Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 23 January 2025 [1]

Case C-717/23

Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz
intervening parties:
Bezirkshauptmannschaft Grieskirchen,
MM

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Reference for a preliminary ruling – Directive 2014/40/EU – Placing on the market of tobacco products in packaging which includes unlawful elements – Concept of 'placing on the market' – Supply of tobacco products by a wholesaler to a retail outlet – Fine imposed on the wholesaler)

I. Introduction

1. The present case provides the Court with the opportunity to rule on the interpretation to be given to the concept of 'placing on the market', within the meaning of point 40 of Article 2 and Article 23(2) of Directive 2014/40/EU. [2]

2. The previous case-law of the Court appears to give some indication as to how that concept is to be defined. Nonetheless, I would propose to refine that case-law on the basis of a fuller interpretation based on the wording, the context and the objective pursued by the provisions of Directive 2014/40.

[1] Original language: French.

[2] Directive 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).

II. Legal context

A. European Union law

1. Directive 2014/40

3. Recital 8 of Directive 2014/40 states that, 'in accordance with Article 114(3) [TFEU], a high level of health protection should be taken as a base for legislative proposals and, in particular, any new developments based on scientific facts should be taken into account. Tobacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco on human health, health protection should be given high importance, in particular, to reduce smoking prevalence among young people'.

4. Article 1 of that directive, entitled 'Subject matter', provides:

'The objective of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning:

…

(b) certain aspects of the labelling and packaging of tobacco products including the health warnings to appear on unit packets of tobacco products and any outside packaging as well as traceability and security features that are applied to tobacco products to ensure their compliance with this Directive;

…

in order to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people, and to meet the obligations of the Union under the [World Health Organization (WHO)] Framework Convention for Tobacco Control ("FCTC").'

5. Article 2 of that directive, entitled 'Definitions', provides:

'For the purposes of this Directive, the following definitions shall apply:

…

(40) "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; in the case of cross-border distance sales the product is deemed to be placed on the market in the Member State where the consumer is located;

(41) "retail outlet" means any outlet where tobacco products are placed on the market including by a natural person.'

6. Article 8 of that directive, entitled 'General provisions', which forms part of Chapter II of that directive, itself entitled 'Labelling and packaging', provides, in paragraph 3 thereof:

'Member States shall ensure that the health warnings on a unit packet and any outside packaging are irremovably printed, indelible and fully visible, including not being partially or totally hidden or interrupted by tax stamps, price marks, security features, wrappers, jackets, boxes, or other items, when tobacco products are placed on the market. On unit packets of tobacco products other than cigarettes and roll-your-own tobacco in pouches, the health warnings may be affixed by means of stickers, provided that such stickers are irremovable. The health warnings shall remain intact when opening the unit packet other than packets with a flip-top lid, where the health warnings may be split when opening the packet, but only in a manner that ensures the graphical integrity and visibility of the text, photographs and cessation information.'

7. Article 13 of Directive 2014/40, entitled 'Product presentation', is worded as follows:

'1. The labelling of unit packets and any outside packaging and the tobacco product itself shall not include any element or feature that:

…

(c) refers to taste, smell, any flavourings or other additives or the absence thereof;

…'

8. Article 19 of that directive, entitled 'Notification of novel tobacco products', provides, in paragraph 1 thereof:

'Member [States] shall require manufacturers and importers of novel tobacco products to submit a notification to the competent authorities of Member States of any such product they intend to place on the national market[s] concerned. The notification shall be submitted in electronic form six months before the intended placing on the market. …

…'

9. Article 20 of that directive, entitled 'Electronic cigarettes', provides, in the first subparagraph of paragraph 2 thereof:

'Manufacturers and importers of electronic cigarettes and refill containers shall submit a notification to the competent authorities of the Member States of any such products which they intend to place on the market. The notification shall be submitted in electronic form six months before the intended placing on the market. …'

10. Article 23 of that directive, entitled 'Cooperation and enforcement', provides, in paragraphs 2 and 3 thereof:

'2. Member States shall ensure that tobacco and related products which do not comply with this Directive, including the implementing and delegated acts provided for therein, are not placed on the market. Member States shall ensure that tobacco and related products are not placed on the market if the reporting obligations set out in this Directive are not complied with.

3. Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures that are necessary to ensure that these penalties are enforced. The penalties provided for shall be effective, proportionate and dissuasive. 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.'

2. Regulation (EU) 2019/1020

11. Recitals 1, 14 and 43 of Regulation (EU) 2019/1020[3] are worded as follows:

'(1) In order to guarantee the free movement of products within the Union, it is necessary to ensure that products are compliant with Union harmonisation legislation and therefore fulfil requirements providing a high level of protection of public interests, such as health and safety in general, health and safety in the workplace, protection of consumers, protection of the environment, public security and protection of any other public interests protected by that legislation. Robust enforcement of these requirements is essential to the proper protection of these interests and to create the conditions in which fair competition in the Union market for goods can thrive. Rules are therefore necessary to ensure this enforcement, regardless of whether products are placed on the market via offline or online means and regardless of whether they are manufactured in the Union or not.

…

(14) Modern supply chains encompass a wide variety of economic operators who should all be subject to enforcement of Union harmonisation legislation, while taking due consideration of their respective roles in the supply chain, and the extent to which they contribute to the making available of products on the Union market. Therefore, it is necessary to apply this Regulation to economic operators that are directly concerned by Union harmonisation legislation listed in Annex I to this Regulation …

…

(43) Market surveillance authorities act in the interest of economic operators, of end users, and of the public, to ensure that public interests covered by relevant Union harmonisation legislation on products are consistently preserved and protected through appropriate enforcement measures, and that compliance with such legislation is ensured across the supply chain through appropriate checks, taking into consideration the fact that administrative checks alone, in many cases, cannot replace physical and laboratory checks in order to verify the compliance of products with the relevant Union harmonisation legislation. Consequently, market surveillance authorities should ensure a high level of transparency while performing their activities and should make available to the public any information that they consider to be relevant in order to protect the interests of end users in the Union.'

[3] Regulation of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 (OJ 2019 L 169 p. 1).

12. Article 1 of that regulation, entitled 'Subject matter', states, in paragraph 1 thereof:

'The objective of this Regulation is to improve the functioning of the internal market by strengthening the market surveillance of products covered by the Union harmonisation legislation referred to in Article 2, with a view to ensuring that only compliant products that fulfil requirements providing a high level of protection of public interests, such as health and safety in general, health and safety in the workplace, the protection of consumers, the protection of the environment and public security and any other public interests protected by that legislation, are made available on the Union market.'

13. Article 2 of that regulation, entitled 'Scope', provides, in paragraph 1 thereof:

'This Regulation shall apply to products that are subject to the Union harmonisation legislation listed in Annex I ("Union harmonisation legislation"), in so far as there are no specific provisions with the same objective in the Union harmonisation legislation, which regulate in a more specific manner particular aspects of market surveillance and enforcement.'

14. Article 3 of the same regulation, entitled 'Definitions', provides:

'For the purposes of this Regulation, the following definitions shall apply:

(1) "making available on the market" means any supply of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge;

(2) "placing on the market" means the first making available of a product on the Union market;

…'

15. Article 16 of Regulation 2019/1020, entitled 'Market surveillance measures', provides, in paragraph 3 thereof:

'For the purposes of paragraph 2, the corrective action required to be taken by the economic operator may include, inter alia:

…

(c) withdrawing or recalling the product immediately and alerting the public to the risk presented;

…'

B. Austrian law

16. Pursuant to Paragraph 1 of the Tabak- und Nichtraucherinnen- bzw. Nichtraucherschutzgesetz (Law on tobacco and the protection of non-smokers) of 1 July 1995[4] ('the Law on tobacco'), 'placing on the market' means 'to make products, irrespective of their place of manufacture, available to consumers, with or without payment'.

[4] BGBl., 431/1995, in the version published in BGBl. I, 66/2019.

17. Under Paragraph 2(1) of that law, the placing on the market of 'tobacco and related products which do not comply with Paragraphs 4 to 10e or with regulations made pursuant' to that law is prohibited.

18. Paragraph 5d of that law is worded as follows:

'(1) The labelling of unit packets and any outside packaging and the tobacco product itself shall not include any element or feature that:

…

3. refers to taste, smell, any flavourings or other additives or the absence thereof;

…

(3) The elements and features that are prohibited pursuant to subparagraphs 1 and 2 include, in particular, texts, symbols, names, trademarks, figurative or other signs.'

19. Paragraph 14(1) of that law provides:

'Any person who

1. places tobacco or related products on the market contrary to Paragraph 2,

…

commits an administrative offence, unless the facts are such that a more severe penalty can be imposed pursuant to other administrative provisions, and shall be penalised by way of an administrative fine of up to EUR 7 500, or up to EUR 15 000 in the event of a repeat offence.

…'

III. The dispute in the main proceedings, the question referred and the procedure before the Court

20. On 30 May 2022, the Bezirkshauptmannschaft Grieskirchen (District Administrative Authority, Grieskirchen, Austria; 'the administrative authority') imposed an administrative fine of EUR 1 000 on MM, a tobacco wholesaler, on the ground that the company of which he is the managing director had supplied cigarettes to a tobacconist (retailer) in a unit packet bearing a prohibited label. It regarded the descriptions 'perfectly rounded' and 'with slow curing' appearing on that unit packet as elements referring to taste. The administrative authority considered that, in supplying those cigarettes, the wholesaler had infringed point 1 of Paragraph 14(1) of the Law on tobacco, read in conjunction with point 1 of Paragraph 2(1) and point 3 of Paragraph 5d(1) of that law.

21. MM brought an action against that decision before the Landesverwaltungsgericht Oberösterreich (Regional Administrative Court, Upper Austria, Austria), which, by decision of 1 September 2022, upheld the action, annulled the administrative authority's decision of 30 May 2022 and terminated the administrative penalty proceedings.

22. According to that regional administrative court, the administrative authority had erred in finding that the supply of the products in question to the retailer entailed placing those products on the market. Point 2 of Paragraph 1 of the Law on tobacco restates the definition of 'placing on the market' found in point 40 of Article 2 of Directive 2014/40, such that that concept must be understood as making products, irrespective of their place of manufacture, available to consumers, with or without payment. Thus, a product must be regarded as having been 'placed on the market' with respect to consumers where that product is available from retailers or by distance selling, and 'making available' to consumers is to be equated with keeping a stock of tobacco products for the purposes of direct supply to consumers, that is to say, the last step before sale to consumers, which generally takes place at a tobacconist. The Regional Administrative Court, Upper Austria, therefore concluded that the products in question had not been 'placed on the market' by MM in so far as he had supplied them to a retailer, which is another business operator and not a consumer.

23. The administrative authority brought an appeal on a point of law (*Revision*) against the decision of 1 September 2022 before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), which is the referring court. The Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz (Federal Minister for Health, Social Affairs, Care and Consumer Protection, Austria) subsequently intervened in the proceedings in substitution for the administrative authority.

24. In order to rule on the main proceedings, the referring court considers it necessary to determine whether the prohibition provided for under EU law – which is substantively the same in Austrian law – on placing tobacco products on the market where the unit packet infringes the requirements concerning presentation, applies as from the stage of supply of those products by a wholesaler to a retailer, or whether it applies only to the stage of their supply by the retailer to a consumer. It considers that the interpretation of the concept of 'placed on the market', which appears in Article 23(2) of Directive 2014/40, is decisive in that regard. However, that directive does not define the concept of 'making products available', despite it being a key element in the concept of 'placing on the market', as defined in point 40 of Article 2 of that directive.

25. In the first place, the referring court observes that the German-language version [5] of point 40 of Article 2 of Directive 2014/40 does not rule out an interpretation of the concept of 'placing on the market' which extends to making the product available to a retailer. The English-language [6] and French-language [7] versions, however, do not shed any light on that question.

26. In the second place, the referring court observes that, as regards point 40 of Article 2 of Directive 2014/40, the Court of Justice held, in the judgment in *Pro Rauchfrei II*, [8] that according to the usual meaning of the words 'make … available' used in that provision, a tobacco product must be regarded as having been 'placed on the market' when consumers can acquire it. According to the referring court, that is the case only where such a product is available for sale, though it need not yet have been bought and paid for. It would follow that, in the present case, the supply of those products by a wholesaler to a retailer does not constitute a 'placing on the market'.

5 'die entgeltliche oder unentgeltliche Bereitstellung von Produkten … *für* Verbraucher'. Emphasis added.

6 'to make products … available to consumers'.

7 'le fait de mettre des produits … à la disposition des consommateurs'.

8 Judgment of 9 March 2023 (C-356/22, EU:C:2023:174, paragraph 20).

27. However, given the factual differences between the case which gave rise to the judgment in *Pro Rauchfrei II*[9] and the case in the main proceedings, the referring court is uncertain whether the interpretation adopted by the Court in that judgment is to be understood as meaning that, regardless of the provision of Directive 2014/40 which is at issue, a 'placing on the market' of tobacco products always involves the tobacco product being made available directly to a consumer (for example by sale), and that such a placing on the market cannot occur at an earlier stage of the supply chain.

28. In that regard, the referring court observes that the Court did not reproduce, in its judgment, the reasoning set out by Advocate General Tanchev in his Opinion in *Pro Rauchfrei*,[10] according to which wholesale transactions were expressly excluded from the concept of 'placing on the market'. That being so, the referring court considers that a schematic reading of Directive 2014/40 suggests, on the contrary, that the concept of 'placing on the market', which is defined in general terms in point 40 of Article 2 of that directive, may apply to various economic operators trading in tobacco, depending on the applicable provision of that directive and the situation at issue. Thus, the obligation imposed on Member States, by Article 23(2) of that directive, to ensure that tobacco and related products which do not comply with the directive are not 'placed on the market' may apply, in some cases, to manufacturers, importers or wholesalers, and in others, to retailers only.

29. In the third place, the referring court refers to German legislation. It states that the German legislature proceeded on the basis of an interpretation of the concept of 'placing on the market' which, depending on the provision of Directive 2014/40 in question, is capable of covering all the economic operators trading in tobacco products or only some of them. According to the referring court, while the German legislation in essence restates the definitions contained in Article 2 of that directive, it nevertheless stipulates, in relation to the definition of 'placing on the market', that tobacco products are made available wherever a product intended to be distributed, consumed or used on the EU market is supplied in the course of a business activity. It considers that the German legislature has thus adopted the definition of 'placing on the market' contained in point 2 of Article 2 of Regulation (EC) No 765/2008,[11] in order to ensure consistency between the basic provisions and the market surveillance measures.

30. Accordingly, the referring court states that point 1 of Paragraph 1(1) of the German Law on tobacco ensures that the concept of 'placing on the market' covers not only the direct supply of tobacco products to a consumer, but any supply of those products, at any level of the supply chain. Following on from that provision, Paragraph 3(1) of that law provides that economic operators and owners of retail outlets are equally required, in the course of their business activity, to ensure that only products meeting the requirements of that law are placed on the market.

31. The referring court states that there are no comparable rules in Austrian law, which is limited to what is almost a word-for-word transposition of the definition given in point 40 of Article 2 of Directive 2014/40, in point 2 of Paragraph 1 of the Law on tobacco, and of the prohibition on placing on the market laid down by Article 23(2) of Directive 2014/40, in point 1 of Paragraph 2(1) of that law.

9 Judgment of 9 March 2023 (C-356/22, EU:C:2023:174).

10 C-370/20, EU:C:2021:627.

11 Regulation of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products (OJ 2008 L 218, p. 30). Point 2 of Article 2 of that regulation was reproduced in point 2 of Article 3 of Regulation 2019/1020.

32. In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) decided to stay the proceedings and refer the following question to the Court of Justice 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] 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?'

33. MM, the Austrian, Belgian and Netherlands Governments and the European Commission submitted written observations. With the exception of the Belgian Government, those parties made oral submissions at the hearing on 23 October 2024.

IV. Analysis

34. By its sole question, the referring court asks, in essence, whether Article 23(2) of Directive 2014/40, read in conjunction with point 40 of Article 2 of that directive, must be interpreted as meaning that the obligation imposed on Member States to ensure that tobacco products in unit packets that do not comply with the requirements of that directive concerning the presentation of those products are not placed on the market also applies at the stage of supply of those products by a wholesaler to a retailer or only at the stage of their supply by a retailer to consumers.

35. Before beginning the analysis of that question, I think it is necessary to make some preliminary remarks concerning its subject matter.

36. I note that the parties to the dispute have, for the most part, focused on the interpretation of point 40 of Article 2 of Directive 2014/40, which provides an abstract definition of the concept of 'placing on the market' for the purposes of that directive. In my opinion, however, the present case does not concern the interpretation of the definition of the concept of 'placing on the market' in the abstract, but the interpretation of a substantive provision of that directive which employs that concept.

37. In my view, the subject matter of the present case has more to do with the scope of the Member States' obligation not to permit the placing on the market of tobacco products which do not comply with Directive 2014/40, and the Court will accordingly have to determine whether such an obligation entails checks only at the stage at which those products are sold by the retailer to the consumer, or whether it also entails surveillance at earlier stages of the supply chain, such as the wholesale stage which is at issue in the present case.

38. I will therefore focus my analysis on the interpretation of Article 23(2) of Directive 2014/40, in so far as it requires Member States to ensure that tobacco products which do not comply with that directive are not placed on the market.

39. According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. [12]

[12] Judgments of 30 January 2019, *Planta Tabak* (C-220/17, EU:C:2019:76, paragraph 60), and of 26 September 2018, *Baumgartner* (C-513/17, EU:C:2018:772, paragraph 23).

40. I will therefore proceed to consider the interpretation of Article 23(2) of Directive 2014/40 from a literal perspective (section A below), a schematic perspective (section B below) and a purposive perspective (section C below) in order to determine whether the supply of tobacco products by a wholesaler to a retailer comes within the scope of the Member States' obligation to ensure that no product which does not comply with that directive is placed on the market.

A. Literal interpretation

41. Article 23(2) of Directive 2014/40 imposes a general surveillance obligation on the Member States designed to ensure that no product which does not comply with that directive is placed on the market.

42. All the parties refer to point 40 of Article 2 of Directive 2014/40 for the purpose of determining the meaning of the concept of 'placed on the market' in connection with such a surveillance obligation.

43. Thus, the Commission claims that the wording of point 40 of Article 2 of Directive 2014/40 is clear and provides that placing on the market does not occur until the products in question are directly accessible by consumers. It submits that any interpretation of that concept covering the supply of products by a wholesaler to a retailer is contrary to the wording of that provision.

44. I agree with that interpretation. Point 40 of Article 2 of Directive 2014/40 contains a general definition of the concept of 'placing on the market' which presupposes that the products in question are accessible to consumers.

45. However, I share the view of the Belgian and Netherlands Governments that the issue of whether the surveillance obligation imposed on the Member States by Article 23(2) of Directive 2014/40 also requires checks at the stage of supply of the products in question by a wholesaler to a retailer cannot be resolved simply by reference to the definition of the concept of 'placing on the market' in point 40 of Article 2 of that directive.

46. As the Commission itself observes, Article 23(2) of Directive 2014/40 imposes an obligation on Member States to achieve a particular outcome, namely that products which do not comply with that directive are not made available to consumers. Thus, the concept of 'placing on the market', as defined in point 40 of Article 2 of that directive, serves only to identify the outcome required to be achieved by Article 23(2) thereof. It does not, by contrast, enable a determination to be made as to whether such an outcome entails the Member State fulfilling its surveillance obligation also at the wholesale stage, or only at the stage of supply of the products in question by the retailer to the consumer.

47. Equally, the reference to the definition of 'placing on the market' made by the Court in the judgment in *Pro Rauchfrei II*[13] does not clarify the scope of the obligation contained in Article 23(2) of Directive 2014/40. In the case that gave rise to that judgment, the Court had to determine whether the sale of tobacco products from an automatic vending machine inside which the products were not visible constituted a 'placing on the market' within the meaning of Article 8(3) of that directive, which provides that, at the time of placing on the market, the health warnings on the products in question must not be hidden. In that regard, the Court held that, according to the usual meaning of the words 'make … available', a tobacco product must be

[13] Judgment of 9 March 2023 (C-356/22, EU:C:2023:174).

regarded as having been 'placed on the market' when consumers can acquire it. Where such a product is made available for sale, it must be regarded as having been placed on the market, even before it has been purchased and payment has been made.

48. In those circumstances, the judgment in *Pro Rauchfrei II*[14] clarifies the concept of 'placing on the market', in accordance with point 40 of Article 2 of Directive 2014/40, in a manner that is consistent with the literal interpretation on which placing on the market presupposes that the products in question are directly accessible to consumers.

49. Here again, however, that approach serves only to highlight the outcome that the Member States are required to achieve under Article 23(2) of Directive 2014/40, namely that consumers are unable to acquire products which do not comply with that directive. It does not, by contrast, enable a determination to be made as to whether, in order to achieve that outcome, the Member States are required to carry out checks only at the stage of sale by the retailer to the consumer, or also further up the supply chain.

50. The very wording of Article 23(2) of Directive 2014/40 is not unequivocal in that regard. Thus, as all the parties have observed, that provision lays down the outcome to be achieved. The question of the means to be employed by the Member States in order to achieve that outcome, namely whether the Member States are required to carry out checks only at the final stage of the supply chain or also at earlier stages, is not settled by that provision.

51. Accordingly, in so far as it is not unambiguously apparent from the wording of Article 23(2) of Directive 2014/40 whether the Member States' obligation to ensure that tobacco products which do not comply with that directive are not 'placed on the market' entails checks at the stage of the supply of those products by a wholesaler to a retailer, I consider it necessary to analyse the terms of the definition of that concept in the light of the context of that provision and the objectives pursued by that directive.

B. Schematic interpretation

52. First, Article 23 of Directive 2014/40, entitled 'Cooperation and enforcement', is among the final provisions of that directive and paragraph 2 thereof provides that 'Member States shall ensure that tobacco and related products which do not comply with [that directive] … are not placed on the market'.

53. Article 23(3) of Directive 2014/40, for its part, imposes an obligation on the Member States to lay down penalties for infringement of the national provisions transposing that directive.

54. I therefore understand Article 23(2) of Directive 2014/40 as imposing a general surveillance obligation on the Member States, designed to ensure that no product which does not comply with that directive is made available to consumers, and paragraph 3 of that article as giving specific form to that general surveillance obligation through the establishment of penalties for infringement of the requirements of that directive.

[14] Judgment of 9 March 2023 (C-356/22, EU:C:2023:174).

55. There is nothing to limit the establishment of those penalties to the infringement of the provisions of Directive 2014/40 at the stage of supply of non-compliant tobacco products by a retailer to a consumer. On the contrary, as the Commission observes, those penalties relate to all the provisions of that directive, regardless of the stage of the supply chain to which they apply.

56. In those circumstances, I do not consider that any such limit should apply to the surveillance obligation imposed on Member States by Article 23(2) of Directive 2014/40.

57. Second, in a wider context referred to by the Commission, it should be pointed out that Directive 2014/40 is supplemented, to some extent, by Regulation 2019/1020, which provides for market surveillance measures intended to ensure that the products concerned comply with the substantive provisions of the harmonisation legislation.

58. Regulation 2019/1020 applies to products subject to the EU harmonisation legislation listed in Annex I to that regulation, which includes Directive 2014/40. In that regard, that regulation seeks to reinforce the market surveillance of products covered by that directive so that only products which comply with it are placed on the market.

59. In other words, Regulation 2019/1020 seeks to increase the effectiveness of the mechanisms provided for by Directive 2014/40 as regards the conformity of tobacco products with the provisions of that directive.

60. To that end, Regulation 2019/1020 imposes, inter alia, a market surveillance obligation on the Member States and requires them to adopt certain measures in respect of non-compliant products, including requiring the economic operator concerned to take the action necessary to bring the non-compliance to an end. That regulation thus does not limit the surveillance obligation, introduced to reinforce the surveillance obligation already imposed by Directive 2014/40, to the stage of supply of the product by the wholesaler to the consumer, but completes the mechanism by requiring the Member States to adopt specific measures.

61. As the Commission itself observes, that is intended to ensure that Directive 2014/40 is fully applied throughout the entire tobacco product supply chain, recital 12 of Regulation 2019/1020 stating that ‘economic operators throughout the entire supply chain should be expected to act … in full accordance with the legal requirements applicable when placing … products … on the market’.

62. It appears to me that such a mechanism provides confirmation that the surveillance obligation imposed by Article 23(2) of Directive 2014/40 is to be interpreted as having the same scope as that imposed by Regulation 2019/1020.

63. For those reasons, I consider that it is apparent on a schematic interpretation that the surveillance obligation imposed on the Member States by Article 23(2) of Directive 2014/40 means that the Member States are to fulfil their surveillance obligation not only at the stage of the supply of the products in question by the retailer to the consumer, but also at the wholesale stage.

64. It seems to me, furthermore, that that interpretation is confirmed by the purposive interpretation of that provision.

C. Purposive interpretation

65. As the Court has previously held, in accordance with Article 1 of Directive 2014/40, that directive has a twofold objective of facilitating the smooth functioning of the internal market for tobacco and related products, while taking as a base a high level of protection of human health, especially for young people. [15]

66. The objective of ensuring a high level of protection of health is affirmed in recitals 8, 13, 18, 21, 36, 54 and 59 of Directive 2014/40.

67. Given that objective, I consider that the general surveillance obligation imposed on the Member States by Article 23(2) of Directive 2014/40 must be interpreted as meaning that those checks are to be carried out not only at the stage of the sale of the product in question by the retailer to the consumer, but also at the time of every transaction which necessarily leads to the product ultimately being made available to consumers.

68. To limit the checks carried out by the Member States with a view to enforcing the requirements of Directive 2014/40 to the final stage of the tobacco product supply chain would, in my view, undermine the effectiveness of the surveillance obligation imposed by that directive on the Member States.

69. Such an interpretation would mean that, under Directive 2014/40, the retailer alone would be liable for the placing on the market of products which do not comply with that directive, when, as regards many of the requirements of that directive, concerning the ingredients or packaging of those products, the retailer does not have control. That would result, to my mind, in a non-negligible risk of products which are non-complaint – and thus harmful to the health of consumers – being made available to them.

70. On the other hand, the interpretation that I propose, on which the Member States' obligation to ensure that no product which does not comply with Directive 2014/40 is placed on the market requires checks to be carried out at various stages of the supply chain, makes it possible to achieve the objective of ensuring a high level of protection of health, by requiring Member States to verify compliance with the provisions of Directive 2014/40 whenever a transaction takes place which necessarily leads to the product ultimately being made available to consumers.

71. Similarly, the objective of smooth functioning of the internal market is, in my view, a reason to reject the Commission's position that the surveillance obligation imposed by Article 23(2) of Directive 2014/40 merely requires the Member States to carry out checks with regard to the sale by the retailer to the consumer, it being for the Member States to adopt national measures concerning earlier stages of the supply chain, if they so wish, in order to ensure that non-compliant products are not made available to consumers.

72. Such an interpretation would create a risk of disparities in the legislation of different Member States and of different obligations being imposed on supply chain operators other than retailers depending on the national measures adopted by the Member States.

[15] Judgment of 4 May 2016, *Poland* v *Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 80).

73. Therefore, I consider that the purposive interpretation of Article 23(2) of Directive 2014/40 leads to the conclusion that the obligation imposed on Member States to ensure that tobacco products in unit packets which do not comply with the requirements of that directive as regards the presentation of those products are not placed on the market must be fulfilled not only at the stage of sale of those products by the retailer to the consumer, but also at the stage of their supply by a wholesaler to a retailer.

V. Conclusion

74. In the light of all the foregoing, I propose that the Court's answer to the question referred for a preliminary ruling by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) should be as follows:

Article 23(2) 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, read in conjunction with point 40 of Article 2 thereof,

must be interpreted as meaning that the obligation imposed on Member States to ensure that tobacco products in unit packets which do not comply with the requirements of that directive as regards the presentation of those products are not placed on the market applies not only at the stage of their supply by a retailer to consumers, but also at the stage of supply of those products by a wholesaler to a retailer.