

Case C-370/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

7 August 2020

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

25 June 2020

Applicant and appellant on a point of law:

Pro Rauchfrei e.V.

Defendant and respondent in the appeal on a point of law:

JS

Subject matter of the main proceedings

Action for an injunction prohibiting the offering of cigarettes via an automatic vending machine, on the ground that it infringes the prohibition on the hiding of the health warnings on cigarette packets and on displaying images of cigarette packets without such warnings

Subject matter and legal basis of the request

Request for a preliminary ruling under Article 267 TFEU for an interpretation of the first sentence of Article 8(3) (concepts of ‘placing on the market’ and ‘hidden’) and of Article 8(8) (concept of ‘images of unit packets’) of Directive 2014/40

Questions referred

1. Does the concept of ‘placing on the market’ within the meaning of the first sentence of Article 8(3) of Directive 2014/40/EU cover the offering of

tobacco products via vending machines in such a way that, although the cigarette packets contained in them display the warnings prescribed by law, the cigarette packets are initially stocked in the machine in such a way that they are not visible to the consumer, and the warnings on them become visible only when the customer operates the machine, which has previously been enabled by the cashier, and the cigarette packet is thus dispensed onto the checkout belt prior to the payment process?

2. Does the prohibition in the first sentence of Article 8(3) of Directive 2014/40/EU on warnings being ‘hidden by other items’ cover the case in which the entire tobacco packaging is hidden when the goods are presented by an automatic vending machine?
3. Is the criterion of ‘images of unit packets’ in Article 8(8) of Directive 2014/40/EU satisfied even if an image is not a faithful depiction of the original packaging, but the consumer associates the image with tobacco packaging on account of its design in terms of outline, proportions, colour and brand logo?
4. Are the requirements of Article 8(8) of Directive 2014/40/EU satisfied even if the consumer has the opportunity to see the cigarette packaging with the prescribed warnings prior to the conclusion of the contract of sale, irrespective of the depiction used?

Provisions of EU law cited

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, in particular recitals 48 and 60, Article 2.40, Article 8

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests, in particular Articles 3 and 4

Provisions of national law cited

Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition; ‘the UWG’), in particular Paragraphs 3, 3a, 5a, 8

Gesetz über Tabakerzeugnisse und verwandte Erzeugnisse (Law on tobacco products and related products; ‘the TabakerzG’), in particular Paragraph 6

Verordnung über Tabakerzeugnisse und verwandte Erzeugnisse (Regulation on tobacco products and related products; ‘the TabakerzV’), in particular the first sentence of point 4 of Paragraph 11(1), Paragraph 11(2)

Brief summary of the facts and procedure

The defendant operates two supermarkets in Munich. After 20 May 2017, it offered cigarettes for sale at the checkout points of those supermarkets in the automatic vending machine shown below:



- 1 The cigarette packets stocked in the automatic vending machine were not visible to the customer. Although the product selection buttons on the automatic vending machine showed various brands of cigarettes, they did not display the legally prescribed health warnings.
- 2 The sale was carried out in such a way that the customer first requested the cashier to enable the automatic vending machine and then pressed the selection button for the desired cigarette brand. The cigarette packet was then conveyed from the machine's dispensing device onto the checkout belt. Payment for the cigarette pack was then made at the checkout point, provided that the customer maintained his intention to purchase. Organising the sales process through the automatic vending machine in this way served to prevent theft and to protect minors.
- 3 The applicant objected to the offering of cigarettes via the automatic vending machine operated by the defendant before the Landgericht (Regional Court). The Regional Court dismissed the action. The applicant's appeal on the merits was unsuccessful. The referring court is called on to rule in the appeal on a point of law.

Brief summary of the basis for the request

- 4 The referring court takes the view that the success of the appeal on a point of law depends on the interpretation of the first sentence of Article 8(3) and of Article 8(8) of Directive 2014/40. First, the decisive question is whether the presentation of cigarettes by means of the automatic vending machine at issue is contrary to the prohibition on the hiding of the health warnings to be affixed to the unit packet of a tobacco product pursuant to the first sentence of Article 8(3) of Directive 2014/40. Second, clarification is required as to whether the automatic vending machine shows images of cigarette packets that do not display health warnings, contrary to what is required under Article 8(8) of Directive 2014/40.

Interpretation of the first sentence of Article 8(3) of Directive 2014/40

Criterion of placing on the market (first question referred)

- 5 The first question that arises is whether the presentation of cigarette packets by means of the automatic vending machine constitutes ‘placing on the market’ within the meaning of the first sentence of Article 8(3) of Directive 2014/40. The first question referred serves to clarify this problem of interpretation.
- 6 The offering via the automatic vending machine at issue is characterised by the fact that, although the cigarette packets contained in it display the warnings prescribed by law, the cigarette packets are initially stocked in the machine in such a way that they are not visible to the consumer. The cigarette packets and the warnings on them become visible only when the customer operates the machine, which has previously been enabled by the cashier, and the cigarette packet is thus dispensed onto the checkout belt before the payment process. The referring court takes the view that it is not possible to provide a clear answer to the question of whether the criterion of placing on the market within the meaning of the first sentence of Article 8(3) of Directive 2014/40 is satisfied in the case of this temporally staggered purchase process, in which the health warnings on the cigarette packets are visible only for a portion of the time.
- 7 The wording of the first sentence of Article 8(3) of Directive 2014/40 militates against a narrow interpretation to the effect that the concept of placing on the market covers only the change of actual physical control from the seller to the customer after the payment process. Pursuant to point 40 of Article 2 of Directive 2014/40, the term ‘placing on the market’ means to make products available, with or without payment. The term ‘making available’ is likely to include the offering of cigarettes in automatic vending machines on which the dispensing process can be triggered by the customer himself.
- 8 The context of the provision does not allow for an unequivocal interpretation of the concept of placing on the market. The court dealing with the appeal on the merits took the view that the stocking of cigarette packets in the automatic vending machine in question was merely a sales arrangement. It was, in its view,

clear from recital 48 of Directive 2014/40 that the harmonisation objective of that directive was not directed at sales arrangements and advertising. Consequently, the offering of cigarettes in automatic vending machines was not the subject of the provisions set out in the directive. The referring court takes the view that there are doubts as to whether it is possible to agree with that interpretation. Recital 48 of the Directive 2014/40 states that the directive does not harmonise the rules on smoke-free environments, or on domestic sales arrangements or domestic advertising, or brand stretching, nor does it introduce an age limit for electronic cigarettes or refill containers. The court dealing with the appeal on the merits concluded from this that Directive 2014/40 regulates only the design of the product itself, but not the sales arrangements for tobacco products, such as their presentation in automatic vending machines. It should be considered that while recital 48 excludes 'advertising' in addition to 'sales arrangements' from the harmonisation objective of Directive 2014/40, the latter makes express provisions in relation to advertising for electronic cigarettes in Article 20(5) and recital 43 of the directive. It is also clear from recital 60 that the objectives of the directive include the approximation of the laws, regulations and administrative provisions of the Member States concerning, inter alia, the 'presentation' of tobacco products. It might be inferred from the term 'presentation' used in the English-language version that not only the presentation of the unit packet of the tobacco product itself but also the circumstances of its presentation in the context of the sales situation form part of the subject matter governed by Directive 2014/40.

- 9 The legislative objective of the first sentence of Article 8(3) of Directive 2014/40 likewise does not make it clear whether the concept of placing on the market covers the presentation of cigarette packets in the automatic vending machines at issue. According to recital 28 of Directive 2014/40, the purpose of the prohibition on the hiding of warnings under the first sentence of Article 8(3) of that directive is to ensure the integrity and visibility of health warnings and to maximise their efficacy (see judgment of the Court of Justice of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325). As with the requirement of health warnings, the prohibition on the hiding of warnings therefore seeks to protect health by means of warnings concerning the adverse effects on human health of a product or other undesired consequences of its consumption (see Article 1 and Article 2.32 of Directive 2014/40). It is clear from this that the purpose of the prohibition on the hiding of warnings under the first sentence of Article 8(3) of Directive 2014/40 is to ensure that the health warnings can be perceived by the consumer and taken into account by him in the context of his purchasing decision. According to the findings of the court dealing with the appeal on the merits, the purchase contract is not concluded simply by pressing the selection button on the automatic vending machine; rather, it is not concluded until the subsequent payment for the cigarettes – shortly afterwards. By ejecting the cigarette packet onto the checkout belt through pressing the selection button on the machine, the consumer is able to view the cigarette packaging completely and from all sides prior to conclusion of the contract and can thus make his purchasing decision, or decide not to purchase, in awareness of the unconcealed warnings on the packet. Against this background, it could be assumed that the legislative objective of the

prohibition on the hiding of warnings in the context of the purchase of cigarettes sold via the automatic vending machine in question is not sufficiently affected, because the health warnings on the packets become fully visible during the sales process in good time before the final purchase decision is made. On the other hand, in view of the importance of health warnings for the protection of the important legal interest of health and the objective of tobacco control, which is also laid down in Article 1 of Directive 2014/40, it is not unreasonable to assume that health warnings will be sufficiently effective only if they can reach the consumer as soon as the cigarettes are presented in the vending machine and thus at a point in time at which a first essential step is already taken in the decision for or against the purchase of cigarettes. This could militate in favour of including even this presentation by the automatic vending machine at the beginning of the purchase process in the concept of ‘placing on the market’ and therefore within the scope of the prohibition on the hiding of health warnings.

Criterion of warnings not being hidden by other items (second question referred)

- 10 The question also arises as to whether, under circumstances such as those in question here, the criterion of warnings not being hidden by other items within the meaning of the first sentence of Article 8(3) of Directive 2014/40 is met. The second question referred serves to clarify this problem of interpretation.
- 11 It is disputed whether the prevention of the visibility of the health warnings on cigarette packets as a result of their being made available in an automatic vending machine constitutes ‘hiding’ as that concept is used in the first sentence of Article 8(3) of Directive 2014/40. According to one view, the prohibition on the hiding of warnings also covers cases in which the entire packaging is hidden by a vending machine, because the first sentence of Article 8(3) of Directive 2014/40 seeks to ensure the visibility of the warnings already at the point when the goods are presented. On the contrary view, according to recital 48 of Directive 2014/40, the first sentence of Article 8(3) of that directive refers only to the product itself or to the design of the packaging and not to its presentation or other sales arrangements, and therefore not to factors external to the packaging. The stocking of tobacco products in automatic vending machines or on shelves is merely a sales arrangement and does not affect the packaging design regulated by the directive. Consequently, this also cannot constitute ‘hiding’ for the purposes of the first sentence of Article 8(3) of the directive.
- 12 The referring court takes the view that it is not possible to provide a clear answer to the question at issue.
- 13 The wording of the first sentence of Article 8(3) of Directive 2014/40 does not preclude the assumption that the prevention of the visibility of health warnings as a result of the cigarette packets being made available in the automatic vending machine may also constitute a case in which warnings are hidden by another item, which must be prevented under that provision. If not only a health warning but the

entire packaging is hidden by an item, this inevitably means that the warning affixed to the package will be hidden.

- 14 The context of the provision does not allow a clear interpretation of the concept of 'hidden'. As explained, it is not possible to provide a clear answer to the question of whether it can be gathered from recital 48 of the directive that selling arrangements such as the offering of cigarettes in an automatic vending machine are excluded from the scope of the first sentence of Article 8(3) of the directive for systematic reasons. This perspective could be relevant not only for the concept of placing on the market but also for the criterion of 'hidden'. However, the examples of items referred to in the first sentence of Article 8(3) of Directive 2014/40 do not indicate any intention on the part of the legislature to exclude cases in which warnings are hidden as a result of cigarette packets being made available in an automatic vending machine from the scope of the prohibition on the hiding of warnings, because there is no necessary reference to the design of the packet itself. It is true that the tax stamps, price marks and security features listed in the first sentence of Article 8(3) of Directive 2014/40 are items that are regularly affixed to cigarette packets and therefore concern the design of the packet. By contrast, however, the wrappers, jackets and boxes likewise referred to in the first sentence of Article 8(3) of Directive 2014/40 are items that may also completely enclose the packet and may thus deprive the consumer of the possibility of perceiving the health warnings affixed to the packet – as in the case of the automatic dispenser at issue – irrespective of the other aspects of the design of the packet.
- 15 The legislative objective of the first sentence of Article 8(3) of Directive 2014/40 likewise does not make it clear whether the concept of being hidden by other items covers the presentation of cigarette packets in the automatic vending machines at issue. In that regard, account must be taken of the same factors as those relating to the interpretation of the criterion of 'placing on the market'.

Interpretation of Article 8(8) of Directive 2014/40

- 16 Pursuant to Article 8(8) of Directive 2014/40, images of unit packets and any outside packaging targeting consumers in the European Union must comply with the provisions of Chapter II ('Labelling and packaging') of Title II ('Tobacco products').

Concept of 'images of unit packets' (third question referred)

- 17 The first question that arises is whether there is an image of a unit packet within the meaning of Article 8(8) of Directive 2014/40 if, although the image is not a faithful depiction of the original packaging, the consumer associates the image with tobacco packaging on account of its design in terms of outline, proportions, colour and brand logo. The third question referred serves to clarify this problem of interpretation.

- 18 The referring court takes the view that it is not possible to provide a clear answer to the question raised.
- 19 The term ‘image of a unit packet’ within the meaning of Article 8(8) of Directive 2014/40/EU could suggest that only a faithful depiction of a cigarette packet – not including the health warnings – is covered by the criterion of Article 8(8) of Directive 2014/40. However, the literal meaning of the term is also likely to include a depiction in the sense of a stylised representation of the essential characteristics of a packet.
- 20 The regulatory context of Article 8(3) of Directive 2014/40 and its provisions on ensuring the visibility of health warnings on tobacco product packets merely show that Article 8(8) of that directive concerns images of those packets. Once again, these could be either faithful or stylised depictions.
- 21 The legislative objective of Article 8(8) of Directive 2014/40 is more likely to suggest that that provision should also apply to depictions which, by virtue of their design, evoke an association with a cigarette packet in the mind of the consumer. The requirement laid down in Article 8(8) of Directive 2014/40 that images of packets must also comply with the requirements for ensuring the visibility of health warnings applicable to the packet itself serves to protect health by means of warnings concerning the adverse effects on human health of a product or other undesired consequences of its consumption, as is the case with the objective of the health warnings themselves. It is clear from this that the purpose of Article 8(8) of Directive 2014/40, too, is to ensure that the health warnings can be perceived by the consumer and taken into account in the context of his purchasing decision. However, if a recognition effect is triggered in the mind of the consumer by a design which, although not a faithful depiction, alludes to a packet due to the stylised representation of the essential characteristics of such a packet, this would suggest that, in the interests of effective protection of health and the objective of tobacco control, such a stylised representation should be sufficient for the purposes of the concept of ‘image’ within the meaning of Article 8(8) of Directive 2014/40. Even such a depiction could trigger, as in the case of a faithful image, a purchasing impulse that is to be combated by health warnings pursuant to Article 8 of Directive 2014/40.

Whether the requirements of Article 8(8) of Directive 2014/40 are satisfied if the consumer is able to perceive the cigarette packet prior to the conclusion of the contract of sale (fourth question referred)

- 22 The further question arises as to whether, under circumstances such as those obtaining here, the requirements of Article 8(8) of Directive 2014/40 are satisfied simply because the consumer is given the opportunity to perceive the cigarette packets bearing the prescribed health warnings prior to the conclusion of the contract of sale. The fourth question referred serves to clarify this problem of interpretation.

- 23 The court dealing with the appeal on the merits assumed that Article 8(8) of Directive 2014/40 must be interpreted as meaning that the use of images of cigarette packets in dealings with consumers is prohibited only if it takes place instead of presenting the packet prior to the conclusion of the contract of sale. The referring court takes the view that there are doubts as to whether it is possible to agree with the court dealing with the appeal on the merits.
- 24 It is not possible to infer from the wording of Article 8(8) of Directive 2014/40, which refers unreservedly to images of unit packets, the limitation of the scope of that provision as recognised by the court dealing with the appeal on the merits.
- 25 An interpretation that takes account of the regulatory context does not lead to a clear outcome. The court dealing with the appeal on the merits again based its view on the assumption that it is clear from recital 48 of Directive 2014/40 that mere advertising and sales arrangements are not the subject matter of the directive. This assumption is not beyond doubt, as has already been stated above.
- 26 Nor can it be unequivocally ascertained from the regulatory objective of Article 8(8) of Directive 2014/40 whether that provision also seeks to prohibit the use of images of cigarette packets without health warnings in cases where the consumer has the opportunity to perceive the actual cigarette packets bearing the prescribed health warnings prior to the conclusion of the contract of sale. In that regard, account must again be taken of the same factors as those relating to the interpretation of the criterion of ‘placing on the market’. The referring court makes reference to the statements made in that regard.