Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 15 July 2021 [1]

Case C-370/20

Pro Rauchfrei e.V.
v
JS e.K.

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Directive 2014/40/EU — Health warnings to be carried by each unit packet of a tobacco product and any outside packaging — Tobacco vending machine — Article 2(40) — Concept of 'placing on the market' — Article 8(3) —Prohibition on health warnings being 'hidden by other items' — Article 8(8) — Concept of 'images' of unit packets or any outside packaging targeting consumers in the European Union)

1. The dispute in the main proceedings concerns the labelling and packaging of tobacco products sold via a vending machine. Directive 2014/40/EU of the European Parliament and of the Council [2] requires that each unit packet of a tobacco product carry the health warnings for which it provides. Article 8(3) of that directive specifies that those warnings must be fully visible, including not being hidden by certain items. The question before the Bundesgerichtshof (Federal Court of Justice, Germany) is whether, where the health warnings on cigarette packets are not visible while the packets are stocked inside a vending machine, the prohibition on warnings being hidden is infringed. For that to be the case, the vending machine would have to be regarded as an item hiding the warnings, as are, for instance, wrappers and jackets, to which Article 8(3) of that directive makes express reference, which is questionable.

2. The referring court also wishes to know whether there is an infringement of the rule laid down in Article 8(8) of Directive 2014/40 that the *images* of unit packets and any outside packaging must also carry health warnings. Indeed, the product selection buttons of the vending machine in question in the case in the main proceedings show images of various brands of cigarettes. The question is whether those images may be regarded as images within the meaning of Article 8(8) of that directive, in which case they would be required to carry health warnings, which they do not.

[1] Original language: English.

[2] Directive 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, and corrigendum, OJ 2015 L 150, p. 24).

3. Thus, the present case provides the Court with an opportunity to give a ruling, in relation to a tobacco vending machine, on the scope of the requirement that not only each unit packet of a tobacco product, but also the images of that packet, must carry the health warnings provided for in Directive 2014/40.

I. Legal framework

A. European Union law

4. Article 2 of Directive 2014/40 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;

…'

5. Article 8 of Directive 2014/40 states:

'1. Each unit packet of a tobacco product and any outside packaging shall carry the health warnings provided for in this Chapter in the official language or languages of the Member State where the product is placed on the market.

…

3. 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.

…

8. Images of unit packets and any outside packaging targeting consumers in the Union shall comply with the provisions of this chapter.'

B. German law

6. Paragraph 11 of the Verordnung über Tabakerzeugnisse und verwandte Erzeugnisse (Regulation on tobacco products and related products; 'the TabakerzV'), entitled 'General provisions for the labelling of tobacco products', states:

'(1) The following general requirements shall apply to the design and affixing of the health warnings referred to in Paragraphs 12 to 17 to the packages and outer packages of tobacco products: The health warnings

…

4. may not be partially or totally hidden or interrupted at the time of placing on the market, including offering for sale; in the case of packages with flip-top lids where the warnings are split when opening the packet, this may only be done in a manner that ensures graphic integrity and legibility,

…

(2) Representations of packages and outer packaging intended for promotional activities addressed to consumers in the European Union shall comply with the requirements of this Subsection.'[3]

II. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

7. JS operates two supermarkets in Munich (Germany). From 20 May 2017, it offered cigarettes for sale at the checkout points of those supermarkets in the automatic vending machine shown below ('the vending machine at issue'):

[3] The 'Subsection' referred to by Paragraph 11(2) of the TabakerzV is Subsection 3 thereof, which relates to packaging and warnings.



8. The cigarette packets stocked in the vending machine at issue were not visible to the customer. Although the product selection buttons on that vending machine showed various brands of cigarettes, they did not display the legally prescribed health warnings.

9. The sale was carried out in such a way that the customer first requested the cashier to enable the vending machine and then pressed the selection button for the desired cigarette brand. The cigarette packet was then conveyed from the machine's dispensing device onto the checkout belt. Payment for the cigarette packet was then made at the checkout point, provided that the customer maintained his or her intention to purchase. Organising the sales process through the vending machine in this way served to prevent theft and to prevent sales to minors.

10. Pro Rauchfrei e.V., a non-profit association, brought an action before the Landgericht München I (Regional Court, Munich I, Germany), seeking, primarily, to prohibit, upon threat of a penalty, JS from offering for sale tobacco products, in particular, cigarettes, in such a way that the health warnings displayed on the unit packets or on their outside packaging are hidden, as described in points 8 and 9 above. In the alternative, Pro Rauchfrei requested that JS be prohibited, upon threat of a penalty, from offering for sale tobacco products, in particular cigarettes, in such a way that images of unit packets without health warnings are displayed in place of the unit packets with such warnings, as described in the same points.

11. By judgment of 5 July 2018, the Landgericht München I (Regional Court, Munich I) dismissed the action.

12. By judgment of 25 July 2019, the Oberlandesgericht München (Higher Regional Court, Munich, Germany) dismissed the appeal brought by Pro Rauchfrei against the judgment of the Landgericht München I (Regional Court, Munich I).

13. Pro Rauchfrei lodged an appeal on a point of law (*Revision*) against the judgment of the Oberlandesgericht München (Higher Regional Court, Munich) before the Bundesgerichtshof (Federal Court of Justice).

14. The Bundesgerichtshof (Federal Court of Justice) considers that the success of the appeal on a point of law (*Revision*) depends on the interpretation of the first sentence of Article 8(3) and of Article 8(8) of Directive 2014/40. Thus, it stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does the concept of "placing on the market" within the meaning of the first sentence of Article 8(3) of [Directive 2014/40] cover the offering of tobacco products via vending machines in such a way that, although the cigarette packets contained in them display the warnings prescribed by law, the cigarette packets are initially stocked in the machine in such a way that they are not visible to the consumer, and the warnings on them become visible only when the customer operates the machine, which has previously been enabled by the cashier, and the cigarette packet is thus dispensed onto the checkout belt prior to the payment process?

(2) Does the prohibition in the first sentence of Article 8(3) of [Directive 2014/40] on warnings being "hidden by other items" cover the case in which the entire tobacco packaging is hidden when the goods are presented by an automatic vending machine?

(3) Is the criterion of "images of unit packets" in Article 8(8) of [Directive 2014/40] satisfied even if an image is not a faithful depiction of the original packaging, but the consumer associates the image with tobacco packaging on account of its design in terms of outline, proportions, colour and brand logo?

(4) Are the requirements of Article 8(8) of [Directive 2014/40] satisfied even if the consumer has the opportunity to see the cigarette packaging with the prescribed warnings prior to the conclusion of the contract of sale, irrespective of the depiction used?'

15. Written observations were submitted by JS and the European Commission. No hearing was held in the case.

III. Analysis

A. The first question referred

16. By its first question, the referring court asks the Court of Justice, in essence, whether the concept of 'plac[ing] on the market' within the meaning of the first sentence of Article 8(3) of Directive 2014/40 covers the presentation of cigarette packets by means of a vending machine in such a way that those packets are initially stocked in the machine without being visible to the consumer, so that the health warnings they carry become visible only when the customer operates the machine and the packet is dispensed onto the checkout belt, prior to the payment process.

17. As mentioned in point 1 above, each unit packet of a tobacco product and any outside packaging must, according to Article 8(1) of Directive 2014/40, carry the health warnings provided for in Chapter II of Title II of that directive ('the required health warnings'). Article 8(3) of that directive specifies, inter alia, that those warnings cannot be partially or totally hidden or interrupted by certain items.

18. I note that both the obligation to carry the required health warnings and the prohibition on their being interrupted or hidden applies only 'when tobacco products are placed on the market', according to Article 8(3) of Directive 2014/40.[4] The concept of 'placing on the market' is defined by Article 2(40) of Directive 2014/40 as follows: '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 …'

19. Thus, by its first question, the referring court asks, in essence, whether, in the present case, a cigarette packet must be considered to be placed on the market: (i) when it is offered for sale via the vending machine at issue, that is, before the purchase decision is made; or (ii) at the time when actual physical control of that packet is transferred from the seller to the customer after the payment process.

20. I should point out that, according to the order for reference, the Oberlandesgericht München (Higher Regional Court, Munich) took the view that the offering for sale of cigarette packets by means of a vending machine falls outside the scope of Directive 2014/40, given that that presentation constitutes a 'sales arrangemen[t]', which, according to recital 48 of that directive, is not harmonised by that directive.[5] Therefore, I find it necessary to examine whether Directive 2014/40 is applicable to the present case before I analyse the first question referred.

1. Whether Directive 2014/40 is applicable to the present case

21. Unlike the Oberlandesgericht München (Higher Regional Court, Munich), the referring court seems to be inclined towards the view that Directive 2014/40 is applicable. The referring court notes, in particular, that, although recital 48 of Directive 2014/40 indicates that it does not harmonise the rules on 'domestic advertising', recital 43 and Article 20(5) of that directive nonetheless lay down rules on advertising electronic cigarettes. The referring court also notes that, according to recital 60 and the title of Directive 2014/40, that directive harmonises the rules on, inter alia, the 'presentation' of tobacco products, which may be understood as covering also the circumstances of their presentation.

22. In that regard, JS submits that (i) recital 48 of Directive 2014/40 applies not only to electronic cigarettes, but also to tobacco products; (ii) the sale of cigarette packets via a vending machine constitutes a sales arrangement within the meaning of that recital; and (iii) therefore, the sale of cigarette packets via a vending machine falls outside the scope of that directive.

[4] '[W]here the product is placed on the market', pursuant to Article 8(1) of Directive 2014/40.

[5] According to the order for reference, '[the Oberlandesgericht München (Higher Regional Court, Munich)] found that keeping the unit packets of cigarettes in stock in the automatic vending machine at issue was simply a sales arrangement. According to that court, it followed from recital 48 of Directive 2014/40 that that directive's objective of approximating national rules did not cover sales arrangements and advertising. Thus, the relevant provisions of that directive did not apply to the offering for sale of cigarettes by means of automatic dispensers, which is at issue in the present case'.

23. The Commission takes the opposite view. It argues that, while, according to recital 48 of Directive 2014/40, sales arrangements, such as the sale of tobacco products via a vending machine, fall within the competence of the Member States, the health warnings to be affixed on tobacco products fall within the scope of that directive, which fully harmonises them. The Commission stresses, in particular, that the European Union has competence to approximate national rules that circumvent measures having as their object the functioning of the internal market, such as the labelling provisions of Directive 2014/40. [6]

24. I consider that Directive 2014/40 is applicable to the present case.

25. The first sentence of recital 48 of Directive 2014/40 states that '… this Directive does not harmonise the rules on smoke-free environments, *or on domestic sales arrangements or domestic advertising*, or brand stretching, nor does it introduce an age limit for electronic cigarettes or refill containers'. [7]

26. In my view, the first sentence of recital 48 of Directive 2014/40 applies only to electronic cigarettes and refill containers, not to tobacco products such as cigarettes. [8] This is because, first, that sentence makes express reference to 'electronic cigarettes or refill containers'. Second, the preceding recitals – that is, recitals 36 to 47 – all make reference to electronic cigarettes or nicotine-containing liquid, [9] without mentioning tobacco products. Third, that interpretation is confirmed by the *travaux préparatoires* for Directive 2014/40. A document drafted by the Presidency of the Council of the European Union [10] indicates that recitals (a) to (m) – which correspond to recitals 36 to 48 of Directive 2014/40 – are 'recitals related to Article 18' – now Article 20 of Directive 2014/40, entitled 'Electronic cigarettes'. In particular, recital (l) is almost identical to recital 48 of Directive 2014/40.

27. However, irrespective of whether or not the first sentence of recital 48 of Directive 2014/40 applies to tobacco products, that directive cannot, in my view, be considered to harmonise national rules on the sale of tobacco products via vending machines, or national rules on the advertising of those products on tobacco vending machines.

28. First, Directive 2014/40 does not harmonise national rules on the sale of tobacco products via vending machines. Indeed, there is no reference to sales via vending machines, or to any sales arrangements, [11] in Article 1 of Directive 2014/40, which lists the subject matter of that directive. Furthermore, the prohibition, or the restriction, of sales via vending machines was envisaged, and

6 The Commission relies on the judgment of 5 October 2000, *Germany* v *Parliament and Council* (C-376/98, EU:C:2000:544, paragraph 100).

7 Emphasis added.

8 For the sake of completeness, I should specify that electronic cigarettes are not tobacco products. According to Article 2(4) of Directive 2014/40, tobacco products must 'consist, even partly, of tobacco'. That is not the case for electronic cigarettes, which, as Article 2(16) indicates, are used 'for consumption of nicotine-containing vapour'. Electronic cigarettes are not used for consumption of tobacco as defined by Article 2(1), that is, 'leaves and other natural processed or unprocessed parts of tobacco plants' (see also judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraphs 37 and 38).

9 With the exception, however, of recitals 42 and 45. Nevertheless, recital 42 uses the phrase 'these products', which may only be understood as referring to the products described in the preceding recital, namely, electronic cigarettes. Moreover, the reference, in recital 45, to 'suspected adverse effects' on human health echoes Article 20(9), which applies only to electronic cigarettes; and the reference, in the same recital, to a 'safeguard clause', corresponds to Article 20(11), also applicable only to electronic cigarettes.

10 See Council Document No 17727/13 ANNEX, of 17 December 2013 (at p. 15).

11 Except for 'cross-border distance sales of tobacco products' in Article 1(d) – which, precisely, are not 'domestic' arrangements which, pursuant to the first sentence of recital 48 of Directive 2014/40, fall outside the scope of that directive.

discarded in the impact assessment of Directive 2014/40.[12] Finally, the sale of tobacco products via vending machines falls within the scope of Council Recommendation 2003/54/EC,[13] which, according to recital 16 of that recommendation, addresses types of advertising, marketing and promotion practices 'other' than those covered, inter alia, by Directive 2001/37/EC of the European Parliament and the Council[14] (now repealed and replaced by Directive 2014/40). Reference should be made, in that regard, to paragraph 1(c) of Recommendation 2003/54, whereby Member States are recommended to either 'restric[t] the access to tobacco vending machines to locations accessible to persons over the age set for purchase of tobacco products in national law', or, where such an age limit does not exist, 'otherwise regulat[e] the access to the products sold through such machines'.

29. Second, Directive 2014/40 does not harmonise national rules on the advertising of tobacco products on tobacco vending machines. Indeed, there is no reference to advertising on vending machines, or to any advertising of tobacco products, irrespective of the medium, in Article 1 of Directive 2014/40, which lists the subject matter of that directive. Furthermore, advertising of tobacco products on tobacco vending machines falls within the scope of Recommendation 2003/54, which, as explained in point 28 above, addresses types of advertising, marketing and promotion practices not covered by Directive 2014/40. Reference should be made, in that regard, to paragraph 2(d) of Recommendation 2003/54, whereby Member States are recommended to 'prohibit, in accordance with national constitutions or constitutional principles', 'the use of … indoor or outdoor advertising techniques (such as advertising on tobacco vending machines)'.[15]

30. That being said, although Directive 2014/40 does not harmonise national rules on the sale of tobacco products via vending machines or on advertising on those machines, it does not follow that that directive is not applicable to the present case.

31. First, the question before the Court is not whether or not tobacco products may be sold via vending machines (or whether or not the sale of tobacco products via vending machines may be restricted to persons above the legal age for purchase of those products). The question is whether, *where, as appears to be the case in Germany, national legislation allows for tobacco products to be sold via a vending machine,* that machine may, on the one hand, entirely hide the required health warnings on the tobacco products inside it, and, on the other hand, show on its selection buttons images of those products not carrying those warnings. That question falls within the scope of Directive 2014/40, given that one objective of that directive is, according to Article 1(b) of that directive, the approximation of national rules concerning 'certain aspects of

[12] Impact assessment of 19 December 2012 accompanying the proposal for a directive of the European Parliament and of the Council 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 (SWD(2012)°452 final) ('the impact assessment of Directive 2014/40'). According to Section 4.1 of Part 1 of the impact assessment of Directive 2014/40, 'the approximation of Member States' legislation on tobacco vending machines (TVM) was discarded in the impact assessment and public consultation. This policy area was discarded given subsidiarity concerns and taking into account the already good progress in this area' (p. 50). See also the Study prepared by RAND Europe, entitled 'Assessing the Impacts of Revising the Tobacco Products Directive', of September 2010 ('the RAND Study'). According to the RAND Study, of the five options envisaged by the Commission, three contained measures concerning tobacco vending machines: Option 3 comprised measures to 'make vending machines inaccessible to minors', while Options 4 and 5 contemplated a complete 'ban [on] vending machines' (see pp. 189, 219, 227 and 235). The RAND Study is available on the website of the European Commission.

[13] Recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control (OJ 2003 L 22, p. 31).

[14] Directive of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001 L 194, p. 26). Directive 2001/37 is mentioned in recital 9 of Recommendation 2003/54.

[15] Reference should also be made to recital 14 of Recommendation 2003/54, according to which vending machines 'should not carry advertising other than what is strictly necessary for indicating the products sold'.

the labelling and packaging of tobacco products including the health warnings'. There is no indication that the harmonisation of the relevant 'aspects' of the labelling and packaging of tobacco products is limited to their sale by specific means.

32. Second, the question before the Court is not whether or not tobacco advertising is permitted. In particular, it is not whether or not vending machines may carry tobacco advertising. The question is whether, *where, as appears to be the case in Germany, tobacco advertising on vending machines is permitted,* the images of brands of cigarettes shown on the selection buttons of a vending machine must be accompanied by the required health warnings. That question falls within the scope of Directive 2014/40, given that one objective of that directive is, according to Article 1(b) of that directive, the approximation of national rules on the health warnings to appear on unit packets of tobacco products and, according to Article 8(8), on the images of those unit packets.

33. I conclude that, contrary to JS' arguments, Directive 2014/40 does apply to the present case.

2. Whether the presentation of tobacco products by means of the vending machine at issue constitutes placing on the market

34. As mentioned in point 19 above, the referring court asks, in essence, whether, in the present case, a cigarette packet must be considered to be placed on the market when it is offered for sale via the vending machine at issue, or at the time when the actual physical control of that packet is transferred from the seller to the customer after the payment process.

35. JS submits that, irrespective of whether Directive 2014/40 applies to the present case, stocking tobacco products in the vending machine at issue cannot constitute placing on the market.

36. The Commission claims that, in the light of its assessment of the third and the fourth questions referred, there is no need to address that issue. However, the Commission submits that, should the Court disagree with the interpretation of Article 8(8) of Directive 2014/40 proposed by the Commission, it would be necessary for it to find that the cigarette packet has certainly been placed on the market at the time when it is dispensed onto the checkout belt. Whether or not that packet was placed on the market at an earlier stage is for the referring court to decide.

37. I take the view that a cigarette packet is placed on the market at the time when it is offered for sale via the vending machine at issue.

38. Article 2(40) of Directive 2014/40 provides for a broad definition of the concept of 'placing on the market' of tobacco products. It is sufficient, for a product to be considered placed on the market, that it is made available to consumers in the Union (wholesale being thus excluded).

39. In particular, absent any reservation in Article 2(40) of Directive 2014/40 as to the means whereby a product is made available to consumers, those means must be considered irrelevant. Therefore, where a tobacco product is made available to consumers via a vending machine, it is placed on the market within the meaning of that provision. In that regard, it does not matter that the European Parliament did not follow the proposal of its Committee on Legal Affairs to amend Article 2(40) to the effect that 'placing on the market' meant 'to make products available to consumers located in the Union, with or without payment, including by means of distance sale *or*

by use of vending machines…'.[16] Indeed, one reason why that proposal was not taken over could be that it may be understood as implying that the sale of tobacco products by vending machines is permitted whereas, as explained in point 28 above, that issue falls outside the scope of Directive 2014/40.

40. Moreover, according to Article 2(40) of Directive 2014/40, a product is considered placed on the market where it is made available to consumers, 'with or without payment'. Thus, tobacco products made available to consumers free of charge are placed on the market within the meaning of that provision (where, obviously, free distribution of tobacco products is permitted, which it is only if it does not occur in the context of the sponsorship of events or activities having cross-border effects and having the direct or indirect effect of promoting such products).[17] In other words, it is not necessary that tobacco products are made available for sale. It is sufficient that they are made available for consumption. It follows that, where tobacco products are made available for sale, they must be considered placed on the market before they are purchased and before they are paid for.

41. In the present case, it follows from points 39 and 40 above that the cigarette packet is placed on the market as soon as it is offered for sale in the vending machine at issue, not when that packet is paid for and the actual physical control thereof is transferred from the seller to the customer.

42. Therefore, the answer to the first question referred should be that, where a tobacco product is offered for sale via a vending machine which must be operated by the customer so that the product is dispensed onto the checkout belt, before payment is made for it, that product must be considered to be placed on the market within the meaning of Article 2(40) of Directive 2014/40 at the time when it is offered for sale via that vending machine, not at the time when it is paid for and actual physical control of that product is transferred from the seller to the customer.

B. The second question referred

43. By its second question, the referring court asks the Court of Justice, in essence, whether the prohibition on the hiding of the required health warnings by 'other items' laid down in the first sentence of Article 8(3) of Directive 2014/40 covers the situation in which the entire packaging carrying those warnings is hidden because the cigarette packet is not visible when it is inside the vending machine.

44. The first sentence of Article 8(3) of Directive 2014/40 effectively prohibits the health warnings on a unit packet and any outside packaging of tobacco products from being 'partially or totally hidden or interrupted by tax stamps, price marks, security features, wrappers, jackets, boxes, *or other items*',[18] when tobacco products are placed on the market.

45. In that regard, JS submits that, where the required health warnings carried by a unit packet are hidden because that packet is not visible when it is inside a vending machine, there is no infringement of Article 8(3) of Directive 2014/40. A vending machine is not an 'ite[m]' hiding the

[16] See Opinion of the Committee on Legal Affairs, of 25 June 2013, in the European Parliament's Report on the proposal for a directive of the European Parliament and of the Council 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, of 24 July 2013 (Amendment 22 at p. 273).

[17] According to Article 5(2) of Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 2003 L 152, p. 16).

[18] Emphasis added.

required health warnings within the meaning of that provision. Such 'items' may only be articles which compromise the integrity of the required health warnings, not articles used for the sale of tobacco products.

46. The Commission claims that, in the light of its assessment of the third and the fourth questions referred, there is no need to examine the second question. However, the Commission indicates that, should the Court disagree with the interpretation of Article 8(8) of Directive 2014/40 which the Commission proposes, it would be necessary for it to find that the vending machine at issue cannot be regarded as an 'ite[m]' hiding the required health warnings for the purposes of Article 8(3) of that directive. In the Commission's view, there is no reason to interpret that provision broadly, as meaning that Article 8(3) is infringed solely on account of the fact that the tobacco products sold in retail premises are not on display in those premises. The effectiveness of the required health warnings may be ensured by other means, such as ensuring that the product selection buttons comply with Article 8(8) of Directive 2014/40.

47. I take the view that the prohibition on the required health warnings being hidden 'by other items', laid down in the first sentence of Article 8(3) of Directive 2014/40, does not cover the case where the entire packaging of tobacco products is hidden when those products are inside a vending machine.

48. First, the first sentence of Article 8(3) of Directive 2014/40 states that *the required health warnings* on the unit packets of tobacco products and any outside packaging must not be partially or totally hidden. It does not state that *the unit packets* carrying those warnings must not be hidden at retail shops (so as to ensure the full visibility of the warnings). [19]

49. Second, the first sentence of Article 8(3) of Directive 2014/40, in so far as it states that the required health warnings must be 'irremovably printed', 'indelible', and cannot be 'partially' 'hidden or interrupted', seeks to ensure that the integrity of the required health warnings is not compromised. Stocking the unit packets carrying those warnings inside a vending machine has no effect on the integrity of the warnings.

50. Third, the first sentence of Article 8(3) of Directive 2014/40 does not simply prohibit the required health warnings from being hidden. Rather, it specifies that those warnings must not be hidden by certain items, namely, 'tax stamps, price marks, security features, wrappers, jackets, boxes, *or other items*'. [20] Clearly, a vending machine is no simple 'bo[x]', let alone a wrapper or a jacket. Nor can it, in my view, be considered to fall within the scope of the prohibition laid down by the first sentence of Article 8(3) of Directive 2014/40 on account of the reference to the 'other items' hiding the required health warnings. Indeed, the fact that that provision does not define those 'other items' does not mean that *anything* hiding the warnings falls within the scope of the prohibition. Rather, the items listed as examples suggest that the 'other items' must either be affixed on the packaging of the tobacco product in question (like tax stamps, price marks and security features), or be themselves (elements of) that packaging, including the 'outside packaging' as defined by Article 2(29) of Directive 2014/40 (like wrappers, jackets and boxes). That is not the case in respect of a vending machine, which cannot be regarded as packaging since its purpose (unlike that of wrappers, jackets and boxes) is not to enclose or even stock one or more unit packets of tobacco products, but to make those products available for sale.

[19] Actually, the opposite approach – that is, the introduction of restrictions, or of a complete prohibition, on displaying tobacco products at points of sale – was envisaged (and discarded) in the *travaux préparatoires* of Directive 2014/40. See, in that regard, Section 4.1 of Part 1 of the impact assessment of Directive 2014/40 (at p. 50), and the RAND Study (at pp. 227 and 233).

[20] Emphasis added.

51. Fourth, the interpretation of the first sentence of Article 8(3) of Directive 2014/40 proposed in point 47 above is consistent with international law. I should mention that the European Union and its Member States are parties to the World Health Organisation Framework Convention on Tobacco Control, signed in Geneva on 21 May 2003 ('the FCTC'), the provisions of which are binding on them.[21] Article 11(1) of the FCTC states that the parties to that convention 'shall … adopt and implement … effective measures to ensure that: … (b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use …'. I should also mention that the parties to the FCTC adopted a set of guidelines for the implementation of that convention, which, although they have no binding force, are nonetheless intended to have a decisive influence on the content of the rules adopted by the European Union in the area under consideration.[22] Paragraph 10 of the Guidelines for Implementation of Article 11 of the World Health Organisation Framework Convention on Tobacco Control ('the Guidelines for Implementation of Article 11 of the FCTC') provides that 'Parties should ensure that health warnings … are not obstructed by other required packaging and labelling marking or by commercial inserts and onserts', or by 'other markings, such as tax stamps and markings as per the requirements of Article 15 of the Convention'. Thus, under paragraph 10 of the Guidelines for Implementation of Article 11 of the FCTC, the only elements which should not obstruct the health warnings are (i) 'other required packaging and labelling marking',[23] including the markings required by Article 15 of the FCTC;[24] and (ii) 'commercial inserts and onserts'.[25] Clearly, a vending machine does not belong to any of those categories. Similarly, paragraph 54 of those guidelines states that the 'Parties should ensure that adhesive labels, stickers, cases, covers, sleeves, wrapping and tobacco manufacturers' promotional inserts and onserts do not obscure, obliterate or undermine health warnings'. Again, none of those terms may be used to refer to a vending machine. All the articles which, under paragraphs 10 and 54 of the Guidelines for Implementation of Article 11 of the FCTC, should not obstruct the health warnings, are articles that may be apposed or affixed inside a unit packet or to the outside of that packet.

52. Thus, the answer to the second question referred should be that the prohibition on the required health warnings being hidden by 'other items', laid down in the first sentence of Article 8(3) of Directive 2014/40, does not cover the case where the entire packaging of a tobacco product is hidden because that product is stocked in a vending machine in such a way that it is not visible to the consumer.

C. The third question referred

53. By its third question, the referring court asks the Court of Justice, in essence, whether an image which is not a faithful depiction of the original packaging, but which the consumer associates with cigarettes' packaging on account of its design in terms of outline, proportions, colour and brand logo, constitutes an 'imag[e] of [a] unit packe[t]' within the meaning of Article 8(8) of Directive 2014/40.

[21] See recital 7 of Directive 2014/40. See also Article 1 of that directive, which states that the directive seeks to 'meet the *obligations* of the Union under the [FCTC]' (emphasis added).

[22] Judgment of 4 May 2016, *Poland* v *Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 47).

[23] Namely, the 'information on relevant constituents and emissions of tobacco products', which should be carried by each unit packet and outside packaging of tobacco products (see Article 11(2) of the FCTC).

[24] The markings required by Article 15 of the FCTC are intended to eliminate the illicit trade in tobacco products. Their equivalents under Directive 2014/40 are the unique identifier and the security features, provided for by Articles 15 and 16 thereof.

[25] I should specify that paragraph 6 of the Guidelines for Implementation of Article 11 of the FCTC defines 'onsert' as 'any communication affixed to the outside of an individual package and/or carton purchased at retail by consumers …'

54. JS considers that the third question should be answered in the negative. In its view, the question whether the images of brands of cigarettes shown on the selection buttons of the vending machine at issue may be regarded as images of unit packets within the meaning of Article 8(8) of Directive 2014/40 falls outside the scope of that directive, given that, according to recital 48 thereof, it does not harmonise national rules on domestic advertising. In any event, those images of cigarette brands do not constitute images of cigarette packets within the meaning of Article 8(8). Rather, they are part of the sales process as they allow consumers to choose the brand of cigarettes they wish to purchase.

55. Conversely, the Commission submits that the third question should be answered in the affirmative. In its view, the concept of images of unit packets within the meaning of Article 8(8) of Directive 2014/40 must be interpreted broadly as covering any representation of a cigarette packet. That follows from the use of the English and French terms 'image'; from the requirement that, as for food labelling, the consumer must be given the necessary information to make choices in full knowledge of the facts, and he or she should be protected against misleading claims; from the objective of ensuring a high level of protection of human health, in accordance with Article 168(1) TFEU; and from the fact that, otherwise, the consumer would see the required health warnings only after the cigarette packet is dispensed onto the checkout belt.

56. I take the view that images of cigarette brands which are not a faithful depiction of unit packets, but which an average consumer associates with tobacco packaging on account of their design, are to be considered images of unit packets within the meaning of Article 8(8) of Directive 2014/40.

57. As mentioned in point 2 above, Article 8(8) of Directive 2014/40 states that 'images of unit packets and any outside packaging targeting consumers' must comply with the provisions of Chapter II of Title II of that directive, that is, they must, in particular, carry the required health warnings. The concept of images of unit packets and any outside packaging is not, however, defined by Article 8(8) or any other provisions of the directive.

58. According to case-law, the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. [26]

59. First, in its usual meaning, the term 'image' covers not only the representation or likeness of a person or a thing, but also the reproduction or the imitation of the form of a person or a thing. This suggests that the concept of image within the meaning of Article 8(8) of Directive 2014/40 includes, but is not limited to, faithful depictions of unit packets or the outside packaging of tobacco products, and, in particular, that that concept is not limited to photographs. That is true not only of the English term 'image', but also of the French term 'image', of the Italian term 'illustrazione', and of the German term 'Bild', used in those language versions of Article 8(8).

60. Second, Article 10(1)(a) of Directive 2014/40, which provides that each unit packet and any outside packaging of tobacco products for smoking is to carry a combined health warning, describes that warning as consisting of a text warning and 'a corresponding colour photograph'. Article 2(33) of that directive, which defines the combined health warning, uses the term 'photograph or illustration'. Thus, when referring to a photograph, Articles 2(33) and 10(1)(a) do

[26] Judgment of 22 April 2021, *Austrian Airlines* (C-826/19, EU:C:2021:318, paragraph 22).

not use the term 'image', which Article 8(8) uses, but a different term ('photograph' or 'illustration'). That suggests that the concept of 'image' within the meaning of Article 8(8) of Directive 2014/40 is not limited to photographs of unit packets. The same is true of the French version of Articles 2(33) and 10(1)(a), which use the terms 'photo ou … illustration' and 'photographie', not the term 'image' used in Article 8(8); of the German version of Articles 2(33) and 10(1)(a), which use the terms 'Fotografie oder Illustration' and 'Farbfotografie', not the term 'Bild' used in Article 8(8). That is somewhat less true of the Italian version of Articles 2(33) and 10(1)(a), which use the terms the terms 'fotografia o … illustrazione' and 'fotografia', where Article 8(8) uses the term 'illustrazione'. However, on the whole, those various language versions of Articles 2(33) and 10(1)(a) appear to use a different term (or terms) when they are referring to an actual photograph.

61. Third, in my view, a broad interpretation of the concept of images of unit packets or any outside packaging within the meaning of Article 8(8) of Directive 2014/40 as covering not only faithful depictions of unit packets, but also images which consumers associate with tobacco packaging, is consistent with the objectives of that directive and, more specifically, the objective of Article 8 of that directive.

62. According to case-law, Directive 2014/40 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.[27] As the referring court notes, an image which the consumer associates with tobacco packaging may, in the same way as a faithful depiction, trigger a purchasing impulse. That impulse may be combated by the required health warnings. Thus, a broad interpretation of the concept of images of unit packets within the meaning of Article 8(8) as covering also images which the consumer associates with tobacco packaging would allow for those warnings to be affixed on those images, thereby discouraging the purchase of tobacco products and enhancing the protection of human health.

63. As for the objective of Article 8(8), it seems to me that that provision seeks to prevent circumvention of the rule laid down in Article 8(1). Indeed, Article 8(1) states that each unit packet of a tobacco product must carry the required health warnings. Article 8(3) ensures the effectiveness of that rule by prohibiting those warnings from being hidden or interrupted. Article 8(8) addresses, inter alia, the situation where a retailer seeks to avoid any display of the required health warnings at the point of sale by displaying, in lieu of the unit packets carrying those warnings, images of those packets not carrying the warnings. By requiring that the images of tobacco packaging also carry the warnings, Article 8(8) seeks to prevent that situation, thereby ensuring, in a similar fashion to Article 8(3), the effectiveness of the rule laid down in Article 8(1). A broad interpretation of the concept of images of tobacco packaging within the meaning of Article 8(8) as covering images which the consumer associates with unit packets of tobacco products would ensure the full effectiveness of Article 8(1). That is all the more so given that, in the present case, the effectiveness of Article 8(1) cannot be ensured by applying the prohibition laid down in the first sentence of Article 8(3), as explained in points 47 to 52 above.

64. Fourth, the interpretation of the concept of images of unit packets within the meaning of Article 8(8) of Directive 2014/40 proposed in point 56 above is consistent with international law. Indeed, Article 13(4) of the FCTC provides that '[a]s a minimum, and in accordance with its

[27] Judgments of 4 May 2016, *Poland* v *Parliament and Council* (C-358/14, EU:C:2016:323, paragraph 80); of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraphs 171 and 220); of 17 October 2018, *Günter Hartmann Tabakvertrieb* (C-425/17, EU:C:2018:830, paragraph 23); of 30 January 2019, *Planta Tabak* (C-220/17, EU:C:2019:76, paragraph 38); and of 22 November 2018, *Swedish Match* (C-151/17, EU:C:2018:938, paragraph 40).

constitution or constitutional principles, each Party shall: … (b) require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship'. The concept of 'tobacco advertising and promotion' is defined by Article 1(c) of the FCTC as 'any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly'. According to paragraph 14 of the Guidelines for Implementation of Article 13 of the World Health Organisation Framework Convention on Tobacco Control ('the Guidelines for Implementation of Article 13 of the FCTC'), '[v]ending machines … constitute by their very presence a means of advertising or promotion under the terms of the Convention'.[28] It follows that, under Article 13(4)(b) of the FCTC, tobacco vending machines must, as a form of tobacco advertising, be 'accompan[ied by]', or, rather, carry health warnings.[29]

65. Thus, it seems to me that the concept of images of unit packets within the meaning of Article 8(8) of Directive 2014/40 must cover not only faithful depictions of that packaging, but also images which an average consumer associates with unit packets of tobacco products. As the referring court notes, in order to determine whether a particular image may be associated with unit packets, account must be taken of its design in terms of outline, proportions, colour and brand logo.

66. Whether, in the present case, the images of cigarette brands shown on the selection buttons of the vending machine at issue constitute images which an average consumer associates with unit packets of tobacco products on account of their design, is a question of fact which must be determined by the referring court.

67. Therefore, the answer to the third question referred should be that the concept of 'images of unit packets and any outside packaging' of tobacco products within the meaning of Article 8(8) of Directive 2014/40 covers not only images which are faithful depictions of unit packets or any outside packaging, but also images which an average consumer associates with unit packets or any outside packaging on account of their design in terms of outline, proportions, colour and brand logo.

D. The fourth question referred

68. By its fourth question, the referring court asks the Court of Justice, in essence, whether, where an image of a cigarette packet falling within the scope of Article 8(8) of Directive 2014/40 does not carry the required health warnings, that image is nonetheless consistent with that provision if the consumer has an opportunity to see those warnings before he or she purchases the packet.

69. According to the order for reference, the Oberlandesgericht München (Higher Regional Court, Munich) found that Article 8(8) of Directive 2014/40 prohibits the use of images of cigarette packets not carrying the required health warnings only if those images are presented in

[28] Reference should also be made to the fourth bullet point of the Appendix to those guidelines, entitled 'Indicative (non-exhaustive) list of forms of tobacco advertising, promotion and sponsorship within the terms of the Convention', which makes reference to 'tobacco product vending machines'.

[29] It is true that the last sentence of paragraph 40 of the Guidelines for Implementation of Article 13 of the FCTC states that '[i]n order to maximise their effectiveness, the warnings or other messages required by Parties under Article 13.4(b) of the Convention should be *consistent with* the warnings or other messages on packaging that the Convention requires under Article 11' (emphasis added) – which implies that the health warnings which, according to Article 13(4)(b) of the FCTC, tobacco vending machines must carry are *not identical* to the health warnings which, under Article 11(1)(b) of the FCTC, the unit packets and packages of tobacco products must carry. However, Article 13(4)(b) of the FCTC and paragraph 14 of the Guidelines for Implementation of Article 13 of the FCTC make it clear that tobacco vending machines must carry at least *some sort* of health warnings.

lieu of the packets prior to the conclusion of the contract of sale. The referring court considers that there are doubts as to whether it is possible to agree with the Oberlandesgericht München (Higher Regional Court, Munich).

70. JS submits that, even if the images of cigarette brands shown on the selection buttons of the vending machine at issue were considered images of unit packets within the meaning of Article 8(8) of Directive 2014/40, there would be no infringement of that provision as the consumer sees the required health warnings when the packet is handed to him or her. Moreover, he or she will see those warnings each time he or she smokes a cigarette.

71. The Commission takes the opposite view.

72. I consider that, where an image of a cigarette packet falling within the scope of Article 8(8) of Directive 2014/40 does not carry the required health warnings, it is irrelevant whether or not the consumer has an opportunity to see those warnings before he or she purchases that packet.

73. First, Article 8(8) of Directive 2014/40 lays down a general rule that images of unit packets must comply with the requirements of Chapter II of Title II of that directive, in particular, they must carry the required health warnings. That rule is not subject to any conditions or restrictions. Thus, Article 8(8) prohibits the *use* of images not carrying the required health warnings, irrespective of any purchase process. It suffices that the images 'targe[t] consumers', which is certainly the case of images used in supermarkets, as is so in the present case.

74. Second, there can be no objection that, given that Article 8(8) of Directive 2014/40 seeks only to prevent circumvention of the rule laid down in Article 8(1) of that directive that each cigarette packet must carry the required health warnings, there is no infringement of the former provision if those warnings may be seen by the consumer before he or she purchases the cigarette packet. That interpretation would be inconsistent with the wording of Article 8(8), which, again, does not provide for such an exception to the rule it lays down. In other words, Article 8(8) seeks not only to prevent circumvention of Article 8(1) as explained in point 63 above, but also to complement the rule laid down in that provision.

75. Thus, the answer to the fourth question referred should be that, where an image of a unit packet or of any outside packaging of a tobacco product within the meaning of Article 8(8) of Directive 2014/40 does not carry the health warnings provided for in Chapter II of Title II of that directive, that provision is infringed even if the consumer has the opportunity to see the unit packet or outside packaging carrying those warnings before he or she purchases the product.

IV. Conclusion

76. In the light of the foregoing, I propose that the Court give the following reply to the questions referred by the Bundesgerichtshof (Federal Court of Justice, Germany):

(1) Where a tobacco product is offered for sale via a vending machine which must be operated by the customer so that the product is dispensed onto the checkout belt, before payment is made for it, that product must be considered to be placed on the market within the meaning of Article 2(40) 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 at the time when it is offered for sale via that vending machine, not at the time when it is paid for and actual physical control of that product is transferred from the seller to the customer.

(2) The prohibition on the health warnings being hidden by 'other items' laid down in the first sentence of Article 8(3) of Directive 2014/40 does not cover the case where the entire packaging of a tobacco product is hidden because that product is stocked in a vending machine in such a way that it is not visible to the consumer.

(3) The concept of 'images of unit packets and any outside packaging' of tobacco products within the meaning of Article 8(8) of Directive 2014/40 covers not only images which are faithful depictions of unit packets or any outside packaging, but also images which an average consumer associates with unit packets or any outside packaging on account of their design in terms of outline, proportions, colour and brand logo.

(4) Where an image of a unit packet or of any outside packaging of a tobacco product within the meaning of Article 8(8) of Directive 2014/40 does not carry the health warnings provided for in Chapter II of Title II of that directive, that provision is infringed even if the consumer has the opportunity to see the unit packet or outside packaging carrying those warnings before he or she purchases the product.