

Provisional text

JUDGMENT OF THE COURT (First Chamber)

30 January 2019(\*)

(Reference for a preliminary ruling — Approximation of laws — Validity of Directive 2014/40/EU — Manufacture, presentation and sale of tobacco products — Regulation of ‘ingredients’ — Prohibition of flavoured tobacco products)

In Case C-220/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 21 April 2017, received at the Court on 27 April 2017, in the proceedings

**Planta Tabak-Manufaktur Dr. Manfred Obermann GmbH & Co. KG**

v

**Land Berlin,**

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President of the Court, acting as President of the First Chamber, A. Arabadjiev, E. Regan, C.G. Fernlund and S. Rodin (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: R. Şereş, administrator,

having regard to the written procedure and further to the hearing on 21 March 2018,

after considering the observations submitted on behalf of:

- Planta Tabak-Manufaktur Dr. Manfred Obermann GmbH & Co. KG, by T. Masing and C. Eckart, Rechtsanwälte,
- the Spanish Government, by S. Jiménez García, acting as Agent,
- the French Government, by R. Coesme and D. Colas, acting as Agents,
- the Hungarian Government, by G. Koós and Z. Fehér, acting as Agents,
- the United Kingdom Government, by S. Brandon, I. Rogers and Z. Lavery, acting as Agents,
- the Norwegian Government, by P. Wennerås, M. Schei and M. Reinertsen Norum, acting as Agents,
- the European Parliament, by L. Visaggio, U. Rösslein and J. Rodrigues, acting as Agents,
- the Council of the European Union, by P. Plaza García, E. Karlsson and R. Wiemann, acting as Agents,

– the European Commission, by M. Kellerbauer and J. Tomkin, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 4 July 2018,  
gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the validity of Article 7(1), (7) and (14), Articles 8 to 11, in particular the second subparagraph of Article 9(1), the second sentence of Article 9(4)(a), Article 9(6), Article 10(1)(b), (e) and (f), the first sentence of the first subparagraph of Article 11(1) and Article 13(1) (c), and the interpretation of Article 7(14) and Article 13(1)(c) and (3) 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 (OJ 2014 L 127, p. 1, and corrigendum OJ 2015 L 150, p. 24).
- 2 The request has been made in proceedings between Planta Tabak-Manufaktur Dr. Manfred Obermann GmbH & Co. KG ('Planta Tabak') and Land Berlin (the *Land* of Berlin, Germany) concerning the prohibition of placing certain tobacco products on the market and the rules on the labelling and packaging of tobacco products.

#### Legal context

- 3 According to recital 9 of Directive 2014/40:

'It is necessary to establish a number of new definitions in order to ensure that this Directive is uniformly applied by Member States. Where different obligations imposed by this Directive apply to different product categories and the relevant product falls into more than one of those categories (e.g. pipe, roll-your-own tobacco), the stricter obligations should apply.'

- 4 Recital 16 of that directive states:

'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.'

- 5 Article 1 of the directive provides:

'The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States ...

...

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 [World Health Organisation (WHO)] Framework Convention for Tobacco Control ("FCTC") [approved by Council Decision 2004/513/EC of 2 June 2004 concerning the conclusion of the WHO Framework Convention on Tobacco Control (OJ 2004 L 213, p. 8)].'

6 Article 2 of the directive provides:

‘For the purposes of this Directive, the following definitions shall apply:

...

(14) “novel tobacco product” means a tobacco product which:

- (a) does not fall into any of the following categories: cigarettes, roll-your-own tobacco, pipe tobacco, waterpipe tobacco, cigars, cigarillos, chewing tobacco, nasal tobacco or tobacco for oral use; ...

...’

7 Article 7 of the directive 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. ...

...

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.

...’

8 Articles 8 to 11 of the directive, which form part of Chapter II, ‘Labelling and packaging’, of Title II of the directive, contain respectively general provisions, provisions on general warnings and information messages on tobacco products for smoking, provisions on combined health warnings for tobacco products for smoking, and provisions on the labelling of tobacco products for smoking other than cigarettes, roll-your-own tobacco and waterpipe tobacco.

9 In accordance with Article 9 of the directive:

‘1. Each unit packet and any outside packaging of tobacco products for smoking shall carry one of the following general warnings:

“Smoking kills — quit now”

or

“Smoking kills”.

Member States shall determine which of the general warnings referred to in the first subparagraph is to be used.

...

4. The general warning and information message referred to in paragraphs 1 and 2 shall be:

- (a) printed in black Helvetica bold type on a white background. In order to accommodate language requirements. Member States may determine the font size, provided that the font size specified in national law ensures that the relevant text occupies the greatest possible proportion of the surface reserved for these health warnings; ...

...

6. The Commission shall, by means of implementing acts, determine the precise position of the general warning and the information message on roll-your-own tobacco marketed in pouches, taking into account the different shapes of pouches.'

10 Article 10 of the directive provides:

'1. Each unit packet and any outside packaging of tobacco products for smoking shall carry combined health warnings. The combined health warnings shall:

...

- (b) include smoking cessation information such as telephone numbers, email addresses or internet sites intending to inform consumers about the programmes that are available to support persons who want to stop smoking;

...

(e) appear at the top edge of a unit packet and any outside packaging, and be positioned in the same direction as any other information appearing on that surface of the packaging. Transitional exemptions from that obligation on the position of the combined health warning may apply in Member States where tax stamps or national identification marks used for fiscal purposes remain mandatory, as follows:

- (i) in those cases, where the tax stamp or national identification mark used for fiscal purposes is affixed at the top edge of a unit packet made of carton material, the combined health warning that is to appear on the back surface may be positioned directly below the tax stamp or national identification mark;
- (ii) where a unit packet is made of soft material, Member States may allow for a rectangular area to be reserved for the tax stamp or national identification mark used for fiscal purposes of a height not exceeding 13 mm between the top edge of the packet and the top end of the combined health warnings.

The exemptions referred to in points (i) and (ii) shall apply for a period of three years from 20 May 2016. Brand names or logos shall not be positioned above the health warnings;

...

(f) be reproduced in accordance with the format, layout, design and proportions specified by the Commission pursuant to paragraph 4;

...'

11 The first sentence of the first subparagraph of Article 11(1) of the directive provides:

‘Member States may exempt tobacco products for smoking other than cigarettes, roll-your-own tobacco and waterpipe tobacco from the obligations to carry the information message laid down in Article 9(2) and the combined health warnings laid down in Article 10.’

12 Article 13 of the directive provides:

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

...

(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.’

13 Under Article 29(1) of the directive:

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 May 2016. They shall forthwith communicate to the Commission the text of those provisions.

The Member States shall apply those measures from 20 May 2016, without prejudice to Articles 7(14), 10(1)(e), 15(13) and 16(3).’

14 Under Article 30 of the directive:

‘Member States may allow the following products, which are not in compliance with this Directive, to be placed on the market until 20 May 2017:

(a) tobacco products manufactured or released for free circulation and labelled in accordance with 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)] before 20 May 2016;

...’

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

15 Planta Tabak manufactures and markets tobacco products, in particular flavoured roll-your-own tobacco.

16 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’) transposed Directive 2014/40.

17 By application of 25 April 2016 to the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), Planta Tabak sought a declaration that certain provisions of the TabakerzG, relating to the prohibition of flavourings, shock photographs and the prohibition of advertising of flavourings, are not applicable to its products. Planta Tabak further argued that Article 7(1) and (7), Articles 8 to 11 and Article 13(1)(c) of Directive 2014/40 infringe primary EU law, in particular the principles of legal certainty, equal treatment and proportionality.

- 18 In the first place, the referring court entertains doubts as to the validity and interpretation of the provisions of Directive 2014/40 concerning the prohibition of flavourings in tobacco products, the rules on the labelling and packaging of tobacco products, and the prohibition of advertising of flavourings.
- 19 The referring court is uncertain, to begin with, as to the interpretation of Article 7(1), (7) and (14) of Directive 2014/40 and the conformity of that provision with the principle of legal certainty, as regards the prohibition from 20 May 2016 of placing on the market tobacco products with a characterising flavour where the EU-wide sales volume of those products is less than 3% in a particular product category, and from 20 May 2020 where that is not the case. The referring court explains that the tobacco manufacturers concerned are not in a position to obtain information on sales volumes at EU level, despite the introduction by the Commission, in Implementing Decision (EU) 2015/2186 of 25 November 2015 establishing a format for the submission and making available of information on tobacco products (OJ 2015 L 312, p. 5), of a reporting and information system intended in the medium term for the collection and making available of that information. Neither the Commission's website nor those of the competent German federal authorities contain information of that kind or indications of how to obtain it. The procedure to be followed for the application of the derogation in Article 7(14) of Directive 2014/40 is thus not clearly defined.
- 20 Next, the expression 'product category' in that provision is not defined by Directive 2014/40 and cannot be defined with certainty by means of interpretation. The referring court is uncertain, in particular, whether product categories are to be classified solely according to the kind of tobacco product or the kind of flavouring it contains, or whether those two criteria are to be combined (menthol cigarettes, mentholated fine-cut tobacco, etc).
- 21 The referring court observes, moreover, that, as regards the dates of application of the prohibitions of placing tobacco products on the market, Article 7 of that directive is contrary to the principle of equal treatment, in that it distinguishes between flavoured tobacco products according to their sales volume, although those products are in comparable situations from the point of view of the directive's objectives of protecting consumers' health and of eliminating obstacles to trade.
- 22 Furthermore, the referring court asks whether, having regard to the time limits laid down by Directive 2014/40, the prohibition of flavourings complies with the principle of proportionality and with Article 34 TFEU, bearing in mind the negative economic and social consequences for small and medium-sized undertakings specialising in 'niche products' whose market share at EU level is less than 3% and whose placing on the market is therefore prohibited from 20 May 2016.
- 23 In the second place, the referring court also mentions the shortness of the period ending on 29 May 2016 prescribed in Article 29(1) of Directive 2014/40 for the transposition of that directive and the commencement of the application of the national provisions, having regard to the dates of adoption of Commission Implementing Decision (EU) 2015/1735 of 24 September 2015 on the precise position of the general warning and the information message on roll-your-own tobacco marketed in pouches (OJ 2015 L 252, p. 49) and Commission Implementing Decision (EU) 2015/1842 of 9 October 2015 on the technical specifications for the layout, design and shape of the combined health warnings for tobacco products for smoking (OJ 2015 L 267, p. 5).
- 24 In this respect, the referring court asks whether, from the point of view of EU law, the national legislature is entitled generally to adopt its own transitional provisions. If the answer is in the negative, it then asks whether it is contrary to the principle of sincere cooperation laid down in Article 4(3) TEU, in conjunction with the principle of the uniform and effective application of EU law, to require the Member States to transpose Directive 2014/40 well before the expiry of the period laid down in Article 29(1) of the directive.
- 25 In addition, the referring court states that the temporal coincidence of the deadline for transposing Directive 2014/40 and the application of the national provisions is difficult to reconcile with the principle of proportionality. It considers that, without the detail added by Implementing Decisions 2015/1735 and 2015/1842 concerning inter alia the precise placing of the general warning and the information message on roll-your-own tobacco marketed in pouches, manufacturers would not have been able to plan and order

packaging and printing materials or, if necessary, to arrange for the conversion of the corresponding filling and packaging machines. There was a period of approximately seven months between the adoption of those decisions and the date of 20 May 2016 laid down in Article 29(1) of Directive 2014/40.

26 In the third place, the referring court is uncertain, having regard to the principle of proportionality, whether the mere mention of a flavouring or a substance producing a smell or taste, permitted in tobacco products, in a neutral, non-advertising form on the unit packet or outside packaging is allowed by Article 13(1)(c) of Directive 2014/40.

27 Finally, the referring court asks whether, by prohibiting the use of certain trade marks, Article 13(1)(c) of Directive 2014/40 constitutes a disproportionate expropriation for the purposes of the second sentence of Article 17(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). Trade mark proprietors to whom that provision applies are excluded from making any reasonable or relevant use of those marks and that exclusion affects them economically in the same way as a formal expropriation. The rules on labelling following from that provision have the consequence that trade mark proprietors are permanently deprived of certain essential possibilities of use referred to in Article 10 of Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (OJ 2015 L 336, p. 1).

28 In those circumstances, the Verwaltungsgericht Berlin (Administrative Court, Berlin) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) (a) Is Article 7(1) and (7) of Directive 2014/40 ... in conjunction with Article 7(14) of Directive 2014/40 ... invalid on the ground of breach of the principle of legal certainty because it requires Member States to prohibit the placing on the market of particular tobacco products even though it is not stated clearly and precisely which of those tobacco products are to be prohibited from as early as 20 May 2016 and which only from 20 May 2020?
- (b) Is Article 7(1) and (7) of Directive 2014/40 ... in conjunction with Article 7(14) of Directive 2014/40 ... 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?
- (c) Is Article 7(1) and (7) of Directive 2014/40 ... invalid on the ground of breach of the principle of proportionality and/or infringement of Article 34 TFEU because it requires Member States to prohibit, from as early as 20 May 2016, the placing on the market of tobacco products with a characterising flavour whose Union-wide sales volumes represent less than 3% in a particular product category?
- (d) If the answers to Question 1(a) to 1(c) are in the negative, how is the term "product category" in Article 7(14) of Directive 2014/40 ... to be understood? Must assignment to "product categories" be based on the type of characterising flavour, on the type of (flavoured) tobacco product, or on a combination of both criteria?
- (e) If the answers to Question 1(a) to 1(c) are in the negative, how is it to be ascertained, with respect to a particular tobacco product, whether the 3% limit in Article 7(14) of Directive 2014/40 ... has been reached, in the absence of any official and publicly accessible figures and statistics in that regard?
- (2) (a) When transposing Articles 8 to 11 of Directive 2014/40 ... into national law, are Member States allowed to adopt supplementary transitional arrangements?
- (b) If the answer to Question 2(a) is in the negative:

- Are Article 9(6) and Article 10(1)(f) of Directive 2014/40 ... invalid on the ground of breach of the principle of proportionality and/or infringement of Article 34 TFEU because they delegate the determination of certain labelling and packaging requirements to the Commission without setting it a time limit in that respect and without providing for more extensive transitional arrangements or time limits to ensure that undertakings affected have adequate time to adapt to the requirements of the directive?
  - Are the second subparagraph of Article 9(1) (text of the warning), the second sentence of Article 9(4)(a) (font size), Article 10(1)(b) (smoking cessation information) and (e) (positioning of the warnings), and the first sentence of the first subparagraph of Article 11(1) (labelling) of Directive 2014/40 ... invalid on the ground of breach of the principle of proportionality and/or infringement of Article 34 TFEU because they confer on Member States various rights of selection and design without setting them a time limit in that respect and without providing for more extensive transitional arrangements or time limits to ensure that undertakings affected have adequate time to adapt to the requirements of the directive?
- (3) (a) Must Article 13(1)(c) in conjunction with Article 13(3) of Directive 2014/40 ... be interpreted as requiring Member States 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 ... invalid on the ground that it infringes Article 17 of the Charter ...?’

### Consideration of the questions referred

#### *Question 1(a) to (c)*

29 By Question 1(a) to (c), the referring court essentially raises the question of the validity of Article 7(1), (7) and (14) of Directive 2014/40, having regard to the principles of legal certainty, equal treatment and proportionality and to Article 34 TFEU.

#### *Validity of Article 7(1), (7) and (14) of Directive 2014/40 having regard to the principle of legal certainty*

30 The referring court asks whether Article 7(1), (7) and (14) of Directive 2014/40, which requires the Member States to prohibit the placing on the market of certain tobacco products without specifying clearly and precisely which of those products must be prohibited from 20 May 2016 and which of them only from 20 May 2020, infringes the principle of legal certainty.

31 The principle of legal certainty indeed requires, according to settled case-law, that EU rules enable those concerned to know precisely the extent of the obligations which are imposed on them and that those persons must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (judgment of 25 July 2018, *Teglgård and Fløjstrupgård*, C-239/17, EU:C:2018:597, paragraph 52 and the case-law cited).

32 It must also be recalled, however, that it is not necessary for a legislative act itself to provide details of a technical nature, and that it is open to the EU legislature to have recourse to a general legal framework which is, if necessary, to be made more precise at a later date (see, to that effect, judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraphs 78 and 139).

33 The fact that Article 7(1), (7) and (14) of Directive 2014/40, first, does not specify the products with a particular characterising flavour whose EU-wide sales volumes represent 3% or more in a particular product category and, second, does not lay down a specific procedure for determining which products fall



within Article 7(14) of the directive does not mean that Article 7(1), (7) and (14) of the directive infringes the principle of legal certainty. In the absence of any legislation in this respect at EU level, it is for the Member States or, if appropriate, the manufacturers themselves to choose a reliable method capable of ensuring compliance with the requirement following from that provision (see, to that effect, judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 101).

34 In those circumstances, it must be considered that Article 7(1), (7) and (14) of Directive 2014/40 does not infringe the principle of legal certainty.

*Validity of Article 7(1), (7) and (14) of Directive 2014/40 having regard to the principles of equal treatment and proportionality and to Article 34 TFEU*

35 The referring court asks whether, because of the distinction between tobacco products according to sales volumes drawn by Article 7(14) of Directive 2014/40, that provision infringes the principle of equal treatment.

36 It must be recalled that the principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 35).

37 The comparability of different situations must be assessed with regard to all the elements which characterise them. Those elements must in particular be determined and assessed in the light of the subject matter and purpose of the EU 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 (judgment of 12 May 2011, *Luxembourg v Parliament and Council*, C-176/09, EU:C:2011:290, paragraph 32).

38 Directive 2014/40 pursues a twofold objective, according to Article 1, namely to facilitate the smooth functioning of the internal market in tobacco and related products while taking as a base a high level of protection of human health, especially for young people (judgment of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, paragraph 80).

39 To achieve the objective of facilitating the smooth functioning of the internal market in tobacco and related products, it is necessary, according to recital 16 of Directive 2014/40, to avoid measures introducing unjustified differences of treatment between different types of flavoured cigarettes.

40 Moreover, the Court found in the judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 114), that tobacco products containing a characterising flavour have similar objective characteristics and similar effects as regards initiating tobacco consumption and sustaining tobacco use.

41 Consequently, tobacco products with a particular characterising flavour whose EU-wide sales volume is less than 3% in a particular product category are not distinguished from tobacco products with a particular characterising flavour whose EU-wide sales volume represents 3% or more in a specific product category either from the point of view of the objective of facilitating the smooth functioning of the internal market in tobacco and related products or from the point of view of the objective of achieving a high level of protection of human health.

42 It follows that the flavoured products concerned by the prohibitions of 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.

43 However, as follows from the case-law cited in paragraph 36 above, a difference in treatment between comparable situations 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 is proportionate to

the aim pursued by the treatment (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 47).

44 On this point, the Court has acknowledged that, in the exercise of the powers conferred on it, the EU legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 57). The EU legislature was therefore able, in the exercise of its broad discretion, to proceed towards harmonisation only in stages and to require only the gradual abolition of the unilateral measures taken by the Member States (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraphs 63 and 134).

45 As regards the objectives pursued by Article 7(14) of Directive 2014/40, it may be seen from recital 16 of the directive that products with a characterising flavour representing a higher sales volume were to be phased out over an extended time period to allow consumers adequate time to switch to other products.

46 As the Advocate General observes in point 48 of his Opinion, the criterion of the sales volume of tobacco products with a characterising flavour in a particular product category does not target tobacco products containing a specific flavouring and is neutral with respect to manufacturers. The documents available to the Court do not show that tobacco products with a particular characterising flavour whose EU-wide sales volume is less than 3% in a particular product category are manufactured principally by small and medium-sized undertakings. That criterion must therefore be regarded as objectively justified.

47 Moreover, it must be considered appropriate for allowing consumers adequate time to switch to other products, thus allowing the economic consequences of the prohibition in Article 7 of Directive 2014/40 to be reconciled with the requirement of ensuring a high level of protection of human health.

48 As the Advocate General observes in point 50 of his Opinion, a criterion based on the sales volume of products, such as that at issue in the main proceedings, reflects consumption habits and the economic importance of the production of the products concerned.

49 In those circumstances, it must be concluded that Article 7(1), (7) and (14) of Directive 2014/40 does not infringe the principle of equal treatment.

50 Next, the referring court asks whether Article 7(1) and (7) of Directive 2014/40 is compatible with the principle of proportionality, as it prohibits the placing on the market of tobacco products with a characterising flavour whose market share at EU level is less than 3% in a particular product category.

51 According to settled case-law, the principle of proportionality requires that acts of the EU institutions must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, paragraph 78).

52 As regards judicial review of the conditions mentioned in the preceding paragraph, according to the case-law cited in paragraph 44 above, the EU legislature enjoys a broad discretion in an area such as that concerned in the present case, which involves political, economic and social choices and in which it is called on to undertake complex assessments.

53 Given the objective pursued by the prohibition of placing tobacco products with a characterising flavour on the market, it must be stated that the prohibition is also appropriate for ensuring a high level of protection of human health, especially for young people. It is not disputed that certain flavourings are particularly attractive to them and that they facilitate initiation of tobacco consumption (judgment of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, paragraphs 81 and 82).

54 In its judgments of 4 May 2016, *Poland v Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 102), and of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 190), the Court found that by Article 7(14) of Directive 2014/40 the EU legislature struck a balance between the economic consequences of the prohibition in Article 7 of that directive, on the one hand, and, on the other, the requirement to ensure a high level of protection of human health with regard to a product characterised by harmful properties.

55 It must therefore be concluded that the prohibition of the placing on the market of tobacco products with a characterising flavour does not go manifestly beyond what is necessary in order to attain the objective pursued.

56 In those circumstances, it must be concluded that Article 7(1), (7) and (14) of Directive 2014/40 does not infringe the principle of proportionality.

57 Furthermore, with reference to the referring court's doubts as to the compatibility of Article 7(1), (7) and (14) of Directive 2014/40 with Article 34 TFEU, it is clear that, although Article 7(1), (7) and (14) of that directive constitutes a restriction within the meaning of Article 34 TFEU, that restriction, as found in paragraph 54 above, is justified by the balancing of the economic consequences of the prohibition in Article 7 of Directive 2014/40 against the requirement to ensure a high level of protection of human health, and does not infringe the principle of proportionality. Consequently, Article 7(1), (7) and (14) of Directive 2014/40 does not infringe Article 34 either.

58 In the light of all the above considerations, the answer to Question 1(a) to (c) is that examination of that question has disclosed no factor of such a kind as to affect the validity of Article 7(1), (7) and (14) of Directive 2014/40.

#### ***Question 1(d) and (e)***

59 By Question 1(d) and (e), the referring court essentially asks the Court to interpret the concept of 'product category' in Article 7(14) of Directive 2014/40 and to explain the procedure to be followed in order to establish whether the 3% limit laid down in that provision is reached in the case of a particular tobacco product.

60 It must be recalled that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (judgment of 26 September 2018, *Baumgartner*, C-513/17, EU:C:2018:772, paragraph 23).

61 First, it should be observed that the expression 'product category', which appears in Article 7(14) of Directive 2014/40, is not defined in Article 2 of that directive, entitled 'Definitions'.

62 Next, as regards the context in which Article 7(14) of Directive 2014/40 occurs, it must be observed that, in accordance with Article 7(12) of Directive 2014/40, cigarettes and roll-your-own tobacco are the only tobacco products concerned by the prohibitions in Article 7(1) and (7) of the directive.

63 Moreover, in Article 2(14) of Directive 2014/40, which defines the term 'novel tobacco product', cigarettes and roll-your-own tobacco are presented as separate categories of tobacco product.

64 Roll-your-own tobacco is also mentioned as an example of a 'product category' in recital 9 of the directive.

65 Cigarettes are consequently a 'product category' within the meaning of Article 7(14) of Directive 2014/40, as is roll-your-own tobacco.

66 As regards the objectives pursued by Article 7(14) of Directive 2014/40, recital 16 of the directive states that 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.

- 67 In so far as the interpretation that cigarettes are a ‘product category’ within the meaning of Article 7(14) of Directive 2014/40, and roll-your-own tobacco is another one, is not contrary to those objectives, and in so far as identical terms used in the same EU act may be presumed to have the same meaning, the expression ‘product category’ within the meaning of that provision should not be interpreted differently from the same expression in other provisions of the directive.
- 68 Moreover, with regard to the method for establishing whether a particular tobacco product reaches the 3% limit at EU-wide level laid down in Article 7(14) of Directive 2014/40, in order to apply the derogation in that provision, it follows from the case-law cited in paragraph 33 above that in the absence of EU legislation it is for the Member States to establish a reliable method capable of ensuring compliance with the requirement following from that provision.
- 69 According to the documents before the Court, the Federal Republic of Germany, in accordance with that case-law, implemented Article 7(14) of Directive 2014/40 by laying down, in Paragraph 34(3) of the Verordnung über Tabakerzeugnisse und verwandte Erzeugnisse (Regulation on tobacco products and related products) of 27 April 2016 (BGBl. 2016 I, p. 980), the flavourings which tobacco products must contain for the prohibition of marketing those products to apply only from 20 May 2020.
- 70 In the light of the above considerations, the answer to Question 1(d) and (e) is that Article 7(14) of Directive 2014/40 must be interpreted as meaning, first, that the concept of ‘product category’ within the meaning of that provision covers cigarettes and roll-your-own tobacco and, second, that the procedure to be followed for determining whether a particular tobacco product reaches the 3% limit laid down in that provision must be established in accordance with the domestic law of the Member State concerned.

## *Question 2*

### Question 2(a)

- 71 By Question 2(a) the referring court asks essentially whether Articles 8 to 11 of Directive 2014/40 must be interpreted as allowing the Member States to determine transposition periods additional to those provided for in Articles 29(1) and 30(a) of that directive.
- 72 It must be observed that Article 29(1) of Directive 2014/40 provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 20 May 2016, and are to apply those measures from 20 May 2016, without prejudice inter alia to Article 7(14) of the directive.
- 73 Article 30 of the directive, headed ‘Transitional provision’, provides, however, in point (a) that the Member States may allow the placing on the market until 20 May 2017 of tobacco products manufactured or released for free circulation and labelled in accordance with Directive 2001/37 before 20 May 2016.
- 74 On the other hand, Articles 8 to 11 of Directive 2014/40 do not provide for transposition periods to take the place of those laid down in Articles 29 and 30 of the directive.
- 75 In the light of the above considerations, the answer to Question 2(a) is that Articles 8 to 11 of Directive 2014/40 must be interpreted as not allowing the Member States to determine transposition periods additional to those provided for in Articles 29 and 30 of that directive.

### Question 2(b)

- 76 By Question 2(b) the referring court asks, in the event of a negative answer to Question 2(a), whether the second subparagraph of Article 9(1), the second sentence of Article 9(4)(a), Article 9(6), Article 10(1)(b),

(e) and (f), and the first sentence of the first subparagraph of Article 11(1) of Directive 2014/40 infringe the principle of proportionality and Article 34 TFEU.

77 The referring court notes that Article 9(6) and Article 10(1)(f) of Directive 2014/40 delegate to the Commission the establishment of certain rules concerning the labelling and packaging of tobacco products, without setting the Commission a time limit for doing so and without providing for more precise transitional arrangements or time limits to ensure that undertakings affected have adequate time to adapt to the requirements of the directive.

78 As regards the principle of proportionality, it must be observed that, since general principles of law, which include that principle, form part of the EU legal order, they must be observed not only by the EU institutions but also by the Member States in the exercise of the powers conferred on them by EU directives (judgment of 2 June 2016, *ROZ-ŠWIT*, C-418/14, EU:C:2016:400, paragraph 20).

79 In the present case, in accordance with Article 32 of Directive 2014/40, that directive entered into force on 19 May 2014, while the Member States were required to apply the laws, regulations and administrative provisions necessary to comply with the directive by 20 May 2016, without prejudice inter alia to Article 7(14).

80 The period of two years that was available to the Member States for adopting those provisions in order to transpose Directive 2014/40 and ensure that the economic operators affected would have adequate time to adapt to the requirements of the directive is sufficient from the point of view of the principle of proportionality.

81 Moreover, Article 30 of Directive 2014/40 authorises the Member States to allow the placing on the market until 20 May 2017 of tobacco products manufactured or released for free circulation and labelled in accordance with Directive 2001/37 before 20 May 2016.

82 Furthermore, as regards the compliance with Article 34 TFEU of the second subparagraph of Article 9(1), the second sentence of Article 9(4)(a), Article 9(6), Article 10(1)(b), (e) and (f), and the first sentence of the first subparagraph of Article 11(1) of Directive 2014/40, it is clear that the principle of the free movement of goods does not preclude prohibitions or restrictions of imports, exports or goods in transit justified inter alia on grounds of protection of the health and life of humans (see, to that effect, judgment of 14 December 2004, *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 60).

83 It follows that the provisions of the second subparagraph of Article 9(1), the second sentence of Article 9(4)(a), Article 9(6), Article 10(1)(b), (e) and (f), and the first sentence of the first subparagraph of Article 11(1) of Directive 2014/40 must be regarded as consistent with the principle of proportionality and with Article 34 TFEU.

84 In those circumstances, the answer to Question 2(b) is that examination of that question has disclosed no factor of such a kind as to affect the validity of the second subparagraph of Article 9(1), the second sentence of Article 9(4)(a), Article 9(6), Article 10(1)(b), (e) and (f), and the first sentence of the first subparagraph of Article 11(1) of Directive 2014/40.

### **Question 3**

#### **Question 3(a)**

85 By Question 3(a) the referring court asks whether Article 13(1)(c) and (3) of Directive 2014/40 must be interpreted as requiring the Member States 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 concerned is still permitted.

86 In accordance with Article 13(1)(c) and (3) of Directive 2014/40, the labelling of unit packets, any outside packaging and the tobacco product itself cannot include any element or feature that refers to taste, smell, any flavourings or other additives or the absence thereof. Those elements and features may be represented inter alia by texts, symbols, names, trade marks, figurative or other signs.

87 Given that, according to the actual wording of Article 13(1)(c) of Directive 2014/40, tobacco products may not include ‘any element or feature’ that ‘refers’ to ‘any flavourings’, and that, according to the wording of Article 13(3) of the directive, those elements and features may include inter alia texts, symbols, names, trade marks or figurative signs that are not of a promotional nature, it must be considered that the EU legislature did not intend to draw a distinction between promotional and non-promotional information. That interpretation is borne out by the fact that, in contrast to the provisions of Article 13 of the directive, the EU legislature expressly provided in Article 20(4)(b) of the directive that unit packets and any outside packaging of electronic cigarettes and refill containers are not to include elements or features referred to in Article 13 of the directive, with the exception of Article 13(1)(c) of the directive, on the presence or absence of flavourings.

88 Moreover, as the Advocate General observes in point 78 of his Opinion, tobacco products with a characterising flavour can still be distinguished from other tobacco products, provided they do not include any of the elements listed in Article 13(1)(a) to (e) of the directive.

89 In addition, since the Court held in the judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 141), that the prohibition of any element or feature referring to any flavouring applies irrespective of whether the information in question is factually accurate, it must be considered that the prohibition refers also to non-promotional information mentioning ingredients the use of which is allowed by Directive 2014/40.

90 It follows that Article 13(1)(c) and (3) of Directive 2014/40 must be interpreted as requiring the Member States 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 concerned is still permitted.

#### Question 3(b)

91 By Question 3(b) the referring court asks whether, because of the substantial restrictions on the use of trade marks in Article 13(1)(c) of Directive 2014/40, that provision infringes Article 17 of the Charter.

92 It must be observed that the right to property enshrined in Article 17 of the Charter extends also, in accordance with Article 17(2), to intellectual property.

93 By prohibiting the labelling of unit packets and any outside packaging and the tobacco product itself from mentioning trade marks referring to any flavourings, Article 13(1)(c) of Directive 2014/40, read in conjunction with Article 13(3) of the directive, restricts the use of those marks.

94 However, the right to property is not an absolute right and must be viewed in relation to its social function (see, to that effect, judgment of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 113).

95 That consideration is reflected in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented (judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 47).

96 In accordance with that provision, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 160).

- 97 In the present case, the restriction of the use of trade marks was imposed by Directive 2014/40 and concerns only the use by manufacturers of their marks on the labelling of unit packets, the outside packaging and the tobacco product itself, consequently without prejudicing the substance of their trade mark rights, the purpose being to ensure a high level of health protection when the obstacles created by national laws on labelling are eliminated (see, to that effect, judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 150).
- 98 Directive 2014/40 leaves the proprietors of the trade marks referred to in Article 13(1)(c) and (3) the freedom to make use of them in any way, in particular by wholesale, other than those mentioned in those provisions. Consequently, the restriction on the use of trade marks set out in paragraph 93 above does not amount to a deprivation of property.
- 99 Moreover, since, according to recital 16 of Directive 2014/40, tobacco products having a characterising flavour facilitate initiation of tobacco consumption and affect consumption patterns, the prohibition of placing trade marks referring to a flavouring on the labelling of unit packets, the outside packaging and the tobacco product itself is liable to make them less attractive and meets objectives of general interest recognised by the European Union, by contributing to ensuring a high level of protection of public health.
- 100 It follows that examination of the third question has disclosed no factor of such a kind as to affect the validity of Article 13(1)(c) and (3) of Directive 2014/40.

### Costs

- 101 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

- 1. Examination of the first question referred for a preliminary ruling 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 7(14) of Directive 2014/40 must be interpreted as meaning, first, that the concept of ‘product category’ within the meaning of that provision covers cigarettes and roll-your-own tobacco and, second, that the procedure to be followed for determining whether a particular tobacco product reaches the 3% limit laid down in that provision must be established in accordance with the domestic law of the Member State concerned.**
- 3. Articles 8 to 11 of Directive 2014/40 must be interpreted as not allowing the Member States to determine transposition periods additional to those provided for in Articles 29 and 30 of that directive.**
- 4. Examination of the second question referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of the second subparagraph of Article 9(1), the second sentence of Article 9(4)(a), Article 9(6), Article 10(1)(b), (e) and (f), and the first sentence of the first subparagraph of Article 11(1) of Directive 2014/40.**
- 5. Article 13(1)(c) and (3) of Directive 2014/40 must be interpreted as requiring the Member States 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 concerned is still permitted.**

- 6. Examination of the third question referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Article 13(1)(c) and (3) of Directive 2014/40.**

[Signatures]

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\* Language of the case: German.