

Case C-717/23

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:

27 November 2023

Referring court:

Verwaltungsgerichtshof (Supreme Administrative Court, Austria)

Date of the decision to refer:

17 November 2023

Appellant on a point of law:

Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz (Federal Minister for Social Affairs, Health, Care and Consumer Protection)

Subject matter of the main proceedings

Penalty proceedings against a tobacco wholesaler for allegedly supplying cigarettes in a unit packet with unlawful labelling.

Subject matter and legal basis of the reference

Interpretation of Directive 2014/40/EU; Article 267 TFEU

Question referred for a preliminary ruling

Should Article 23(2) in conjunction with point 40 of Article 2 and Article 13(1)(c) 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 L 127, 29.4.2014, p.1, be interpreted as meaning that the prohibition on placing a tobacco product on the market in a unit packet having elements or features relating to taste also covers the supplying of such a tobacco product by a wholesaler to a retail

outlet or only covers the sale of such a tobacco product by a retail outlet to a consumer?

Provisions of European Union 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; Articles 1, 2, 13, 15 and 23 thereof.

Provisions of national law cited

Tobacco Marketing and Non-Smoker Protection Act (TNRSG), Federal Law Gazette (BGBl.) No 431/1995, in the version in force at the material time, BGBl. I No 66/2019; Paragraphs 1, 2, 5d(1) subparagraph 3 and Paragraph 14

Tobacco Monopoly Act 1996 – TabMG 1996, BGBl. No 830/1995, in the version in force at the material time, BGBl. I No 104/2019; Paragraphs 5, 6, 8 and 36

Brief summary of the facts and proceedings

- 1 By means of a penalty decision issued by the Grieskirchen District Commission (hereinafter: District Commission) on 30 May 2022 a wholesaler was found guilty in that the company he represents as managing director and which is involved in the tobacco product distribution chain placed cigarettes on the market, by delivering cigarettes to a particular tobacconist's with the disclosures 'perfectly rounded' and 'with slow curing' on the unit packet, which relate to taste.
- 2 In doing so, it was argued that the wholesaler was in breach of Paragraph 14(1) subparagraph 1 in conjunction with Paragraph 2(1) subparagraph 1 and Paragraph 5d(1) subparagraph 3 of the TNRSG, and therefore a fine of EUR 1 000 (and a custodial sentence in lieu of a fine) was imposed on him.
- 3 The wholesaler appealed the penalty decision before the Administrative Court, which upheld the appeal, annulled the contested penalty decision and terminated the administrative penalty proceedings.
- 4 The Administrative Court stated, by way of reasoning, that the District Commission had taken the view that the 'placing on the market' had taken place by delivering the tobacco product to the tobacconist's. Paragraph 1 subparagraph 2 of the TNRSG reproduces the definition of 'placing on the market' from point 40 of Article 2 of Directive 2014/40/EU. It follows that 'placing on the market' takes place to consumers at retail outlets and by distance sales. The Austrian legislature had been content to merely reproduce this definition. Unlike in Germany, there are no rules in Austria which ensure that all market participants

in the supply chain are responsible for placing on the market. According to the wording of the definition, the view must therefore be taken that ‘making available’ to consumers refers to the keeping in stock of tobacco products for the purpose of direct supply to consumers, that is to say, the last step before sale to consumers, which takes place, for example, in a tobacconist’s. There was therefore no ‘placing on the market’ of the tobacco product by the wholesaler because he supplied it to the operator of a retail outlet (tobacconist’s), who is also a trader and not a consumer.

- 5 The District Commission brought an appeal on a point of law (‘Revision’) against that decision before the Verwaltungsgerichtshof (Supreme Administrative Court). Subsequently, the competent federal minister took the place of the District Commission in the proceedings. During the appeal on a point of law, it was argued that, during the negotiations on Directive 2014/40/EU, Member States always assumed that all market participants in the distribution chain would be responsible for compliance with the requirements of the Directive. Otherwise, effective market surveillance in order to achieve and maintain a high level of human health protection would not be possible.

Brief summary of the basis for the reference

- 6 Directive 2014/40/EU does not expressly specify which economic operators involved in the tobacco product trade are to be covered by the prohibition laid down in Article 23(2) of Directive 2014/40/EU. Interpretation of the term ‘placing on the market’ seems to be decisive for the purpose of answering that question.
- 7 According to point 40 of Article 2 of Directive 2014/40/EU, ‘placing on the market’ means to make products, irrespective of their place of manufacture, available to consumers located in the Union, with or without payment, including by means of distance sale. Directive 2014/40/EU does not contain a legal definition of the term ‘making products available’, which is itself a central element of the term ‘placing on the market’. Point 35 of Article 2 of Directive 2014/40/EU defines a ‘consumer’ to whom products are made available, as a natural person who is acting for purposes which are outside his or her trade, business, craft or profession. Point 41 of Article 2 of Directive 2014/40/EU defines ‘retail outlet’ as any outlet where tobacco products are placed on the market including by a natural person (in the main proceedings, this is the tobacconist’s).
- 8 The way in which the definition in point 40 of Article 2 of Directive 2014/40/EU is worded provides no clear answer to the question of whether a tobacco product is ‘placed on the market’ only when it is made available to a consumer or when it is made available to a retail outlet. For example, while the German versions of point 34 of Article 2 and Article 18(1) of Directive 2014/40/EU mention cross-border distance sales of tobacco products ‘to consumers’ [German: ‘an Verbraucher’], the German version of point 40 of Article 2 of Directive

2014/40/EU does not mention making tobacco products available ‘to consumers’, rather ‘for consumers’ [German: ‘für Verbraucher’]. According to the Supreme Administrative Court, this does not preclude an interpretation to the effect that the making available of the tobacco product to a retail outlet – and not only the making available to consumers directly – is covered by the concept of ‘placing on the market’.

- 9 As regards the definition in point 40 of Article 2 of Directive 2014/40/EU, the Court of Justice has held that, according to the usual meaning of the words ‘make ... available’, a tobacco product must be regarded as having been ‘placed on the market’ when consumers can acquire it, which is already the case when a tobacco product is merely made available for sale, even before it has been purchased and payment has been made (judgment of the Court of 9 March 2023 in Case C-356/22 *Pro Rauchfrei e. V.*, paragraph 20). If this understanding of the concept of ‘placing on the market’, which refers to consumers, is transposed to the main proceedings, the supply of a tobacco product by a wholesaler would not yet constitute ‘placing on the market’ since the TabMG 1996 stipulates that a wholesaler may fundamentally only supply the tobacco product to a tobacconist. Consumers, for their part, cannot acquire tobacco products from a wholesaler.
- 10 The judgment in Case C-356/22 concerned the interpretation of the prohibition on hiding the health warnings laid down by Article 8(3) of Directive 2014/40/EU and not Article 13(1)(c) of Directive 2014/40/EU on the presentation of the tobacco product. It concerned application of the concept of ‘placing on the market’ to a particular form of sale of tobacco products to consumers in a retail outlet. Given these differences, the Supreme Administrative Court is doubtful that the remarks made by the Court in its judgment in Case C-356/22, paragraph 20, should be understood to mean that the ‘placing on the market’ of tobacco products always requires, irrespective of the substantive connection to a particular provision of Directive 2014/40/EU, the tobacco product to have been made directly available to a consumer (for example, by sale) and that placing on the market cannot exist at an earlier stage in the supply chain. Although Advocate General *Tanchev* in his opinion in Case C-370/20, *Pro Rauchfrei e. V.*, paragraph 38, which preceded the judgment in Case C-356/22, stated that, it is sufficient for a tobacco product to be considered ‘placed on the market’, that it is made available to consumers in the Union, adding in parentheses: ‘(wholesale being thus excluded)’, this reasoning was not reproduced by the Court in its judgment in Case C-356/22.
- 11 According to the Supreme Administrative Court, there are also good reasons for the view that a tobacco product, in so far as compliance with the rules on the presentation of the unit packet are concerned, is not only ‘placed on the market’ when it has been made directly available to a consumer.
- 12 Directive 2014/40/EU uses the term ‘placing on the market’, which is described in general terms in point 40 of Article 2, in different substantive contexts. Some of these provisions prohibit the ‘placing on the market’ of certain tobacco products on account of their ingredients, such as Article 7(1), (6), (7) and (9), or Article 17,

or make ‘placing on the market’ subject to compliance with the requirements of the Directive, such as Article 8(1), Article 15(1) and Article 20(1) and (3)(a). Other provisions require manufacturers and importers to inform the national authorities before and after the ‘placing on the market’ of tobacco products, such as Article 5(1), Article 6(4), Article 19(1), Article 20(2) and Article 22(1). Others also refer to retail outlets where tobacco products are ‘placed on the market’ directly to consumers, such as point 41 of Article 2 and Article 18(2).

- 13 Such a systematic reading of Directive 2014/40/EU suggests that the concept of ‘placing on the market’, as described in general terms in point 40 of Article 2, may, depending on its connection to a particular substantive provision of the Directive and depending on the specific case, cover various economic operators involved in the tobacco product trade. The obligation imposed on Member States by Article 23(2) of Directive 2014/40/EU to ensure that tobacco products which do not comply with that Directive are not ‘placed on the market’ could therefore – depending on the substantive context and the circumstances at hand – cover manufacturers, importers or wholesalers on one case, whereas it may cover only the operators of retail outlets in another case.
- 14 For example, in the main proceedings in Case C-356/22, only the operator of the retail outlet had, through the design of its vending machine, any influence on whether warnings affixed to cigarette packets were hidden in breach of the first sentence of Article 8(3) of Directive 2014/40/EU. In the main proceedings in this case, however, the manufacturer of the cigarettes (or unit packet) may design their presentation in accordance with the provisions of Article 13 of Directive 2014/40/EU. But the importer or wholesaler may also decide whether or not they supply forward, through the tobacco product supply chain, a unit packet with presentation in breach of the requirements of that Directive. The same applies to the sale of such a product by a tobacconist at its retail outlet to a consumer.
- 15 When transposing Directive 2014/40/EU, the German legislature also appears to have proceeded from an interpretation of the concept of ‘placing on the market’, which, depending on the connection to a particular provision of Directive 2014/40/EU, may cover all or only individual economic operators involved in the tobacco product trade. Under national law, the definition of ‘placing on the market’ is intended to cover not only the direct supply of a tobacco product to the consumer but also any supply at each stage of the supply chain of tobacco products from the manufacturer through to the retail outlet.