



Court of Justice of the European Union

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Advocate General's Opinions in Cases C-358/14 Poland v Parliament and Council, C-477/14 Pillbox 38 (UK) Limited, and C-547/14 Philip Morris Brands SARL and Others

Press and Information

Advocate General Kokott considers the new EU tobacco directive of 2014 to be valid

In particular the extensive standardisation of packaging, the future EU-wide prohibition on menthol cigarettes and the special rules for e-cigarettes are lawful

In her Opinions issued today, Advocate General Juliane Kokott **concludes** that the **new EU tobacco directive of 2014**¹ was **lawfully adopted**. This applies in particular to the standardisation of the labelling and packaging of tobacco products (such as size, minimum content, warnings and permitted information), the EU-wide prohibition on sales of menthol cigarettes applicable from 20 May 2020 and the special rules for e-cigarettes. None of the arguments invoked by Poland — supported by Romania — against the prohibition on menthol cigarettes² is well founded, with the result that Poland's action for annulment must be dismissed. The examination of the questions posed by the English High Court, before which several undertakings³ challenged the implementation of the directive into law in the UK, also reveals no factors such as to affect the validity of the directive.

In Advocate General Kokott's view, the EU legislature **did not exceed** the considerable **latitude** to be given to it in ensuring that tobacco and related products may be placed on the market under uniform conditions throughout the EU without losing sight of the fundamental objective of a high level of health protection.

In so far as the directive must be examined in this context, it is based on the correct legal basis (that is the legal basis for internal market harmonisation measures)⁴ and does not infringe the principles of equal treatment, free competition, proportionality, legal certainty and subsidiarity or the obligation to provide a statement of reasons, or the fundamental rights of the manufacturers or retailers, in particular the freedom to conduct a business, the freedom of expression and the right to property.

Concerning the standardisation of the labelling and packaging of tobacco products, Advocate General Kokott finds that the requirements relating to the shape (cuboid), size and minimum content of cigarette packets are proportionate. They make a particular contribution to increasing the visibility of health warnings and maximising their efficacy. The coolness or fun factor that may be associated with unusual or particularly striking packaging and the curiosity that may be inherent in new or unusual packaging then has a lesser influence on the decision to purchase. Moreover, the minimum content of 20 cigarettes increases the psychological barrier to making a

¹Directive 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).

²The directive imposes a general prohibition on the sale of cigarettes (and roll-your-own tobacco) with characterising flavours. However, if the Union-wide sales volumes amount to 3% or more, as with menthol cigarettes, the prohibition is to apply only from 20 May 2020. By its action, Poland opposed only the prohibition on sales of menthol cigarettes.

³The UK undertaking Pillbox, which, trading under the name 'Totally Wicked', manufactures and markets e-cigarettes, and several manufacturers of tobacco products, namely Philip Morris Brands SARL, Philip Morris Limited (PMI) and British American Tobacco UK Limited (BAT), with the involvement of other manufacturers of tobacco products or suppliers to the tobacco industry, namely Imperial Tobacco Limited, JT International SA, Gallaher Limited, Tann UK Limited, Tannpapier GmbH, V. Mane Fils, Deutsche Benkert GmbH & Co KG, Benkert UK Limited and Joh. Wilh. Von Eicken GmbH.

⁴Article 114 TFEU.

purchase, particularly for adolescents and young adults. In addition, it is neither arbitrary nor disproportionate to give health warnings (consisting of a prescribed text and a corresponding photograph) from now on,⁵ a coverage of 65% of both the front surface and the back surface of the unit packet. The directive rightly also prohibits true statements on product packaging where those statements cast a tobacco product in a deceptively positive light and thus create an additional inducement to purchase and consume the product. Even an organically farmed cigarette, for example, is still a product that is extremely harmful to health. Since the directive specifies only a basic design, it also still leaves scope for additional national packaging standards, for example in respect of the colouring of surfaces not reserved for warnings (possibly through to the introduction of 'plain packaging').

Concerning the prohibition on menthol cigarettes, Advocate General Kokott emphasises that, in common with all other characterising flavours, menthol can, as a rule, reduce or camouflage the generally very bitter and even pungent taste of tobacco smoke. This creates a serious risk that flavoured cigarettes will facilitate initiation of tobacco consumption for non-smokers and make it more difficult for habitual smokers to escape nicotine addiction. The previous national rules on the use of characterising flavours in tobacco products resembled a patchwork quilt. There were also differences specifically in relation to menthol cigarettes. The EU legislature cannot be accused of a manifest error of assessment if it takes the view that this is a problem that has a cross-border dimension which cannot be resolved at Member State level alone, but only at EU level. The necessity of an EU-wide prohibition on all characterising flavours, including menthol, cannot seriously be called into question, particularly in view of the precautionary principle and the standards of the WHO. It is in any case not manifestly disproportionate, also in view of the generous transitional period for menthol cigarettes, to give precedence, in adopting internal market harmonisation measures, to the high level of health protection sought in the EU over any economic and social interests.

Concerning the special rules for e-cigarettes, Advocate General Kokott states that those rules differ appreciably in several respects from the rules for conventional tobacco products. For example, the special rules for e-cigarettes provide for, inter alia, a duty to submit a notification with a six-month standstill period, specific warnings, a maximum nicotine content of 20 mg/ml, a leaflet requirement, a separate prohibition on advertising and sponsorship and annual reporting obligations. Those special rules are, however, relatively moderate, both in comparison with the rules for conventional tobacco products and by international standards, and are ultimately not disproportionate. Advocate General Kokott emphasises in that regard that e-cigarettes are a novel and — for large parts of the population at least — still relatively little known product for which there is a rapidly developing market. In addition, it is not manifestly wrong or unreasonable to accept, in adopting internal market harmonisation measures, that e-cigarettes possibly cause risks to human health and that that product could — above all in the case of adolescents and young adults — develop into a gateway to nicotine addiction and, ultimately, traditional tobacco consumption. Also in the case of e-cigarettes, the EU legislature was entitled to take the view, having regard in particular to the fundamental differences between the Member States' rules and the cross-border dimension of the problem, that rules at Union level are required.

With regard to compliance with the **principle of subsidiarity** in adopting the new tobacco directive, Advocate General Kokott takes the view that it is adequately documented that the EU legislature had comprehensive material on which it could base its evaluation of compliance with the principle of subsidiarity. Nevertheless, she strongly advises the Union legislature to **avoid in future empty formulas** on the principle of subsidiarity like the one contained in the directive and instead to enhance the preamble to the EU measure in question with sufficiently substantial statements regarding the principle of subsidiarity which are tailored to the measures in question.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are

⁵Until now the requirement has been 30% for the front surface of the unit packet and 40% for the back surface of the unit packet.

responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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The full texts ([C-358/14](#), [C-477/14](#) and [C-547/14](#)) of the Opinions are published on the CURIA website on the day of delivery.

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Pictures of the delivery of the Opinions are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106