:185, Case C-216/98 *Commission v Greece* [2000] ECLI:EU:C:2000:571, Case C-197/08 *Commission v France* ECLI:EU:C:2010:111.

5 Case C-221/15 *Criminal proceedings against Etablissements Fr. Colruyt NV* [2016] ECLI:EU:C:2016:704.

6 See: *WHO Report on the Global Tobacco Epidemic, 2008: The MPOWER package* (World Health Organisation 2008). See also Framework Convention on Tobacco Control (21 May 2003, entered into force 27 February 2005) 2303 UNTS 166.

7 Directive 2003/33 on the advertising and sponsorship of tobacco products [2003] OJ L 152, 20.6.2003, p16.

8 Simon Chapman and Becky Freeman, 'Regulating the tobacco retail environment: beyond reducing sales to minors' (2009) 18 *Tobacco Control* 496.

has been found to be a prevalent and important technique for promoting tobacco products,<sup>9</sup> in particular to young people.<sup>10</sup> The concern of the Belgian Law to prevent, in particular, retail pricing strategies being used as a tool to promote the sale of tobacco products to youth groups, as Colruyt was alleged to have been doing, is therefore evidentially well founded.<sup>11</sup>

Colruyt however objected that the 1977 Law prevents, specifically, retailers from selling tobacco products at prices lower than those set by the manufacturer or importer, and therefore appealed to the Belgian Court of Appeal on three legal grounds. First, that the Belgian Law is contrary to Article 15(1) of Directive 2011/64 on tobacco excise duty, which provides that 'manufacturers ... and importers ... shall be free to determine the maximum retail selling price for each of their products'.<sup>12</sup> Second that the Belgian Law is caught by the prohibition in Article 34 TFEU on quantitative restrictions on imports and measures having equivalent effect to a quantitative restriction. Third, that the Belgian Law is contrary to Articles 4(3) TEU and 101 TFEU which, when read together, require Member States to avoid encouraging anti-competitive practices. The case was referred to the CJEU, and following the Opinion of Advocate General (AG) Wahl in April 2016, the CJEU delivered its judgment in September.

## II. The Opinion of the AG and the Judgment of the CJEU

The AG and CJEU both deal with the first question with relative ease. In previous case law on tobacco MUP, the fixing of minimum prices by government

was problematic, since by necessity a producer's maximum price could be no lower than the minimum price.<sup>13</sup> However, the minimum unit price in this case is fixed at whatever price the *producer* has determined. Therefore the AG saw 'no difficulties' in holding that the Belgian Law and Article 15(1) of the Directive did not conflict, because 'the revenue stamp price continues to be freely determined by manufacturers or importers ... therefore the law at issue does not interfere with the right ... to freely set their maximum retail price'.<sup>14</sup> As the CJEU points out, this situation falls outside the scope of Article 15(1) entirely.<sup>15</sup>

The second question, however, leads to far less convincing analysis. The AG and the CJEU both hold that the Belgian Law evades capture by Article 34 TFEU entirely because it is a non-discriminatory selling arrangement. According to *Keck*,<sup>16</sup> measures do not hinder intra-Union trade when they apply equally to all relevant traders and affect all traders in the same manner in law and in fact.<sup>17</sup> However, case law indicates that such measures, if restrictions on product promotion, *can* hinder intra-Union trade due to the extra burden they place on imported products attempting to break onto the market of another Member State.<sup>18</sup> Given that the economic freedom of retailers is 'severely reduced'<sup>19</sup> by the Belgian Law, that the second question is asked solely in relation to tobacco pricing being used as a promotional tool,<sup>20</sup> that price is an important promotional tool for tobacco products,<sup>21</sup> and the ease with which previous public health measures have been judged to hinder intra-Union trade,<sup>22</sup> it might be reasonable to suspect that preventing retailers from using price as a promotional tool would fall within the scope of Article 34 TFEU.

9 Dionysis Spanopoulos et al, 'Retail Price and Point of Sale Display of Tobacco in the UK: A Descriptive Study of Small Retailers' (2012) 7(1) PLoS ONE e29871.

10 Sandy Slater et al, 'The Impact of Retail Cigarette Marketing Practices on Youth Smoking Uptake' (2007) 161 Archives of Pediatrics and Adolescent Medicine 440.

11 See further support for the evidential effectiveness of minimum unit pricing in tackling price promotions in Lisa Henriksen, 'Comprehensive tobacco marketing restrictions: promotion, packaging, price and place' (2012) 21 Tobacco Control 147.

12 Council Directive 2011/64/EU on excise duty applied to manufactured tobacco [2012] OJ L 176, 5.7.2011, p. 24.

13 See for example: Case C-197/08 *Commission v France* ECLI:EU:C:2010:111, para. 37.

14 Opinion of Advocate General Wahl in Case C-221/15 *Criminal proceedings against Etablissements Fr. Colruyt NV* [2016] ECLI:EU:C:2016:288, para. 24.

15 *supra*, note 5, paras. 27 to 29.

16 Case C-267/91 *Keck and Mithouard* [1993] ECLI:EU:C:1993:905.

17 *ibid*, para. 16.

18 See for example Case C-34/95 *De Agostini* [1997] ECLI:EU:C:1997:334, para. 42; Case C-405/98 *Gourmet* [2001] ECLI:EU:C:2001:135, para. 21.

19 *supra*, note 14, para. 36.

20 *supra*, note 14, para. 49.

21 See Frank Chaloupka et al, 'Tax, price and cigarette smoking: evidence from the tobacco documents and implications for tobacco company marketing strategies' (2002) 11(Suppl 1) Tobacco Control i62.

22 For instance, see the cases of: C-1/90 *Aragonesa* [1991] ECLI:EU:C:1991:327, para. 10; Case C-333/14 *Scotch Whisky* [2015] ECLI:EU:C:2015:845, para. 32; Case C-405/98 *Gourmet* [2001] ECLI:EU:C:2001:135, para. 21.

Instead, both the AG and the Court hold that the Belgian law *does not* hinder intra-Union trade. The AG assumes that the freedom of retailers to set price is 'not completely eliminated' because 'at least in theory, nothing prevents retailers (especially larger retailers) from negotiating with manufacturers and importers ... with a view to setting a price for the products lower than that usually practiced'.<sup>23</sup> This analysis is troubling though. It is based on a questionable theoretical assumption - it is not automatic that manufacturers and retailers will be able to negotiate in such a predictable way, the market power balance between the two being a complex and shifting phenomenon.<sup>24</sup> Furthermore, this is the second recent example of EU judicial institutions basing legal analyses of MUP measures on questionable assumptions of business practice. In *Scotch Whisky* the CJEU wrongly assumed, based on the tobacco context, that taxes on alcoholic beverages would always be passed on to the end consumer.<sup>25</sup>

Conversely, the CJEU ignores altogether the legal question of whether restrictions on free formation of retail prices for tobacco hinder intra-Union trade in the same way as restrictions on tobacco producers, focussing entirely upon the impact of the measure on producers. According to the CJEU, the Belgian Law does not affect the ability of importers of tobacco from other Member States to set prices, and therefore if all manufacturers or importers, irrespective of nationality, 'remain free to set that price', the Belgian Law is 'not of such a kind as to prevent access to the Belgian market'.<sup>26</sup> In light of the CJEU's market access jurisprudence,<sup>27</sup> this reasoning is surprising, especially since in *GB-INNO-BM* a very similar Belgian measure gave the Court cause to state that 'the possibility cannot be excluded that in certain cases such a system may be capable of affecting intra-Community trade'.<sup>28</sup> Considering the increasing importance of retail pricing strategy as a marketing tool for tobacco, the possibility that market access may be hindered by MUP measures that affect *retailers specifically* deserved greater attention and contextualisation.

On the third question, the AG responded that 'there is no basis for concluding that a law such as the one at issue compels importers, manufacturers or retailers to conclude anti-competitive agreements'.<sup>29</sup> Yet, he bases his response to the second question on the suggestion that retailers should enter into agreements with producers to fix lower prices if they wish

to sell tobacco at lower prices. The CJEU then claims that the Belgian Law does not compel producers and retailers to 'conclude agreements'.<sup>30</sup> The reasoning adopted on the third question appears confusingly contradictory, and again deserves greater explanation than either the CJEU or the AG are willing to provide.

By not entertaining the possibility that restrictions on tobacco retailers may be incompatible with internal market law, the CJEU has lost an opportunity to examine the proportionality of intervention in the tobacco retail environment for public health purposes. This is unsatisfactory – while a favourable decision here will *prima facie* benefit public health, a better outcome might have been a clearer explanation of exactly when the imposition of MUP will conflict with internal market law.

### III. Implications

The main impact of this case is to legitimise the practice of preventing retailers from discounting tobacco products any further than the price set by their manufacturer or importer, in order to prevent such discounting being used as a tool to promote the sale of tobacco. However, is such a mechanism really required in order to prevent the price of tobacco being used as a marketing tool? In case it might have escaped notice as a result of the scrutiny placed on MUP, the Belgian Law in this case was a general prohibition on the promotion of tobacco products through any and all means. Colruyt simply complained that this prohibition would unlawfully encapsulate a prohibition on the ability of retailers to freely form prices

23 *supra*, note 14, para. 56.

24 See for example: Kusum Ailawadi et al, 'Market power and performance: A cross-industry analysis of manufacturers and retailers' [1995] 71(3) *Journal of Retailing* 211; C Kuo et al, 'Pricing Policy in a Supply Chain: Negotiation or Posted Pricing' (2013) 22(3) *Production and Operations Management* 626.

25 Case C-333/14 *Scotch Whisky* [2015] ECLI:EU:C:2015:845, para. 44. See also: Oliver Bartlett, 'Minimum Unit Pricing for Alcohol May Not be a Proportionate Public Health Intervention' [2016] 1 *European Journal of Risk Regulation* 218.

26 *supra*, note 5, para. 39.

27 See the case law cited above, in addition to cases which demonstrate that restrictions post-importation may have an effect on market access, for example: Case C-142/05 *Mickelsson and Roos* [2009] ECLI:EU:C:2009:336.

28 *GB-INNO-BM*, *supra* note 4, para. 54.

29 *supra*, note 14, para. 63.

30 *supra*, note 5, para. 45.

for tobacco products. Indeed, the majority of EU Member States already have laws that ban price promotions and promotional discounting for tobacco.<sup>31</sup> Member States are also actively encouraged to adopt such measures by Article 13 of the Framework Convention on Tobacco Control.<sup>32</sup>

Thus, the public health objectives that are achieved by a tobacco MUP applied specifically to retailers that reflects a price fixed by producers are practically the same as those sought by general prohibitions on promotional discounting, meaning that the significance of the ruling in *Etablissements Fr. Colruyt* for public health advocacy is arguably low. Perhaps one way in which this ruling could be seen as helpful is that it increases legal consistency in how MUP as a tool is applied to different types of products that are harmful to health. Following the ruling of the CJEU in *Scotch Whisky*, and the very recent ruling of the Inner House of the Scottish Court of Session, fixing an MUP for alcohol is compatible with Article 34 TFEU – the public health objectives sought through applying a minimum unit price to alcohol cannot be achieved as effectively by other methods such as increased taxation according the Inner House, and are appropriate to achieve a legitimate objective that may justify restrictions on intra-Union trade according to the CJEU.<sup>33</sup> Previous to *Etablissements Fr. Colruyt*, applying a minimum unit price to tobacco had been unlawful under the current EU tax directives. After *Etablissements Fr. Colruyt*, it has now at least been established that some form of minimum unit pricing may be applied to both alcohol and tobacco products, thus increasing the legitimacy of the intervention as a generally applicable tool of public health protection.

However, if this case is not overly significant in itself as a boost to the armory of public health advocates, why then is it worthy of attention? One potential reason is that *Etablissements Fr. Colruyt* raises concerns for public health advocacy of a more general nature. The true significance of this case lies in providing further evidence of the fact that the CJEU

seems unable (or unwilling) to analyse legal issues relating to the legitimacy of MUP interventions within their public health or economic contexts. When the CJEU assessed MUP for alcoholic beverages in *Scotch Whisky*, it was unable to recognise that the significant distinctions between alcohol and tobacco as products made the application of jurisprudence developed in the tobacco context inappropriate in the alcohol context.<sup>34</sup> When the CJEU assessed MUP for tobacco in the present case, it did not recognise that the importance of the retail environment as a frontier of tobacco control and the importance of retail pricing strategies in driving sales of tobacco products might merit closer legal scrutiny of whether restrictions on retail pricing freedom constitute a justified or unjustified restriction of the free movement of goods. Given the seemingly extensive and easily engaged scope of Article 34 TFEU where public health measures are concerned, it seems incongruous that this particular public health measure should fall through the net. Certainly, we should not be unhappy that the CJEU has upheld the legitimacy of an MUP measure that contributes to protecting public health. However we might still, with good reason, be concerned that in doing so the CJEU has created a somewhat opaque ‘exception’ for restrictions on retail pricing strategies for tobacco, an exception that cannot be fully explained by the fact that the MUP is effectively being set by tobacco producers rather than the government. Thus, the real significance of this case for public health advocacy may lie in confirming that the EU judicial institutions have a worryingly underdeveloped understanding of the context in which specific economic instruments of public health protection have been designed to function.

*Etablissements Fr. Colruyt* stands as a missed opportunity for the CJEU to clarify the extent to which public health objectives justify the restriction of economic activity. As stated above, the significance of this case for public health protection is relatively minor. However, looking to the bigger picture, if this missed opportunity really does confirm a trend that the EU judicial institutions seem unable to analyse the legality of public health measures within their public health and economic contexts, what future opportunities for clarifying the legal legitimacy of other economic instruments of public health protection might be missed? The next one may fall in circumstances where the stakes for public health are far higher.

31 WHO Report on the global tobacco epidemic 2013: Enforcing bans on tobacco advertising, promotion and sponsorship (World Health Organization 2013), p. 140.

32 See: Guidelines for the implementation of Article 13 of the WHO Framework Convention on Tobacco Control, available online at [http://www.who.int/fctc/guidelines/article\\_13.pdf](http://www.who.int/fctc/guidelines/article_13.pdf) (last accessed 1 November 2016).

33 *Scotch Whisky Association v Lord Advocate*, supra, note 1.

34 See Bartlett, supra, note 25.