

Case C-155/24

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:

28 February 2024

Referring court:

College van Beroep voor het bedrijfsleven (Netherlands)

Date of the decision to refer:

27 February 2024

Applicants on appeal:

Nederlandse Voedsel- en Warenautoriteit

Staatssecretaris van Volksgezondheid, Welzijn en Sport

Philip Morris Benelux BV

Philip Morris Investments BV

JT International Company Netherlands BV

Vereniging Nederlandse Sigaretten- & Kerftabakfabrikanten

Van Nelle Tabak Nederland BV

British American Tobacco International (Holdings) BV

Defendant on appeal:

Stichting Rookpreventie Jeugd

Subject matter of the main dispute

The case in the main proceedings concerns a request made by the Stichting Rookpreventie Jeugd (Youth Smoking Prevention Foundation) ('Foundation') to the Nederlandse Voedsel- en Warenautoriteit (Netherlands Food and Consumer Product Safety Authority) ('NVWA') to ensure that, when used as intended, filter

cigarettes on the Dutch market comply with the maximum emission levels for tar, nicotine and carbon monoxide in cigarettes ('maximum emission levels') laid down in Directive 2014/40/EU ('Directive').

Subject matter and legal basis of the request

This request under Article 267 TFEU concerns the interpretation of Articles 3 and 4 of the Directive. It follows from those provisions taken together that undertakings are prohibited from placing on the market or manufacturing cigarettes in the Member States that exceed the maximum emission levels laid down in the Directive, measured according to the ISO standards prescribed therein.

Questions referred for a preliminary ruling

'1) Is Article 4(1) of Directive 2014/40/EU to be interpreted as meaning that ISO standards not published in the Official Journal of the European Union cannot, without exception, be enforced against individuals, including the Foundation, even if that individual was able to inspect those standards and obtain them (against payment)?

2) Is the unenforceability of Article 4(1) of Directive 2014/40/EU against individuals, in so far as that provision refers to ISO standards not published in the Official Journal of the European Union, to be understood as meaning that it is not permitted to refuse the right to respect the maximum emission levels for tar, nicotine and carbon monoxide laid down in Article 3(1) of the Directive?

3) Is the expression 'consumed as intended', which is included in the definition of 'emissions' in Article 2(21) of Directive 2014/40/EU, to be interpreted as meaning that it is approximated as closely as possible to human smoking behaviour, in which case the measurement would have to take into account the at least partial covering of the micro-ventilation holes in the cigarette filter and/or the volume and frequency of smoke, or does that expression refer only to the method of consuming cigarettes through a process of combustion?

4) If, in view of the answer to question 3, the ISO standards referred to in Article 4(1) of Directive 2014/40/EU are not suitable for measuring emission levels: a) does a high level of public health protection, in particular for young people, which Directive 2014/40/EU includes as one of its objectives, mean that the principles of legal certainty and legal precision of the applicable law do not preclude an alternative method of measurement from being enforced against tobacco manufacturers?

If, also having regard to the principles of legal certainty and legal precision of the applicable law, question 4a) is answered in the affirmative:

4b) are Member States authorised to establish or apply an alternative measurement method themselves, whether temporarily or otherwise, and to enforce this alternative measurement method (also) against tobacco manufacturers, and

4c) how does the application of an alternative measurement method relate to the (maximum) harmonisation and improved functioning of the internal market, which Directive 2014/40/EU includes amongst its objectives?

5a) In the event that an alternative measurement method has to be applied, do the maximum emission levels of Article 3(1) of Directive 2014/40/EU remain fully applicable?

If question 5a) is answered in the negative:

5b) are Member States authorised to adopt or apply themselves, whether temporarily or otherwise, alternative maximum emission levels and to enforce these (also) against tobacco manufacturers, and

5c) how does the application of alternative maximum emission levels relate to the (maximum) harmonisation and improved functioning of the internal market, which Directive 2014/40/EU includes amongst its objectives?

6a) If Member States are authorised to adopt or implement an alternative measurement method and that method can be enforced against tobacco manufacturers, in that case, does a high level of public health protection, in particular for young people, which Directive 2014/40/EU includes amongst its objectives, in combination with Article 23(2) of the Directive, mean in that case that cigarettes on the market in the Netherlands must be withdrawn from the market until a new measurement method has been established, such that it cannot be determined whether the cigarettes consumed as intended comply with the maximum emission levels?

If question 6a) is answered in the affirmative:

6b) Are tobacco manufacturers entitled to a transitional period in that case?

7) If an alternative measurement method has been established or implemented, whether or not in combination with alternative maximum emission levels, are tobacco manufacturers in that case entitled to a transitional period during which they can adapt to that alternative measurement method and any alternative maximum emission levels?

Provisions of EU law and case-law of the Union courts relied on

Recitals 8 and 51, Article 2(10) and (21), Article 3(1) and (2), Article 4(1) and (3) and Article 23(2) of the Directive

Charter of Fundamental Rights of the European Union, Articles 24 and 35

Judgment of 22 February 2022, *Stichting Rookpreventie Jeugd and Others* (C-160/20, EU:C:2022:101) (‘Stichting Rookpreventie judgment’)

Judgment of 11 December 2007, *Skoma-Lux* (C-161/06, EU:C:2007:773) (‘Skoma-Lux judgment’)

Provisions of national law and national case-law relied on

Articles 1, 14 and 17a of the Act of 10 March 1988, containing measures to restrict tobacco consumption, in particular to protect non-smokers

Article 2.1 of the Order of 14 October 2015, merging the general administrative measures based on the Tobacco Act into one order

Articles 1.1 and 2.1 of the Regulation of the State Secretary for Health, Welfare and Sport of 10 May 2016 laying down rules for the manufacture, presentation and sale of tobacco products and related products

Ruling of the rechtbank Rotterdam (District Court of Rotterdam) of 20 March 2020 (ECLI:NL:RBROT:2020:2382)

Ruling of the rechtbank Rotterdam (District Court of Rotterdam) of 04 November 2022 (ECLI:NL:RBROT:2022:9297)

Ruling of the College van Beroep voor het bedrijfsleven (Administrative Court of Appeal for Trade and Industry, Netherlands) of 3 April 2012 (ECLI:NL:CBB:2012:BW2472)

Ruling of the Afdeling bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State, Netherlands) of 2 February 2011 (ECLI:NL:RVS:2011:BP2750)

Succinct presentation of the facts and procedure in the main proceedings

- 1 The maximum emission levels in cigarettes laid down in Article 3(1) of the Directive were determined on the basis of a method widely accepted in the scientific community as best approximating the intended consumption of a cigarette. However, research from 2018 by the Rijksinstituut voor Volksgezondheid en Milieu (National Institute for Public Health and the Environment) (‘RIVM’) shows that when emissions from cigarettes are measured using the so-called Canadian Intense method, these maximum emission levels are greatly exceeded.
- 2 The Foundation asked the NVWA to have filter cigarettes measured according to the Canadian Intense method that do not meet these maximum emission levels withdrawn from the market. On 20 September 2018, the NVWA refused the Foundation’s request. The Foundation lodged an objection to this, which was

dismissed by a decision dated 31 January 2019. The Foundation then appealed the latter decision to the rechtbank Rotterdam (District Court of Rotterdam) ('District Court'). On 20 March 2022, the District Court referred preliminary questions to the Court concerning the validity and interpretation of Article 4(1) of the Directive.

- 3 In the Stichting Rookpreventie judgment, the Court held that the ISO standards referred to in Article 4(1) of the Directive could not be enforced against individuals because they had not been published in the Official Journal of the European Union ('Official Journal'). According to the Court, it is for the national court to determine whether the methods actually used to measure maximum emission levels comply with the Directive, without taking into consideration Article 4(1) thereof.
- 4 Accordingly, in its ruling of 4 November 2022, the District Court held that the ISO standards could not be enforced against the Foundation and that the method used in the Directive to determine maximum emission levels was inconsistent with the Directive because it did not measure the level of emissions released during the intended consumption of a cigarette. It is therefore impossible to determine whether filter cigarettes sold in the Netherlands comply with the maximum emission levels. The District Court upheld the appeal.
- 5 The applicants on appeal appealed to the referring court against that judgment. The Foundation lodged an incidental appeal. At the beginning of 2023, the RIVM, commissioned by the NVWA, measured emission levels based on the WHO TobLabNet SOP 01 method (Standard operating procedure for intense smoking of cigarettes). These results also show the maximum emission levels being exceeded.

The essential arguments of the parties in the main proceedings

- 6 According to the Foundation, the ISO standards prescribed in Article 4(1) of the Directive do not sufficiently approximate the intended consumption. This is because the method used in the Directive does not take into account how a cigarette is smoked in practice, namely by covering the holes in the filter with the lips and fingers.
- 7 The Foundation, the NVWA and the State Secretary are of the opinion that the term 'consumed as intended' in Article 2(21) of the Directive refers to consuming a cigarette by inhaling cigarette smoke, approximating human smoking behaviour as closely as possible. A smoker covers the ventilation holes in the cigarette's filter with his fingers and lips, thus inhaling deeper and more frequently. The measurement method must take this into account.
- 8 By contrast, according to Philip Morris Benelux BV, Philip Morris Investments BV, JT International Company Netherlands BV, Van Nelle Tabak Nederland BV and British American Tobacco International (Holdings) BV ('tobacco manufacturers'), the term refers only to the burning of the cigarette and the

consequent generation of smoke, and therefore no consideration needs to be given to the covering of the ventilation holes. They refer in that regard to the definition of the term ‘cigarette’ in Article 2(10) of the Directive.

- 9 Furthermore, the tobacco manufacturers take the view that the term ‘enforce’ relates to an obligation, and not to the withholding of a right to enforce emission levels independently of the prescribed emission standards. Invocation can only be said to exist if there is an obligation on a concerned party. The obligations under Articles 3 and 4 rest only on manufacturers, importers and distributors in the tobacco industry and not on the Foundation. Consequently, according to the tobacco companies, the Foundation cannot derive any rights from those articles.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 At issue in the main proceedings is whether the maximum emission levels set out in the Directive are being exceeded. The referring court notes that Articles 3 and 4 are not clear on all points and that it encounters difficulties in interpreting the scope of the *Stichting Rookpreventie* judgment. Moreover, it is also unclear to the court whether enforcement action can be taken against the tobacco companies.
- 11 **First**, the referring court asks how the phrase ‘the public generally’ is to be understood. This is relevant to determine against whom the ISO standards set out in the Directive can be enforced. In the *Stichting Rookpreventie* judgment, the Court held that those standards could be enforced against undertakings (paragraph 52) but not against the public generally, due to the lack of publication in the Official Journal (paragraphs 48, 51 and 73). In view of the different ways in which that phrase is used in the judgment and the different language versions of the judgment, it is not clear to the referring court whether it means that the ISO standards cannot be enforced against the public generally in the sense of ‘the general public’ or whether it refers to standards that cannot be enforced generally, i.e. in principle, not against individuals.
- 12 In addition, the referring court wonders whether ISO standards may nevertheless be enforced against individuals if they have actually been able to take cognisance of those standards, like the Foundation in this case. The court refers in this regard to paragraph 48 of the *Skoma-Lux* judgment. Moreover, the Foundation represents the interests of individuals, who have no knowledge of these ISO standards, and the Foundation obtained the standards precisely in the context of these proceedings. To enforce the ISO standards in those circumstances would mean that the Foundation could not achieve the objective pursued by these proceedings and therefore does not seem tenable to the referring court.
- 13 Building on the above, the referring court asks, **second**, what is to be understood by the term ‘enforce’. In its ruling of 4 November 2022, the *rechtbank Rotterdam* (District Court of Rotterdam) held that this term both relates to an obligation and provides the possibility of withholding a right. In that case, it seems plausible, according to the referring court, that the inability to enforce Article 4(1) of the

Directive, and the reference therein to the ISO standards, against the Foundation must be understood as meaning that it may not be deprived of the right to enforce the maximum emission levels laid down in Article 3(1) of the Directive, independently of the ISO standards prescribed in Article 4(1) of the Directive.

- 14 **Third**, the referring court wishes to know what measurement methods are appropriate for measuring the maximum emission levels of tar, nicotine and carbon monoxide in cigarettes released during the intended consumption of a cigarette and, in particular, what is to be understood by ‘consumed as intended’ as referred to in Article 2(21) of the Directive. Firstly, it follows from paragraph 74 of the *Stichting Rookpreventie Jeugd* judgment that it is for the referring court to assess whether the methods actually used to measure the maximum emission levels comply with the Directive. The referring court infers from this that these are not necessarily ISO standards. Secondly, partly in view of the other language versions, the phrase ‘intended consumption’ must, according to the referring court, be understood as ‘use as intended’. However, it is unclear whether this refers to approximating human smoking behaviour as much as possible, generating smoke through the process of combustion, or a combination of both. In the first case, when measuring maximum emission levels, smoke volume and smoke frequency would be decisive and the ventilation holes would have to be at least partially covered, which does not happen when measuring maximum emission levels according to ISO standards. In that case, therefore, ISO standards would not be suitable for measuring the maximum emission levels released during the intended consumption of a cigarette.
- 15 If the ISO standards are unsuitable, the referring court asks, **fourth**, whether a different measurement method could possibly be used and whether that method could then be enforced against the tobacco manufacturers. After all, tobacco manufacturers are obliged to apply ISO standards. The referring court wishes to know how any new obligations relate to the principle of legal precision of the applicable law and the principle of legal certainty. In line with this, the question arises as to whether any negative impact on tobacco manufacturers can be justified by the objective pursued by the Directive of a high level of public health protection. Moreover, the referring court also wishes to know whether the Member States themselves, and not the European Commission as stipulated in Article 4(3) of the Directive, can establish this measurement method and enforce it against tobacco manufacturers. In that context, the court also questions how this would relate to the objective pursued by the Directive of (maximum) harmonisation and improved functioning of the internal market for tobacco products, and whether it would be in line with Article 24 of the Directive on free circulation.
- 16 **Fifth**, if a different measurement method is to be applied, the referring court asks whether the maximum emission levels of Article 3(1) still apply. The question thus arises as to whether there is an intrinsic link between, on the one hand, the ISO standards set out in Article 4(1) and, on the other hand, the maximum emission levels set out in Article 3, and whether Member States are allowed to set

alternative maximum emission levels themselves, temporarily or otherwise, and to enforce them against tobacco manufacturers, and how this relates to the objective pursued, among others, by the Directive of (maximum) harmonisation and improved functioning of the internal market.

- 17 The referring court points out that the Directive allows maximum emission levels to be reduced and measurement methods to be adapted (see Articles 3(2) and 4(3)). There is nothing to suggest that this could not happen separately. In that regard, the court refers to Recital 51 of the Directive. As such, if there is no intrinsic connectedness, when applying an alternative measurement method, the maximum emission levels of Article 3(1) may remain fully applicable.
- 18 **Sixth**, in the event that the ISO standards are not suitable for measuring maximum emission levels and an alternative measurement method can be enforced against the tobacco manufacturers, without it already being clear what that method is and to what results it will lead, the referring court wonders what the consequences should be in the meantime and, in particular, whether the cigarettes currently sold in the Netherlands should be withdrawn from the market for the time being.
- 19 **Finally**, the referring court wishes to know whether tobacco manufacturers can claim a transitional period to adapt to an alternative measurement method and/or alternative maximum emission levels, if appropriate.