

Case C-452/20**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:**

23 September 2020

Referring court:

Consiglio di Stato (Council of State, Italy)

Date of the decision to refer:

5 August 2020

Appellant:

PJ

Respondents:

Agenzia delle dogane e dei monopoli – Ufficio dei monopoli per la Toscana

Ministero dell'Economia e delle Finanze

Subject matter of the main proceedings

Appeal by a natural person who owns a retail outlet for State monopoly goods against a judgment of the Tribunale Amministrativo Regionale per la Toscana (Regional Administrative Court, Tuscany, Italy) [(‘the TAR’)] dismissing his action for annulment of the decision of the Agenzia delle dogane e dei monopoli (Customs and Monopolies Agency, Italy) suspending his trading licence for 15 days on the ground that cigarettes had been sold to a minor.

Subject matter and legal basis of the reference

Compatibility of a provision of national law transposing 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 (‘Directive 2014/40’) with Article 23(3) and

recitals 21 and 60 of that directive, as well as with Article 5 TEU. Alleged disproportionate nature of the penalty consisting of the 15-day suspension of the trading licence for a tobacconist's retail outlet, imposed on the holder of that licence for selling cigarettes to a minor.

Question referred for a preliminary ruling

Does the second paragraph of Article 25 of regio decreto 24 dicembre 1934, n. 2316 (Royal Decree No 2316 of 24 December 1934), as replaced by Article 24(3) of decreto legislativo n. 6 del 2016 (Legislative Decree No 6 of 2016) (transposing Directive 2014/40/EU 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) – inasmuch as it provides that ‘anyone who sells or supplies tobacco products or electronic cigarettes or refill containers containing nicotine or novel tobacco products to minors under the age of 18 shall be liable to a financial administrative penalty of EUR 500 to EUR 3 000 and a 15-day trading licence suspension’ – infringe the EU principle of proportionality and the precautionary principle, as set out in Article 5 TEU, in Article 23(3) of Directive 2014/40, and in recitals 21 and 60 of that directive, by giving precedence to the precautionary principle without mitigating it with the principle of proportionality, and thus disproportionately sacrificing the interests of economic operators to the protection of the right to health, thereby failing to ensure that a proper balance is struck between the different fundamental rights and, what is more, doing so by means of a penalty that, contrary to recital 8 of the directive, does not effectively pursue the objective of discouraging smoking prevalence among young people?

Provisions of EU law relied on

Article 5 TEU

Directive 2014/40: recitals 8, 21 [and] 60; Article 1, last paragraph; Article 23(3).

Provisions of national law relied on

Regio decreto 24 dicembre 1934, n. 2316 – Approvazione del testo unico delle leggi sulla protezione ed assistenza della maternità ed infanzia (Royal Decree No 2316 of 24 December 1934 – Approval of the consolidated law on the protection and assistance of motherhood and childhood), as replaced by Article 24(3) of decreto legislativo n. 6 del 2016 (Legislative Decree No 6 of 2016): the second paragraph of Article 25 (‘the provision at issue’): ‘Anyone who sells or supplies tobacco products or electronic cigarettes or refill containers containing nicotine or novel tobacco products to minors under the age of 18 shall be liable to a financial administrative penalty of EUR 500 to EUR 3 000 and a 15-

day trading licence suspension. For repeat offences, a financial administrative penalty of EUR 1 000 to EUR 8 000 shall apply and the trading licence shall be revoked'.

Legge 9 luglio 2015, n. 114 – Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea – Legge di delegazione europea 2014 (Law No 114 of 9 July 2015 – Delegation to the government of the transposition of EU directives and the implementation of other acts of the European Union – European Delegation Law 2014)

Legge 24 dicembre n. 234 – Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea (Law No 234 of 24 December 2012 – General rules on Italy's participation in the formation and implementation of EU legislation and policies)

Succinct presentation of the facts and procedure in the main proceedings

- 1 PJ ('the appellant') is the owner of a retail outlet for State monopoly goods. In February 2016, following an inspection, the Customs and Monopolies Agency discovered that the appellant had sold cigarettes to a minor. It therefore fined the appellant EUR 1 000 and suspended his trading licence for 15 days, in accordance with the provision at issue. The appellant paid the financial administrative penalty imposed on him and contested the licence suspension and related measures before the TAR.
- 2 By judgment of 27 November 2018, the TAR dismissed the action. In particular, it considered the request that a reference for a preliminary ruling be made on the ground that the provision at issue was contrary to EU law to be unfounded.
- 3 The appellant brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy) ('the referring court'), resubmitting the arguments made before the TAR.
- 4 The Customs and Monopolies Agency and the Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance, Italy) entered an appearance in the proceedings and requested that the appeal be dismissed.

Essential arguments of the parties in the main proceedings

- 5 The appellant draws attention to the unreasonable and disproportionate nature of the ancillary administrative penalty of the suspension, imposed for a single first-time offence in addition to the financial administrative penalty. He submits that the provision at issue does not effectively pursue the primary objective of Directive 2014/40, which is to discourage smoking prevalence among young people, given that it adversely affects the economic activity of the offender rather than actively discouraging smoking. Moreover, it infringes the principle of

proportionality, as set out in Article 5 TEU and in Article 23(3) of Directive 2014/40, and as is also clear from an opinion of XIV Commissione (Politiche dell'Unione europea) della Camera dei Deputati (Committee XIV (EU Policy), Chamber of Deputies, Italy), which found that the penalty system applicable to retailers did not comply with the principles of proportionality and effectiveness, both because of the excessive severity of the penalties laid down, and because retailers are not always able to ascertain the buyer's age.

- 6 In particular, according to the appellant, in transposing Directive 2014/40, the Italian legislature did not apply the principle whereby Member States may not impose obligations and restrictions on citizens' freedoms protected by EU law to a greater – that is to say, disproportionate – extent than is strictly necessary to attain the objective in the public interest that that authority is required to pursue. Conversely, the objective of reducing smoking prevalence among young people could have been pursued with less onerous and less restrictive penalties, by means of a progressive, tiered penalty system, capable of ensuring that an offender would receive a penalty that would not have the effect of jeopardising his or her survival as an economic operator from the first offence.
- 7 According to the appellant, the provision at issue gave precedence to the precautionary principle in order to protect the right to health of minors, thus infringing the principle of proportionality regarding the effects of such protection on the right to carry on a business – without, moreover, providing appropriate measures to attain that predefined objective. In that regard, the appellant submits that, in the regulatory system of the European Union, the principle of proportionality mitigates the precautionary principle which, in order to ensure the highest level of protection, allows competing economic interests to be sacrificed entirely. He argues that the Italian legislature has introduced penalties that go far beyond merely offsetting the economic advantage obtained from the sale of tobacco to minors and the 'appropriate measure' to prevent the sale of products harmful to the health of minors. This distorts the necessary balance between the various fundamental rights protected by EU law and infringes the prohibition on 'gold-plating' – that is to say, the prohibition on introducing additional constraints when transposing EU legislation.
- 8 In support of his argument, the appellant cites the following provisions: Article 5 TEU, according to which 'under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'; recital 60 of Directive 2014/40, which requires the Member States, when transposing it, to comply with the principle of proportionality; Article 23(3) of that directive, according to which 'penalties applicable to infringements of the national provisions adopted pursuant to this Directive ... shall be effective, proportionate and dissuasive' and 'any financial administrative penalty that may be imposed as a result of an intentional infringement may be such as to offset the economic advantage sought through the infringement'; [and] recital 21 of the directive, according to which 'Member States should be

encouraged to prevent sales of such products to children and adolescents, by adopting appropriate measures’.

Succinct presentation of the reasons for the reference

- 9 Although the referring court considers the question referred to be material to the decision on the dispute before it, since the contested measure was adopted in direct application of the provision at issue, it finds that there is no conflict with EU law.
- 10 Indeed, it is clear from Directive 2014/40, and in particular recitals 8 and 21 and the last paragraph of Article 1, that the right to health, especially that of younger generations, takes precedence over the retailer’s right to carry on a business. In that regard, the classification of tobacco not as an ordinary commodity, the facilitation of the smooth functioning of the internal market on the basis of a high level of health protection, especially for young people, and, at the same time, the protection of health, especially to reduce smoking prevalence among young people, together with the encouragement to prevent sales of such products to children and adolescents by adopting appropriate measures that lay down and enforce age limits, are, in the opinion of the referring court, unequivocal.
- 11 Furthermore, the precedence that the directive has given to the right to health, especially of young people, is the key to its interpretation so as to put into effect and define the principle of proportionality of the penalty, in the sense that determining the existence or otherwise of proportionality depends on whether the penalty in question is likely to act as an effective and dissuasive instrument.
- 12 Moreover, Article 23(3) of Directive 2014/40 empowers the Member States to lay down rules on penalties, requiring only that they be effective, proportionate and dissuasive. It is precisely because the right to health of minors takes precedence that the proportionality of the penalty imposed on the business owner can be assessed according to whether it is likely to be dissuasive, and therefore effective, in view of the aim of prohibiting minors from using tobacco products. In establishing a principle for the financial penalty imposed for infringement, that provision adds only that the penalty ‘may be such as to offset the economic advantage sought through the infringement’; this principle does not exclude non-financial administrative penalties, but allows only the possibility for the amount of the penalty and the economic advantage obtained to be offset.
- 13 The referring court considers that, within the framework of EU law described above, which has reconciled conflicting rights in favour of the right to health of minors and has empowered each Member State to translate the instrument for attaining the objective sought into a dissuasive and effective penalty, and one that is proportionate to the business owner’s right to carry on the business of selling tobacco products, the decisions made by the Italian legislature appear fully consistent with EU law.

- 14 In particular, the referring court mentions Delegation Law No 114 of 2015, Article 6(2)(b) of which identifies the obligation to ‘take into account the specific nature of tobacco products, with the aim of preventing oversupply and the prevalence of smoking among minors’, while referring to the domestic legislation laying down general principles for the transposition of EU law on penalties (Article 32(1)(d) of Law No 234 of 2012). By linking the type of penalty to the level of protection of the interests at stake, that provision introduced the ancillary penalty of suspension where necessary to ensure compliance with the obligations imposed. The Italian legislature, rightly giving precedence, with the provision at issue, to the prevailing right under EU law, introduced the 15-day suspension for a first-time offence, with no minimum period and a possible maximum of six months.
- 15 In the opinion of the referring court, the penalty thus seems proportionate to the right sacrificed by the business owner, being dissuasive and effective for the attainment of the predefined objective, and thus preventively protecting the overriding interest at stake. Moreover, it does not infringe the precautionary principle as construed by the case-law of the Court of Justice (see judgment of 9 June 2016, *Pesce and Others* (C-78/16) and *Serinelli and Others* (C-79/16)).
- 16 In conclusion, according to the referring court, in line with the principles of EU law mentioned and the criteria for interpretation deemed necessary on the basis of the principles affirmed by the provisions of that law, assessing the proportionality of the penalty of suspension of the licence in the light of the precedence of the right to health of minors and the need for the penalty to be dissuasive in order for the protection to be effective, the retailer’s economic loss is reasonably justified by reconciling rights that enjoy different protection in the tobacco trade.
- 17 According to the referring court, it does not appear that the Court of Justice has specifically addressed the rules laid down in Directive 2014/40 in the light of the foregoing. Therefore, in the absence of a specific precedent, no reference can be made to the ‘acte clair’ doctrine, particularly in the light of an express request by a party, the relevance of the question referred and the general applicability of the duty of the courts of last instance to raise a question for a preliminary ruling.
- 18 Accordingly, while mindful of the groundlessness of the appellant’s claim and of the unjustified extension of the duration of the proceedings pending an answer to the question referred for a preliminary ruling, for the sole purpose of fulfilling the duty to make a reference for a preliminary ruling as a national court of last instance, and in view of the fact that failure to fulfil that duty gives rise to direct liability of a substantially objective nature on the part of the Member State (judgments of 30 September 2003, *Köbler*, C-224/01, [EU:C:2003:513;] of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, [EU:C:2006:391; and] of 24 November 2011, *Commission v Italy*, C-379/10, [EU:C:2011:775]), as well as civil liability on the part of the judge, the referring court refers the question to the Court of Justice of the European Union for a preliminary ruling on the basis of the appellant’s submission.