Provisional text

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 4 July 2018 (1)

Case C-220/17

Planta Tabak-Manufaktur Dr. Manfred Obermann GmbH & Co. KG
v
Land Berlin

(Request for a preliminary ruling from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany))

(Reference for a preliminary ruling — Approximation of laws — Manufacture, presentation and sale of tobacco products — Directive 2014/40/EU — Article 7(1) and (7) — Prohibition on the placing on the market of tobacco products with characterising flavours — Article 7(14) — Transitional period for tobacco products with a characterising flavour whose European Union-wide sales volumes represent 3% or more in a particular product category — Assessment of validity — Principle of equal treatment — Article 13(1)(c) — Interpretation — Prohibition on any element or feature that refers to taste, smell, flavourings or other additives or the absence thereof — Application to tobacco products containing a characterising flavour whose sale is still permitted after 20 May 2016)

I. Introduction

1. By its questions referred for a preliminary ruling, the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) asks the Court of Justice about the validity and interpretation under EU law of a number of provisions of Directive 2014/40/EU of the Council and of the European Parliament of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, and repealing Directive 2001/37/EC. (2)

2. Those questions are referred in proceedings between Planta Tabak-Manufaktur Dr. Manfred Obermann GmbH & Co. KG (‘Planta Tabak’), a tobacco manufacturer, and the Land Berlin (Land of Berlin, Germany), concerning whether the German rules transposing the directive apply to the products which that undertaking markets.

3. The referring court's many questions invite the Court to examine afresh certain aspects already discussed in its judgments of 4 May 2016, *Poland* v *Parliament and Council* (3)and *Philip Morris Brands and Others*, (4) in particular the prohibition on the placing on the market of tobacco products with characterising flavours and the rules for the presentation of tobacco products that prohibit all elements or features likely to encourage use of those products, under Article 7(1) and (7) and Article 13(1) of Directive 2014/40 respectively.

4. As requested by the Court of Justice, I will however confine this Opinion to analysing the following two aspects. I will examine initially whether the first prohibition is valid in the light of the principle of equal treatment, in so far as, in Article 7(14) of Directive 2014/40, the EU legislature laid down a transitional period that applies to tobacco products with a characterising flavour whose EU-wide sales volumes are 3% or more in a particular product category. I will then look at how the second provision should be interpreted, to determine whether it prohibits any mention, on the tobacco products with a characterising flavour that can still be sold, of the flavour they contain.

5. I will propose that the Court should reply, on the one hand, that Article 7(1), (7) and (14) of Directive 2014/40 does comply with the principle of equal treatment and, on the other hand, that Article 13(1) of that directive does effectively prohibit any mention of a characterising flavour on the packaging of the products whose sale is still permitted.

II. Legal context

A. Directive 2014/40

6. Recitals 16, 25 and 27 of Directive 2014/40 state:

'(16) The likelihood of diverging regulation is further increased by concerns over tobacco products having a characterising flavour other than one of tobacco, which could facilitate initiation of tobacco consumption or affect consumption patterns. Measures introducing unjustified differences of treatment between different types of flavoured cigarettes should be avoided. However, products with characterising flavour with a higher sales volume should be phased out over an extended time period to allow consumers adequate time to switch to other products.

...

(25) The labelling provisions should also be adapted to new scientific evidence. For example, the indication of the emission levels for tar, nicotine and carbon monoxide on unit packets of cigarettes has proven to be misleading as it leads consumers to believe that certain cigarettes are less harmful than others ...

...

(27) Tobacco products or their packaging could mislead consumers, in particular young people, where they suggest that these products are less harmful. This is, for example, the case if certain words or features are used, such as the words "low-tar", "light", "ultra-light", "mild", "natural", "organic", "without additives", "without flavours" or "slim", or certain names, pictures, and figurative or other signs. Other misleading elements might include, but are not limited to, inserts or other additional material such as adhesive labels, stickers, inserts, scratch-offs and sleeves or relate to the shape of the tobacco product itself. Certain packaging and tobacco products could also mislead consumers by suggesting benefits in terms of weight loss, sex appeal, social status, social life or qualities such as femininity, masculinity or elegance. Likewise, the size and appearance of individual cigarettes could mislead consumers by creating the impression that they are less harmful ...'

7. Article 1 of that directive, 'Subject matter', provides:

‘The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States on:

a) the ingredients and emissions of tobacco products and related reporting obligations, including the maximum emission levels for tar, nicotine and carbon monoxide for cigarettes;

b) certain aspects of the labelling and packaging of tobacco products ...;

...

in order to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people, and to meet the obligations of the Union under the WHO Framework Convention for Tobacco Control (“FCTC”).’

8. Article 7 of that directive, ‘Regulation of ingredients’, provides:

‘1. Member States shall prohibit the placing on the market of tobacco products with a characterising flavour.

...

7. Member States shall prohibit the placing on the market of tobacco products containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity. Filters, papers and capsules shall not contain tobacco or nicotine.

...

12. Tobacco products other than cigarettes and roll-your-own tobacco shall be exempted from the prohibitions laid down in paragraphs 1 and 7. The Commission shall adopt delegated acts in accordance with Article 27 to withdraw that exemption for a particular product category, if there is a substantial change of circumstances as established in a Commission report.

...

14. In the case of tobacco products with a characterising flavour whose Union-wide sales volumes represent 3% or more in a particular product category, the provisions of this Article shall apply from 20 May 2020.

...’

9. According to Article 13 of that directive, ‘Product presentation’:

‘1. The labelling of unit packets and any outside packaging and the tobacco product itself shall not include any element or feature that:

a) promotes a tobacco product or encourages its consumption by creating an erroneous impression about its characteristics, health effects, risks or emissions; labels shall not include any information about the nicotine, tar or carbon monoxide content of the tobacco product;

b) suggests that a particular tobacco product is less harmful than others or aims to reduce the effect of some harmful components of smoke or has vitalising, energetic, healing, rejuvenating, natural, organic properties or has other health or lifestyle benefits;

c) refers to taste, smell, any flavourings or other additives or the absence thereof;

...

3. The elements and features that are prohibited pursuant to paragraphs 1 and 2 may include but are not limited to texts, symbols, names, trademarks, figurative or other signs.'

B. German law

10. Directive 2014/40 was transposed in Germany by, in particular, the Gesetz über Tabakerzeugnisse und verwandte Erzeugnisse (Law on tobacco products and related products) of 4 April 2016 (BGBl. 2016 I, p. 569, 'the TabakerzG'), which came into force on 20 May 2016.

11. Article 5 of the TabakerzG', 'Ingredients', provides:

'The following may not be placed on the market:

1. cigarettes and roll-your-own tobacco that:

   a) have a characterising flavour or

   b) contain flavourings in their components, or any technical features allowing modification of the smell, taste or smoke intensity; …'

12. Paragraph 18 of the TabakerzG, 'Prohibitions intended to protect consumers from being misled' provides:

'…

(2) no tobacco products may be placed on the market where misleading advertising information is displayed on the unit packets, outside packaging or on the tobacco product itself. That is the case where, in particular:

...

c) advertising information refers to a taste, smell or flavour or the absence thereof.

...'

13. Article 47 of the TabakerzG, 'Transitional provisions', states, in paragraph 4:

'In the case of cigarettes and roll-your-own tobacco whose Union-wide sales volumes represent 3% or more in a particular product category, the provisions of Article 5(1)(1)(a) shall apply from 20 May 2020.'

III. The main proceedings, the questions referred and the procedure before the Court of Justice

14. Planta Tabak is a family-owned business that manufactures and distributes various kinds of tobacco products. Before Directive 2014/40 came into force, one of that company's specialities was flavoured roll-your-own tobacco. Mentholated tobacco accounted for the largest share of those products. The company also distributes a small range of — mostly flavoured — cigarettes, waterpipe tobacco and, to a lesser extent, cigarillos, cigars and smokers' articles.

15. On 4 April 2016 the German legislature adopted the TabakerzG in order to transpose Directive 2014/40. On 25 April 2016 Planta Tabak brought proceedings before the Verwaltungsgericht Berlin (Administrative Court, Berlin), disputing that the provisions of that law relating to the prohibition on the placing on the market of tobacco products with a characterising flavour, health warnings and product presentation rules apply to the tobacco products it manufactures and distributes. That court entertains

doubts as to whether the corresponding provisions of that directive are valid and how they should be interpreted.

16. Accordingly, by an order of 21 April 2017, received by the Court of Justice on 27 April 2017, the Verwaltungsgericht Berlin (Administrative Court, Berlin) stayed the proceedings and referred the following questions, among others, to the Court of Justice for a preliminary ruling:

‘1. … [(5)]

(b) Is Article 7(1) and (7) of Directive 2014/40/EU in conjunction with Article 7(14) of Directive 2014/40/EU invalid on the ground of breach of the principle of equal treatment because it differentiates, as regards the prohibitions to be adopted by Member States, on the basis of sales volumes, without any valid reason for doing so?

...

3. (a) Must Article 13(1)(c) in conjunction with Article 13(3) of Directive 2014/40/EU be interpreted as meaning that Member States are required to prohibit the use of information referring to taste, smell, flavourings or other additives even where that information is not promotional information and the use of the ingredients is still permitted?

(b) Is Article 13(1)(c) of Directive 2014/40/EU invalid on the ground that it infringes Article 17 of the Charter of Fundamental Rights of the European Union? [(6)]’

17. Planta Tabak, the Spanish, French, Hungarian, United Kingdom and Norwegian Governments, the European Parliament, the Council of the European Union and the European Commission lodged written observations with the Court.

18. Planta Tabak, the Spanish and United Kingdom Governments, the Parliament, the Council and the Commission appeared at the hearing on 21 March 2018.

IV. Analysis

A. The validity of Article 7(1), (7) and (14) of Directive 2014/40 in the light of the principle of equal treatment (Question 1 (b))

1. Preliminary observations

19. Prominent among the various contributions that Directive 2014/40 makes to the EU rules on tobacco is the prohibition on the placing on the market of products with a characterising flavour, (7) that it establishes in Article 7(1). Article 7(7) prohibits, inter alia, tobacco products containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity. At the present time, those prohibitions only affect cigarettes and roll-your-own tobacco. (8)

20. By adopting those prohibitions, the EU legislature intended to remove vanilla, chocolate and mentholated tobacco products from the market. Recital 16 of Directive 2014/40 sets out the reasons for this. Essentially, the legislature considered that those products can facilitate initiation of tobacco consumption or affect consumption patterns, particularly for young people. As the Court of Justice has noted, those flavours mask or reduce tobacco smoke’s harshness and contribute to promoting and sustaining tobacco use. (9)

21. Those prohibitions took effect, in principle, on 20 May 2016, the date by which the Member States had to transpose Directive 2014/40. (10) However, Article 7(14) of that directive provides that tobacco

products with a characterising flavour whose Union-wide sales volumes represent 3% or more in a particular product category (11) can still be placed on the market until 20 May 2020. (12)

22. In the view of Planta Tabak, shared by the referring court, Article 7(14) of Directive 2014/40 gives rise to an unjustified difference in treatment between comparable tobacco products and, accordingly, breaches the principle of equal treatment. Specifically, whilst it is generally agreed that menthol cigarettes enjoy the transitional period under that article, (13) that period does not, according to the information available to Planta Tabak, apply to mentholated roll-your-own tobacco. (14) Nor does that period apply to tobacco products with other flavours such as vanilla or eucalyptus. However, all those products, Planta Tabak submits, have identical objective characteristics and present the same risks to human health.

23. I note that, in both the *Poland* v *Parliament and Council* and (15)*Philip Morris Brands and Others* (16) judgments, the Court of Justice has already ruled on whether the prohibitions on the placing on the market of tobacco products with a characterising flavour, under Article 7(1) and (7) of Directive 2014/40, are valid in the light of the principle of proportionality. On the other hand, it has not yet addressed whether those provisions, in conjunction with Article 7(14) of that directive, are valid in the light of the principle of equal treatment.

24. It is worth noting here that the principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. (17)

25. Among the provisions to which the referring court's question relates, Article 7(14) of Directive 2014/40 establishes such a difference in treatment. That article sets up a distinction between tobacco products with a characterising flavour, based on the sales volume of each product in a particular product category. This means that, for example, on the one hand, menthol cigarettes, whose EU-wide sales volume exceeds 3% in the 'cigarette' category, and, on the other, cigarettes with a less common flavour whose sales do not reach that threshold, are treated differently. The former can be put into circulation until 20 May 2020; the latter had to be withdrawn from the market on 20 May 2016.

26. Accordingly, it is necessary to ascertain, first, whether tobacco products with a characterising flavour that do not reach the 3% threshold under Article 7(14) of Directive 2014/40 and those which do reach that threshold are in comparable situations (1). Assuming the situations are comparable, it will be necessary, secondly, to evaluate whether the different treatment they receive is objectively justified (2).

2. Comparability of the situations

27. According to the case-law of the Court of Justice, 'the comparability of different situations must be assessed with regard to all the elements which characterise them. These elements must in particular be determined and assessed in the light of the subject matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account'. (18)

28. In the light of the positions of the parties, applying that 'test' to the present case raises (19) a preliminary question: should the comparability of the situations in question be assessed in the light of the *general objectives pursued by Directive 2014/40*, or of the *aims specific to Article 7(14)*, or of both of those considerations?

29. Since in its case-law the Court of Justice analyses the question in two stages — whether the situations are comparable; whether there is objective justification — logic suggests proceeding as follows. At the comparability stage, it is necessary to establish whether the situations involved are, *in principle,* comparable in the light of the aims generally pursued by the instrument in question. The justification stage, if any, determines whether, *in respect of a specific provision of that instrument*,despite the situations being comparable in principle, there are specific considerations compatible with the subject matter and purpose of that instrument that justify a difference in treatment.

30. Accordingly, in order to compare the situation of the tobacco products having a characterising flavour that exceed the 3% threshold of sales in a particular category with that of products not reaching that threshold, it is necessary, to my mind, to look at the general objectives pursued by Directive 2014/40. The specific aims of Article 7(14) of that directive should in my view be analysed at the objective justification stage.

31. As regards the objectives of Directive 2014/40, it is important to note that according to Article 1, the directive pursues a double, if not to say triple, objective. That objective is to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people, and to meet the obligations of the Union under the World Health Organisation Framework Convention for Tobacco Control (FTCT). (20)

32. In the light of that triple objective, the EU legislature has taken the view that all tobacco products with a characterising flavour must, in principle, (21) be subject to the same set of legal rules. It considers that all those products can facilitate initiation of tobacco consumption or affect consumption patterns. Adopting harmonising measures under Article 114 TFEU was therefore intended precisely to avoid 'measures introducing unjustified differences of treatment between different types of flavoured cigarettes'. (22) Those measures sought to eliminate and prevent any divergences between national rules on the use of ingredients giving a characterising flavour to tobacco, in general.

33. What is more, the FCTC, which the EU legislature was seeking to implement, does not distinguish between tobacco products with a characterising flavour. The Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC call in particular for the removal of ingredients that increase the palatability of the product, without in any way distinguishing between the various flavours that can be added in tobacco products. (23)

34. The Court of Justice took the same approach in its judgments of 4 May 2016, *Poland* v *Parliament and Council* and *Philip Morris Brands and Others*, (24) holding that the various types of tobacco products with a characterising flavour have, on the one hand certain similar, objective characteristics and, on the other, similar effects as regards initiating tobacco consumption and sustaining tobacco use.

35. I conclude from the foregoing that all the flavoured tobacco products falling under the prohibitions on characterising flavours in Article 7(1) and (7) of Directive 2014/40 are in comparable situations for the purposes of applying the principle of equal treatment, and their sales volumes in the EU are completely irrelevant in that regard.

3. Whether there is objective justification

36. According to the settled case-law of the Court of Justice, a difference in treatment is justified 'if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment'. (25)

37. Since Directive 2014/40 is an EU legislative act, it is for the EU legislature to demonstrate the existence of an objective criterion, providing the Court with the information necessary to do so. (26)

38. Nevertheless, the Court of Justice holds that the EU legislature must be allowed broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The Court does not seek to substitute its own assessment for that of the legislature. It confines itself to carrying out a limited judicial review, focusing on detecting where a measure might be *manifestly inappropriate* to the objective that the legislature in question sought to achieve. (27) In relation specifically to review of whether the principle of equal treatment is upheld, reproach lies against *arbitrary* differences in treatment, that is to say, those which are *manifestly* not based on objective criteria appropriate to the aim pursued. (28)

39. In the present case, recital 16 of Directive 2014/40 provides a first justification for the difference in treatment introduced in Article 7(14). According to that recital, tobacco products with characterising flavour with a higher sales volume should be phased out over an extended time period '*to allow consumers adequate time to switch to other products*'. (29)

40. The Parliament, Council and Commission state in that respect in their observations that the legislature intended to take into account the fact that certain characterising flavours are particularly well established among consumers and are, therefore, very important to their consumer habits. Those habits can only disappear gradually.

41. Moreover, in its *Poland* v *Parliament and Council* and *Philip Morris Brands and Others* (30) judgments, the Court of Justice identified another underlying justification for the transitional period under Article 7(14) of Directive 2014/40. Analysing the validity of the prohibition on the placing on the market of tobacco products with a characterising flavour in the light of the principle of proportionality, the Court held that the transitional period in question is *intended also to give the tobacco industry time to adapt*. (31)

42. Both those justifications have the same rationale: avoiding certain economic and social consequences likely to follow from a sudden prohibition on products heavily manufactured and consumed in the Union.

43. The *travaux préparatoires* of Directive 2014/40 also reveal that, during the legislative process, the idea had been put forward of not prohibiting mentholated tobacco products, regarded as being well established among consumers. The transitional period under Article 7(14) of Directive 2014/40 seems in fact to be at least in part the outcome of a political compromise between proponents of exempting those products completely from the prohibition on characterising flavours, on the one hand, and those advocating that it should apply to those products, on the other. (32)

44. The referring court is unsure whether those reasons are compatible with the objective of protecting human health pursued by Directive 2014/40. However, in my view, in such a complex, sensitive and economically important field such as the rules governing tobacco, the EU legislature has not exceeded the broad discretion available to it by introducing a phased prohibition on the placing on the market of tobacco products with a characterising flavour.

45. It is significant in that regard that the EU legislature only temporarily deferred the entry into force of the prohibition on certain tobacco products with a characterising flavour. To my mind, it was open to the legislature to implement the objective of protecting human health gradually by establishing derogations of limited scope and appropriate transitional periods. (33)

46. The Court of Justice has moreover consistently held that where the EU legislature is called upon to regulate a complex situation, it can follow a step-by-step approach, provided its choice is based on objective criteria appropriate to the aims pursued. (34)

47. Withdrawing from the market first of all niche products and then the products that are well established among consumers, relying, for that purpose, on the sales volume in a particular product category does, to my mind, satisfy those requirements.

48. On the one hand, a criterion of that kind is *objective* in terms of the products it covers. Any product, irrespective of its characteristics, can enjoy the transitional period under Article 7(14) of Directive 2014/40, provided the sales volume reaches the threshold set. Admittedly, as noted above, (35) the amendments proposed by the Parliament which led to that article were aimed expressly at menthol and menthol-flavoured products. Nevertheless, the legislature quite clearly reconsidered its approach and, ultimately, adopted a neutral criterion.

49. The sales volume criterion is also neutral in terms of manufacturers. The legislature relied not on their respective market shares, but on the global sales of each product. As regards Planta Tabak's argument

that the majority of the tobacco products that exceed the 3% threshold under Article 7(14) are distributed by the few tobacco multinationals, whilst the niche products are manufactured essentially by small or medium-sized enterprises, the truth of that claim cannot be verified from the case file available to the Court. It emerges from the case file that the applicant in the main proceedings does itself produce flavoured cigarettes and the Council asserts, without being challenged, that the multinationals also distribute niche products. In any event, even assuming that argument were found to be correct, that circumstance is not, to my mind, decisive. The effects of any policy will disadvantage someone. As stated in point 38 of this Opinion, what is important for the EU court is that the distinction between those who benefit and those who are disadvantaged should not be based on an arbitrary criterion. In the present case, that criticism cannot be levelled against the choice of the sales volume criterion.

50. In fact, that criterion is moreover *appropriate* to the various stated aims, that is to say, giving consumers time to change their well established habits and the industry time to adapt. (36) In that respect, sales volumes, in so far as they indicate where supply and demand intersect, reflect both well established consumer patterns and the economic importance of the EU tobacco production affected by the prohibition on characterising flavours.

51. In other respects, as the Commission submits, the criterion of EU sales volume also makes sense in the light of the legal basis underlying Directive 2014/40, that is to say, Article 114 TFEU, and of the harmonising objective that directive pursues. The impact of the prohibition of certain products on the functioning of the internal market in fact depends, to a certain extent, on the magnitude of the trade between the Member States. Here too, the criterion in question provides an indication of that trade.

52. It is also my view that the legislature did not exceed its discretion by choosing a threshold of 3% of the EU-wide sales volume in a particular product category. It was reasonable for it to consider that a sales volume of 3% in a particular product category reflects significant consumption patterns and production.

53. In the light of the foregoing, I consider the difference in treatment between comparable tobacco products introduced in Article 7(14) of Directive 2014/40 to be objectively justified. That article is therefore, to my mind, valid in the light of the principle of equal treatment.

B. Interpretation of Article 13(1)(c) of Directive 2014/40 (Question 3(a))

54. Since the prohibitions under Article 7(1) and (7) of Directive 2014/40 came into force on 20 May 2016, it has no longer been possible to sell most tobacco products with a characterising flavour in the European Union.

55. A number of those products can nevertheless still be manufactured and distributed lawfully in the European Union after that date. On the one hand, as alluded to in relation to Question 1(b), (37) tobacco products with a characterising flavour whose Union-wide sales volumes represent 3% or more in a particular product category — that is to say, in particular, menthol cigarettes — will be prohibited only from 20 May 2020. On the other hand, tobacco products other than cigarettes and roll-your-own tobacco — that is to say, among others, pipe tobacco, cigars and cigarillos — can still, indefinitely, be put into circulation. (38)

56. However, under Article 13(1)(c) of Directive 2014/40 the labelling of unit packets, outside packaging and the tobacco products themselves must not contain '*any element or feature*'that'*refers to taste, smell, any flavourings or other additives or the absence thereof*'. Article 13(3) provides that the elements and features prohibited in that way include among others '*texts, symbols, names, trade marks, figurative or other signs*'. (39)

57. Planta Tabak is of the view, which the referring court shares, that this creates a paradox, in which tobacco manufacturers, whilst they can lawfully distribute certain tobacco products with a characterising flavour, cannot however indicate the flavour they contain on the labelling of the unit packets, outside packaging or the products themselves. (40)

58. However, according to Planta Tabak, without any such indication consumers cannot identify flavoured or, conversely, unflavoured tobacco products. Besides those practical considerations, the prohibition under Article 13(1)(c) of Directive 2014/40 creates an economic problem. In so far as the prohibited elements and features include trade marks, (41) tobacco manufacturers are, Planta Tabak argues, forced to abandon those of their marks that refer to taste, smell, flavourings or other additives.

59. Against that background, the referring court invites the Court of Justice to clarify whether Article 13(1)(c) of Directive 2014/40 is aimed only at elements of features *with a promotional or advertising purpose*, that go beyond *merely giving information* about the presence of a taste, smell, flavouring or other additive in a particular tobacco product, or whether *even mentioning such information is prohibited*. (42)

60. In *Philip Morris Brands and Others*, (43) the Court of Justice held that the prohibition, in Article 13(1)(c) of Directive 2014/40, on any element or feature on the labelling of unit packets, outside packaging or the tobacco products themselves that refers to taste, smell or any flavourings or other additives, applies whether or not the information in question is factually accurate.

61. Likewise, it is to my mind beyond doubt that Article 13(1)(c) prohibits even neutral, non-promotional indications, and its wording is not amenable to any other interpretation.

62. As the Commission observes, the wording of Article 13(1)(c) contains no indication that it is limited to promotional or advertising information. It refers to all (‘*any*’) of the elements or features that ‘*refer to*’ taste, smell or any flavourings or other additives. This impression that the provision is of general application is reinforced when one reads Article 13(3), which states that the prohibited elements and features ‘may include but are not limited to’ texts, symbols, names, trademarks, figurative ‘or other’ signs.

63. Moreover, although, in Article 13(1)(a), (b) and (e), the EU legislature used words which could possibly suggest the notion of a degree of advertising for a particular product (‘promotes’; ‘encourages’; ‘suggests’), the expression ‘refers to’ in paragraph (c), on the other hand, merely reflects whether or not, objectively, information about taste, smell or any flavourings or other additives is included on the unit packets, outside packaging or on the tobacco products themselves. (44)

64. Moreover, recitals 25 and 27 of Directive 2014/40 bear out that interpretation. It is clear from those recitals that the EU legislature sought to prohibit all elements in the presentation of tobacco products that could mislead consumers, in particular young people, as to their potential to harm. In that regard, in the light of the available scientific evidence, the legislature took the view that certain terms (‘low-tar’, ‘light’, ‘ultra-light’, ‘mild’, ‘natural’, ‘organic’, ‘without additives’, ‘without flavours’, and so forth) and certain names, images and signs could create an erroneous impression of that nature. (45)

65. The EU legislature therefore did not intend merely to *regulate* the elements and features displayed on tobacco product packaging, focusing on promotional claims, in particular false claims or those attributing effects to certain ingredients. It *hasprohibited* any mention of certain information proven to have the effect of encouraging consumers, even where that information is true and is presented in a neutral and non-promotional form. (46)

66. Admittedly, recitals 25 and 27 of Directive 2014/40 do not refer expressly to indications of the presence of taste, smell, flavours or other additives in a particular tobacco product — and mention only indications of the absence of those elements. The legislature’s rationale is nevertheless clear: *merely giving information*, on the labelling of unit packets, outside packaging and the tobacco products themselves, relating to the presence of taste, smell, flavours or other additives in a particular tobacco product can, *in itself*, minimise the harmful effects of that product on human health and, thereby, encourage its use and is, for that reason, prohibited. (47)

67. Nor is there any doubt, to my mind, that, for the tobacco products with a characterising flavour that can still lawfully be manufactured and distributed after 20 May 2016, (48) Article 13(1)(c) of Directive

2014/40 prohibits any indication of the flavour they contain, on the unit packets, outside packaging or those products themselves.

68. It is worth recalling that, according to the definition given to it in that directive, a characterising flavour means '*a clearly noticeable smell or taste ... resulting from an additive or a combination of additives ...*' (49)Article 13(1)(c) therefore contains a twofold prohibition on indicating any such characterising flavour on the packaging of the products in question: on the one hand, as a reference to taste or smell; on the other hand, as a reference to the additive or additives resulting in that taste or smell.

69. Furthermore, in Directive 2014/40 the EU legislature did not establish any derogation from Article 13(1)(c) in respect of those products which are still permitted. (50) That is all the more remarkable in so far as such a derogation does exist, in contrast, for electronic cigarettes and herbal products for smoking. (51)

70. The fact that the tobacco products with a characterising flavour whose sale is still permitted are included within the scope of application of Article 13(1)(c) of Directive 2014/40 is therefore due to a deliberate decision by the legislature. In my view the Court of Justice cannot, in exercise of its interpretative powers, stand in the place of the legislature by introducing distinctions into that directive which the legislature has not made. (52)

71. Any discussion of whether it is still necessary to indicate the flavours they contain on the packaging of the tobacco products with a characterising flavour that are still permitted will therefore take place instead on examination of the referring court's Question 3 (b) (53) on the validity of Article 13(1)(c) of Directive 2014/40 in the light of the right to property enshrined in Article 17 of the Charter. Since this Opinion does not address that question, I will confine myself, so far as is relevant, to highlighting the following considerations.

72. Whether, like the United Kingdom Government in its observations, one considers that the rights conferred by a trade mark registration are exclusively *negative* — entitling the proprietor to prevent third parties from doing certain acts — or whether one sees a trade mark as also conferring on its proprietor a *positive* right to use it, use of a trade mark is in any event, to my mind, subject to complying with the law, in particular the provisions corresponding to an overriding purpose such as protecting human health, (54) which include Article 13(1)(c) of Directive 2014/40.

73. Admittedly, Planta Tabak disputes that the provision in question is necessary to that objective. According to that company, in so far as certain tobacco products are exempt from the prohibitions on placing on the market under Article 7(1) and (7) of that directive, that same objective does not dictate that the flavours they contain should be removed from the packaging of those products.

74. Equally, however, protecting human health, in particular the health of young people, weighs in favour of eliminating any indication of a characterising flavour on the packaging of the tobacco products still permitted.

75. In that respect, the products that enjoy the exemption under Article 7(12) of Directive 2014/40, which are mainly consumed by older consumers and small groups of the population, (55) remain under close watch. In that context, eliminating elements of presentation likely to encourage the use of those products is justified in order to prevent vanilla cigarillos from replacing menthol cigarettes as a gateway to smoking for young people. (56) As regards the tobacco products that enjoy the transitional period under Article 7(14), I would observe, in common with the Parliament and the French Government, that this transitional period is not intended to give tobacco manufacturers more time to attract new consumers. Those products must immediately cease to be attractive, which means, in particular, removing any indication of a characterising flavour on the packaging of the products in question.

76. Nor, in my view, is there any doubt as to whether Article 13(1)(c) of Directive 2014/40 is proportionate in terms of a purported requirement to keep consumers properly informed. In certain fields,

including that of food, consumers must indeed be given information about the ingredients in the products they consume, so that they can identify and make appropriate use of a food and make choices that suit their individual needs. (57)

77. However, tobacco products are not ordinary commodities. The aim is not to enable consumers to choose more easily between different products. Here, giving consumers appropriate information amounts essentially to highlighting the particularly harmful effects of tobacco on their health. As the United Kingdom Government and the Commission state, in essence, transparency about ingredients gives way to the objective of preventing any information that might lead consumers to forget those effects.

78. In other respects, it is important not to overstate the practical consequences of the prohibition under Article 13(1)(c) of Directive 2014/40. In particular, tobacco manufacturers can still distinguish products containing a characterising flavour from the others, provided they do not use any of the elements listed in Article 13(1)(a) to (e). (58)

V. Conclusion

79. In the light of the foregoing considerations, I propose that the Court should answer Question 1 (b) and Question 3 (a) referred by the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) as follows:

(1) Consideration of Question 1 (b) has disclosed no factor of such a kind as to affect the validity of Article 7(1), (7) and (14) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

(2) Article 13(1)(c) of Directive 2014/40 must be interpreted as meaning that the Member States are required to prohibit the display of elements or features referring to taste, smell, flavours or other additives on the labelling of unit packets, external packaging or on tobacco products themselves, even where that information is not promotional information and the use of the ingredients in question is still permitted.

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1 Original language: French.

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2 OJ 2014 L 127, p. 1.

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3 C−358/14, EU:C:2016:323.

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4 C−547/14, EU:C:2016:325.

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5 In so far as this Opinion addresses certain specific aspects of this case, for the reason described in point 4 hereof, only the relevant questions are set out here. All the questions referred for a preliminary ruling can be found online and in the *Official Journal of the European Union* (OJ 2017 C 239, p. 25).

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6 ‘The Charter’.

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7 According to its definition in Article 2(25) of Directive 2014/40, this means a ‘clearly noticeable smell or taste other than one of tobacco, resulting from an additive or a combination of additives, including, but not limited to, fruit, spice, herbs, alcohol, candy, menthol or vanilla, which is noticeable before or during the consumption of the tobacco product’.

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8 In Article 7(12) of Directive 2014/40, the EU legislature included an exemption for other tobacco products — such as pipe tobacco, cigars and cigarillos — which will remain in place so long as there is no substantial change of circumstances in terms of sales volumes or consumption patterns among young people.

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9 Judgment of 4 May 2016, *Poland* v *Parliament and Council* (C−358/14, EU:C:2016:323, paragraphs 44 and 54).

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10 Under Article 29(1) of Directive 2014/40.

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11 Directive 2014/40 does not define ‘product category’. Its meaning can nevertheless be inferred from Article 2(14)(a) of that directive, which refers to ‘categories’ comprising cigarettes, roll-your-own tobacco, pipe tobacco, waterpipe tobacco, cigars, cigarillos, chewing tobacco, nasal tobacco or tobacco for oral use. In so far as Article 7(12) of that directive for the time being limits the prohibition on characterising flavours to cigarettes and roll-your-own tobacco, only those two product categories can fall within Article 7(14) of that directive.

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12 Further, Article 30 of Directive 2014/40 establishes arrangements for stocks to be used up, under which the Member States may allow tobacco products manufactured or released for free circulation before the date on which that directive came into force to be placed on the market until 20 May 2017.

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13 The Court of Justice has already held that menthol cigarettes enjoy that transitional period (see, to that effect, judgment of 4 May 2016, *Poland* v *Parliament and Council* (C−358/14, EU:C:2016:323, paragraph 100). It based its reasoning in that respect on the concurring statements of the parties in that case (see the Opinion of Advocate General Kokott in *Poland* v *Parliament and Council* (C−358/14, EU:C:2015:848, footnote 10).

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14 In contrast to the applicant in the main proceedings, the Council asserts that menthol roll-your-own tobacco, in the same way as menthol cigarettes, enjoys the transitional period under Article 7(14) of Directive 2014/40. However, that matter does not need resolving in this Opinion.

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15 Judgment of 4 May 2016 (C−358/14, EU:C:2016:323, paragraphs 78 to 104).

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16 Judgment of 4 May 2016 (C−547/14, EU:C:2016:325, paragraphs 168 to 191).

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17 See, among others judgments of 14 December 2004, *Arnold André* (C−434/02, EU:C:2004:800, paragraph 68); of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C−127/07, EU:C:2008:728, paragraph 23), and of 4 May 2016, *Pillbox38* (C−477/14, EU:C:2016:324, paragraph 35).

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18 Judgment of 12 May 2011, *Luxembourg* v *Parliament and Council* (C−176/09, EU:C:2011:290, paragraph 32 and the case-law cited).

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19 According to Planta Tabak, the various tobacco products capable of falling within Article 7(14) of Directive 2014/40 are in comparable situations *in the light of the objective of protecting human health* which that directive pursues. According to the Parliament, the Council and the Commission, in contrast, those various products are not in comparable situations *in the light of the aims of that article*, including that of giving consumers more time (see point 39 et seq. of this Opinion).

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20 Signed in Geneva on 21 May 2003.

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21 With the exception under Article 7(12) of Directive 2014/40.

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22 Recital 16 of Directive 2014/40.

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23 Section 3.1.2.2 of those guidelines. Document available at the following address: http://www.who.int/fctc/treaty_instruments/guidelines_articles_9_10_2017_french.pdf (last consulted on 25 June 2018).

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24 Judgments of 4 May 2016 (C−358/14, EU:C:2016:323, paragraphs 48 to 54) and (C−547/14, EU:C:2016:325, paragraph 114).

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25 Judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C−127/07, EU:C:2008:728, paragraph 47 and the case-law cited).

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26 See, to that effect, *Arcelor Atlantique et Lorraine and Others* (C−127/07, EU:C:2008:728, paragraph 48 and the case-law cited).

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27 See, in particular, judgments of 14 March 1973, *Westzucker* (57/72, EU:C:1973:30, paragraph 14); of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C−491/01, EU:C:2002:741, paragraph 123); and of 17 December 2015, *Neptune Distribution* (C−157/14, EU:C:2015:823, paragraph 76). See also, to that effect, my Opinion in *Swedish Match* (C−151/17, EU:C:2018:241, point 41).

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28 See, to that effect, judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C−127/07, EU:C:2008:728, paragraph 58 and the case-law cited).

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29 My italics.

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30 Judgments of 4 May 2016 (C−358/14, EU:C:2016:323, paragraphs 99, 100 and 102) and (C−547/14, EU:C:2016:325, paragraphs 187, 188 and 190).

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31 I would clarify, incidentally, that in my view, those two judgments must not be understood as meaning that the EU legislature must systematically establish a transitional period when it prohibits the manufacture and distribution of certain products. Admittedly, a transitional period can mitigate the economic and social consequences of such a prohibition and, in that way, makes it more proportionate. That does not mean it is an

indispensable condition, and a prohibition with no transitional period can be perfectly justified and necessary in the light of overriding considerations such as the protection of human health.

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32 By way of reminder, there was no provision equivalent to Article 7(14) in the Commission's Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (COM(2012) 788 final). That provision first appeared at the time of the Parliament's first reading of that proposal. Various amendments aimed at completely excluding mentholated tobacco products from the prohibition on characterising flavours had by then been put forward by parliamentary committees. The Internal Market and Consumer Protection Committee had suggested an amendment under which the Member States could have continued to permit 'certain traditional tobacco flavours which cannot be classified with the other tobacco flavours.Menthol shall be considered as traditional tobacco flavour'. The International Trade Committee and the Agriculture and Rural Development Committee also proposed amendments to that effect (see the report of the Environment, Public Health and Food Safety Committee and the opinions of the International Trade Committee, the Industry, Research and Energy Committee, the Internal Market and Consumer Protection Committee, the Agriculture and Rural Development Committee and the Legal Affairs Committee (A7-0276/2013)). The amendments adopted by the Parliament on 8 October 2013 (P7_TA (2013) 398) included the addition of a provision under which the prohibition on characterising flavours would not apply to 'the use of menthol in all its commercial forms known on the date of publication of this Directive ... for a period of five years ...'. Lastly, in its position adopted at first reading on 26 February 2014 (EP-PE_TC1-COD (2012) 366), the Parliament proposed inserting the last sentence of recital 16 and Article 7(14), both as now worded, and those provisions were retained on completion of the legislative procedure.

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33 See, by analogy, judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C−236/09, EU:C:2011:100, paragraphs 21 to 23).

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34 See, in particular to that effect, judgments of 29 February 1984, *Rewe-Zentrale* (37/83, EU:C:1984:89, paragraph 20); of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C−127/07, EU:C:2008:728, paragraph 63); of 17 October 2013, *Schaible* (C−101/12, EU:C:2013:661, paragraph 91); and of 4 May 2016, *Philip Morris Brands and Others* (C−547/14, EU:C:2016:325, paragraphs 63 and 134).

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35 See footnote 32 of this Opinion.

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36 Other considerations may also justify treating well-established products differently from niche products. In the present case, the Commission submits that withdrawing widely consumed flavoured tobacco products from circulation without a transitional period would risk the side effect of developing the illicit trade in those products. That risk is nevertheless small in the case of flavoured tobacco products not widely sold in the European Union. There would be negligible opportunity to make a profit from the illicit trade in those latter products, given the weak demand for them. I note however that the Court of Justice rejected a similar argument in its judgment of 4 May 2016, *Poland* v *Parliament and Council* (C−358/14, EU:C:2016:323, paragraph 88).

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37 See in particular point 21 of this Opinion.

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38 See Article 7(12) of Directive 2014/40. Mention can also be made of the tobacco products that enjoy the arrangements for stocks to be used up under Article 30 of that directive (see footnote 12 of this Opinion). Since those products represent only a very small proportion of the total, they will not be discussed in the rest of this Opinion.

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39 My italics.

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40 Planta Tabak distributes its products under names and brands which, quite naturally, refer to the flavour they contain, including ‘Rum and Maple’ and ‘PL 88 Menthol’ for roll-your-own tobacco, ‘Danish Black Vanilla Mixture’ and ‘McLintock Wild Cherry’ for pipe tobacco and ‘Unitas Excellent Lemon Mint’ and ‘Black Vanilla’ for cigarettes. Some of those products are still permitted after 20 May 2016, in particular the pipe tobacco products.

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41 Under Article 13(3) of Directive 2014/40.

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42 In her Opinions in *Poland* v *Parliament and Council* (C−358/14, EU:C:2015:848, point 28) and *Philip Morris Brands and Others* (C−547/14, EU:C:2015:853, point 224), Advocate General Kokott advocated a restrictive interpretation of Article 13(1)(c) of Directive 2014/40. In her view, for flavours whose use is, exceptionally, still authorised, that article does allow a neutral, non-promotional indication of those flavours to be made on the packaging, to enable consumers to identify those products.

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43 Judgment of 4 May 2016 (C−547/14, EU:C:2016:325, paragraph 141).

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44 In the other language versions of Directive 2014/40, the terms used in Article 13(1)(c) likewise reflect a prohibition on merely indicating those qualities (see, among others, ‘henviser’ in Danish; ‘beziehin’ in German; ‘refers to’ in English; ‘haga referencia’ in Spanish; ‘richiami’ in Italian; ‘hänvisar’ in Swedish).

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45 See also, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others* (C−547/14, EU:C:2016:325, paragraph 142).

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46 The emission levels for tar, nicotine and carbon monoxide eloquently illustrate this. 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), the predecessor of Directive 2014/40, strictly required those levels to be included on one side of the cigarette packet. However, in the light of new scientific data, the EU legislature found it to be proven that *merely indicating* those levels can, *in itself be misleading*,by leading consumers to believe that certain cigarettes are less harmful than others (see recital 25 of Directive 2014/40).

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47 The referring court is uncertain whether an indication, in a non-promotional form, of ingredients that are lawfully contained in a particular product has that effect of encouraging use. However, it is not for the Court of Justice, in the context of interpreting Article 13(1)(c) of Directive 2014/40, to revisit the legislature’s analysis on that point.

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48 Which, I note, include menthol cigarettes (until 2020) and pipe tobacco, water pipe tobacco, cigars and flavoured cigarillos.

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49 Article 2(25) of Directive 2014/40, the text of which can be found in footnote 7 of this Opinion (my italics).

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50 Article 11 of Directive 2014/40 does indeed contain specific rules on the labelling of tobacco products for smoking other than cigarettes, roll-your-own tobacco and water pipe tobacco — that is to say, certain of the products that can still contain a characterising flavour. However, that article establishes only that Member States can exempt those other tobacco products from the obligations to carry the information message laid down in Article 9(2) of that directive and the combined health warnings laid down in Article 10.

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51 Under Article 20(4)(b) of Directive 2014/40, unit packets and any outside packaging of electronic cigarettes and refill containers must in all cases: include a *list of all ingredients contained in the product* and without prejudice to the foregoing obligation, must not include any of the elements or features referred to in Article 13, *with the exception of Article 13(1)(a) and (c)* concerning information on the nicotine content and *on flavourings*. Article 21(4) of that directive establishes similar provisions for herbal products for smoking.

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52 See, to that effect, the Opinion of Advocate General Mischo in *Cipriani* (C−395/00, EU:C:2002:209, points 62 and 63), reiterating the Roman law adage *Ubi lex non distinguit nec nos distinguere debemus* (where the law does not distinguish, nor should we distinguish).

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53 That question reflects Planta Tabak's thesis that Article 13(1)(c) of Directive 2014/40 infringes its fundamental right to property. According to the applicant in the main proceedings, that article prevents the proprietors of the trade marks in question from enjoying their property by making reasonable or relevant use of them. By reason of its economic effects, that prohibition is, it claims, akin to formal expropriation.

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54 Even if the Court finds that a trade mark does confer a positive right of that nature on its proprietor and that Article 13(1)(c) of Directive 2014/40 entails a restriction on that right, that article must, to my mind, be seen as regulating use of the trade marks in question (Article 17(1), third sentence of the Charter) instead of as a deprivation of those rights (Article 17(1), second sentence of the Charter), and it neither casts doubt on the validity of those trade marks nor prevents them from being used other than on the packaging of tobacco products. Nor does Article 13(1)(c) of Directive 2014/40 impair the very substance of those rights. That article in fact merely prevents the elements that it lists from being included in those marks. Manufacturers can still distinguish their products by using other signs. The function of trade marks of indicating origin is therefore not adversely affected (see, to that effect, judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C−491/01, EU:C:2002:741, paragraphs 152 and 153).

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55 See recitals 19 and 26 of Directive 2014/40.

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56 On that point, it is clear from Article 7(12), in conjunction with recital 19 of Directive 2014/40, that the exemption from the prohibitions on placing on the market that applies to those specific products will remain in place only as long as there is no substantial change of circumstances in terms of sales volumes or consumption patterns of young people.

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57 See, for example, recitals 3, 4 and 17 and Article 3(1) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council, of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ 2011 L 304, p. 18).

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58 The United Kingdom Government noted in that respect that the colour of tobacco product packaging can be adapted, for example using green for mentholated products. Moreover, reading indications on the packaging of tobacco products is not the only means consumers have of knowing what the products contain. They can also obtain information from retailers in order to identify the flavoured products. The Court of Justice has furthermore already rejected arguments of that kind based on the need to give consumers clear and precise information (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 160).