



Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

17 October 2018*

(Reference for a preliminary ruling — Approximation of laws — Manufacture, presentation and sale of tobacco products — Directive 2014/40/EU — Ban on placing tobacco for oral use on the market — Definitions of ‘chewing tobacco’ and ‘tobacco for oral use’ — Paste composed of finely ground tobacco (Thunder Chewing Tobacco) and porous cellulose sachet portions filled with finely ground tobacco (Thunder Frosted Chewing Bags))

In Case C-425/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany), made by decision of 11 July 2017, received at the Court on 14 July 2017, in the proceedings

Günter Hartmann Tabakvertrieb GmbH & Co. KG

v

Stadt Kempten,

intervener:

Landesanwaltschaft Bayern,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Fifth Chamber, acting as President of the Sixth Chamber, C.G. Fernlund and S. Rodin (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Günter Hartmann Tabakvertrieb GmbH & Co. KG, by A. Mayer, Rechtsanwalt,
- the Stadt Kempten, by C. Hage, acting as Agent,
- the Landesanwaltschaft Bayern, by P. Hahn, Landesanwalt,

* Language of the case: German.

- the Czech Government, by M. Smolek, J. Pavliš and J. Vláčil, acting as Agents,
- the Danish Government, by J. Nymann-Lindegren and by M. Wolff and P. Ngo, acting as Agents,
- the Greek Government, by G. Kanellopoulos and by A. Vasilopoulou and E. Chroni, acting as Agents,
- the European Commission, by C. Hödlmayr and J. Tomkin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(6) and (8) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).
- 2 The request has been made in proceedings between Günter Hartmann Tabakvertrieb GmbH & Co. KG and the Stadt Kempten (town of Kempten, Germany) concerning the prohibition against that company from placing smokeless tobacco products on the German market.

Legal context

- 3 Recitals 32, 34 and 35 of Directive 2014/40 state:
(32) Council Directive 89/622/EEC [of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products and the prohibition of the marketing of certain types of tobacco for oral use (OJ 1989 L 359, p. 1)] prohibited the sale in the Member States of certain types of tobacco for oral use. Directive 2001/37/EC [of the European Parliament and of the Council 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)] reaffirmed that prohibition. Article 151(1) of the [Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1)] grants [the Kingdom of] Sweden a derogation from the prohibition. The prohibition of the sale of tobacco for oral use should be maintained in order to prevent the introduction in the Union (apart from [the Kingdom of] Sweden) of a product that is addictive and has adverse health effects. For other smokeless tobacco products that are not produced for the mass market, strict provisions on labelling and certain provisions relating to their ingredients are considered sufficient to contain their expansion in the market beyond their traditional use.

...

(34) All tobacco products have the potential to cause mortality, morbidity and disability. Accordingly, their manufacture, distribution and consumption should be regulated. It is, therefore, important to monitor developments as regards novel tobacco products. Manufacturers and importers should be obliged to submit a notification of novel tobacco products, without prejudice to the power of the Member States to ban or to authorise such novel products.

(35) In order to ensure a level playing field, novel tobacco products, that are tobacco products as defined in this Directive, should comply with the requirements of this Directive.'

4 Article 2 of Directive 2014/40, entitled 'Definitions', provides:

'For the purpose of this Directive the following definitions shall apply:

...

(4) "tobacco products" means products that can be consumed and consist, even partly, of tobacco, whether genetically modified or not;

(5) "smokeless tobacco product" means a tobacco product not involving a combustion process, including chewing tobacco, nasal tobacco and tobacco for oral use;

(6) "chewing tobacco" means a smokeless tobacco product exclusively intended for the purpose of chewing;

...

(8) "tobacco for oral use" means all tobacco products for oral use, except those intended to be inhaled or chewed, made wholly or partly of tobacco, in powder or in particulate form or in any combination of those forms, particularly those presented in sachet portions or porous sachets;

...

(14) "novel tobacco product" means a tobacco product which:

(a) does not fall into any of the following categories: cigarettes, roll-your-own tobacco, pipe tobacco, waterpipe tobacco, cigars, cigarillos, chewing tobacco, nasal tobacco or tobacco for oral use; and

(b) is placed on the market after 19 May 2014;

...'

5 Article 17 of the directive, entitled 'Tobacco for oral use', provides:

'Member States shall prohibit the placing on the market of tobacco for oral use, without prejudice to Article 151 of the Act of Accession of [the Republic of] Austria, [the Republic of] Finland and [the Kingdom of] Sweden.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

6 Günter Hartmann Tabakvertrieb is a German company which imports into Germany various tobacco products which it distributes on the German market, which include, in particular, the products referred to as 'Thunder Chewing Tobacco' and 'Thunder Frosted Chewing Bags', manufactured by V2 Tobacco A/S, a company governed by Danish law.

- 7 In an opinion of 18 September 2014, the Bayerisches Landesamt für Gesundheit und Lebensmittelsicherheit (Bavarian Health and Food Safety Authority, Germany) analysed the product ‘Thunder Frosted Chewing Bags’, distributed on the German market by Günter Hartmann Tabakvertrieb, and concluded that, owing to its structure, consistency and manner of use, it constituted a prohibited tobacco product, given that it was intended for oral use other than smoking or chewing.
- 8 By opinions, respectively, of 19 November 2014 and 26 November 2014, that service considered that the same was the case for the products ‘Thunder Wintergreen Chewing Tobacco’ and ‘Thunder Original Chewing Tobacco’.
- 9 Subsequently, by decisions of 13 October 2014 and 15 January 2015, adopted pursuant to the German law which transposed Directive 2014/40, the town of Kempten banned Günter Hartmann Tabakvertrieb from placing the products ‘Thunder Chewing Tobacco’ and ‘Thunder Frosted Chewing Bags’ on the market.
- 10 That company challenged those decisions by bringing appeals before the Bayerisches Verwaltungsgericht Augsburg (Bavarian Administrative Court, Augsburg, Germany). On 28 July 2015, that court held a hearing relating to the two appeals, within the context of which it examined those tobacco products itself, as well as chewing tobacco products in the traditional sense and the product of the ‘snus’ type.
- 11 By a judgment of 28 July 2015, the Bayerisches Verwaltungsgericht Augsburg (Bavarian Administrative Court, Augsburg) annulled the decision of the town of Kempten concerning the product ‘Thunder Chewing Tobacco’, taking the view that, as a product intended to be chewed, it could be placed on the market.
- 12 In that regard, that court observed, in particular, that the mere fact that the product ‘Thunder Chewing Tobacco’ constitutes a new product and differs from chewing tobacco in the traditional sense did not justify a prohibition on placing on the market. According to that court, in order to know whether a product is intended to be chewed, it is appropriate to rely on an objective consideration of the product and not on the information supplied by the manufacturer or on consumer views. It follows from the examination which that court itself undertook that the tobacco product in question is a product which can be chewed. According to that court, even after having placed the product in a glass of water until the end of the hearing, there remained a piece in one block of consistent mass, which was resistant to pressure and did not disintegrate. By contrast, loose ‘snus’ rapidly dissolved in the water and remained at the bottom of the glass. The product ‘Thunder Chewing Tobacco’ thus resists a mechanical action of the teeth and to some extent needs such an action in order to release the tobacco components.
- 13 On the other hand, so far as concerns the product ‘Thunder Frosted Chewing Bags’, by judgment of 28 July 2015, the Bayerisches Verwaltungsgericht Augsburg (Bavarian Administrative Court, Augsburg) dismissed the appeal brought by Günter Hartmann Tabakvertrieb, taking the view, in particular, that it was very finely ground tobacco, of rather granular consistency, wrapped in cellulose sachets, which did not resist a mechanical action of the teeth and which did not need such an action to release its components. According to that court, a tobacco product is not intended to be chewed solely because its ability to be chewed is conferred on it by a method of dispensation independent of the tobacco product in the proper sense.
- 14 Günter Hartmann Tabakvertrieb and the town of Kempten each brought an appeal against those judgments of the Bayerisches Verwaltungsgericht Augsburg (Bavarian Administrative Court, Augsburg) before the referring court.

- 15 That court observes that Directive 2014/40 does not mention the circumstance in which a tobacco product is intended to be chewed within the meaning of Article 2(8) of that directive and that several variants of interpretation have been put forward in the main proceedings, but that none can claim to prevail clearly.
- 16 In those circumstances, the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- (1) Must Article 2(8) of Directive [2014/40] be interpreted as meaning that only chewing tobacco products in the traditional sense constitute “products intended to be chewed”?
 - (2) Must Article 2(8) of Directive [2014/40] be interpreted as meaning that “products intended to be chewed” are synonymous with “chewing tobacco” within the meaning of Article 2(6) of the directive?
 - (3) Must the question of whether a tobacco product is “intended to be chewed” within the meaning of Article 2(8) of Directive [2014/40] be determined on the basis of an objective consideration of the product and not on the basis of the information supplied by the manufacturer or the actual use by consumers?
 - (4) Must Article 2(8) of Directive [2014/40] be interpreted as meaning that, in order for a tobacco product to be intended to be chewed, that product must in terms of its consistency and firmness be objectively suitable for being chewed and chewing it must result in the ingredients in the product being released?
 - (5) Must Article 2(8) of Directive [2014/40] be interpreted as meaning that, in order for a tobacco product to be intended “to be chewed”, it is additionally necessary, but also sufficient, for the repeated exertion of light pressure on the tobacco product using the teeth or tongue to cause more of the ingredients in the product to be released than if the product is simply kept in the mouth?
 - (6) Or, in order for a tobacco product to be “intended to be chewed”, is it necessary that merely keeping the product in the mouth or sucking it does not cause ingredients to be released?
 - (7) Can the suitability of a tobacco product “to be chewed”, within the meaning of Article 2(8) of Directive [2014/40], also be imparted by the method of dispensation outside the processed tobacco, such as a cellulose sachet?

Consideration of the questions referred

- 17 By its questions, which should be examined together, the referring court seeks guidance, in essence, on the interpretation of the concept of ‘tobacco products intended to be chewed’ within the meaning of Article 2(8) of Directive 2014/40, read in conjunction with Article 2(6) of that directive, in order to assess whether smokeless tobacco products such as those at issue in the main proceedings fall under the prohibition on placing tobacco for oral use on the market, laid down in Article 17 of that directive.
- 18 In accordance with the settled case-law of the Court, it is necessary, in interpreting a provision of EU law, 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 (see, to that effect, judgments of 22 June 2016, *Thomas Philipps*, C-419/15, EU:C:2016:468, paragraph 18, and of 26 July 2017, *Jafari*, C-646/16, EU:C:2017:586, paragraph 73 and the case-law cited).

- 19 In that regard, it should be observed, first of all, that, as set out in Article 17 of Directive 2014/40, Member States are to prohibit the placing on the market of tobacco for oral use, without prejudice to Article 151 of the Act of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.
- 20 Tobacco for oral use is defined in Article 2(8) of that directive as being ‘all tobacco products for oral use, except those intended to be inhaled or chewed, made wholly or partly of tobacco, in powder or in particulate form or in any combination of those forms, particularly those presented in sachet portions or porous sachets’.
- 21 So far as concerns chewing tobacco, which, in accordance with that provision, thus escapes from the prohibition of tobacco for oral use laid down in Article 17 of that directive, it is defined in Article 2(6) of the same directive as being ‘a smokeless tobacco product exclusively intended for the purpose of chewing’.
- 22 In that regard, in contrast to the submission underlying the second question referred for a preliminary ruling, the concept of ‘tobacco intended to be chewed’ within the meaning of Article 2(8) of Directive 2014/40 cannot be distinguished from that of ‘chewing tobacco’ referred to in Article 2(6) of that directive. Those products were specifically covered by a definition in that latter provision and there is nothing to indicate that that definition would not apply when ‘tobacco products ... intended to be chewed’, in Article 2(8) of that directive, are in question.
- 23 As regards, next, the objective of the provisions at issue, it should be recalled, in the first place, that the objective of Directive 2014/40 is, according to Article 1 thereof, twofold in that it seeks 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 (judgments of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 171, and of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, paragraph 80).
- 24 So far as concerns, more specifically, the objective of the prohibition of tobacco for oral use, laid down in Article 17 of that directive, it should be observed that that prohibition was introduced by Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622 (OJ 1992 L 158, p. 30).
- 25 It is apparent from the recitals of Directive 92/41 that that prohibition, which has subsequently been confirmed and referred to by the relevant measures which succeeded that directive, the last of them being Directive 2014/40, was motivated in particular by the actual risk presented by new tobacco products for oral use on the market of the Member States, in particular for young people, given the specific attraction that those products exercise over that group of consumers, thus involving high nicotine dependency.
- 26 At the same time, the EU legislature has taken the view that it was appropriate to reserve different treatment for other smokeless tobacco products which may be classified as ‘traditional’ tobacco products, such as chewing tobacco, having regard, in particular, to the lack of novelty and attraction for young people (see, to that effect, judgment of 14 December 2004, *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 66).
- 27 However, although the prohibition of tobacco for oral use was thus introduced owing to the emergence on the market of new tobacco products intended for such use, particularly those of the ‘snus’ type, it cannot be inferred therefrom that the novelty or, conversely, the ‘classical’ or ‘traditional’ nature of a product, to which the referring court refers in the order for reference, is, as such, decisive for the purpose of classifying a product as a tobacco product intended for oral use, within the meaning of Article 17 of Directive 2014/40, read in conjunction with Article 2(8) of that directive.

- 28 As Advocate General Geelhoed observed in point 31 of his Opinion in *Arnold André* (C-434/02, EU:C:2004:487), the provisions at issue do not distinguish between traditional and non-traditional products, but draw a distinction according to intended use.
- 29 Finally, it should be noted that it is common ground that the prohibition on placing tobacco for oral use on the market, laid down in Article 17 of Directive 2014/40, concerns, in particular, sucking tobacco of the ‘snus’ type (see, to that effect, judgment of 16 July 2015, *Commission v Denmark*, C-468/14, not published, EU:C:2015:504, paragraphs 24 and 25), since that product may be described as ‘finely ground or cut tobacco sold loose or in small sachet portions and intended to be consumed by placing between the gum and the lip’ (judgment of 14 December 2004, *Arnold André*, C-434/02, EU:C:2004:800, paragraph 19).
- 30 Moreover, it results both from the context and from the purpose of Article 2(8) of Directive 2014/40, read in conjunction with Article 2(6) of that directive, as set out in paragraphs 19 to 26 above, in particular from the derogating nature of the first of those provisions, that the concept of ‘tobacco products intended to be chewed’ must be interpreted strictly, in such a way that it cannot encompass sucking tobacco such as that of the ‘snus’ type.
- 31 As the European Commission has observed, it is apparent from the travaux préparatoires for Directive 2014/40 that, by the addition of the adverb ‘exclusively’ to the definition of the concept of ‘chewing tobacco’ set out in Article 2(6) of that directive, the EU legislature intended to define that concept in order to limit the possibilities of circumventing the prohibition of tobacco for oral use faced with repeated attempts to market tobacco of the ‘snus’ type under the title of ‘chewing tobacco’.
- 32 It follows that only products which can be consumed in the proper sense only by chewing, that is to say products which can release their essential ingredients in the mouth only by chewing, may be classified as ‘tobacco products intended to be chewed’ within the meaning of Article 2(8) of Directive 2014/40.
- 33 By contrast, a tobacco product which, whilst also being able to be chewed, is essentially intended to be sucked, that is to say a product which it is sufficient to hold in the mouth for its essential ingredients to be released, cannot be classified as such.
- 34 As for the products at issue in the main proceedings, it should be observed that, under Article 267 TFEU, the Court has no power to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by Union institutions (judgments of 10 May 2001, *Veedfald*, C-203/99, EU:C:2001:258, paragraph 31, and of 6 October 2005, *MyTravel*, C-291/03, EU:C:2005:591, paragraph 43).
- 35 Consequently, it is for the national court to determine, on the basis of all the relevant objective characteristics of the products at issue in the main proceedings, such as their composition, their consistency, their method of dispensation and, where appropriate, their actual use by consumers, whether they can be consumed in the proper sense only by chewing.
- 36 Having regard to the foregoing considerations, the answer to the questions referred is that Article 2(8) of Directive 2014/40, read in conjunction with Article 2(6) of that directive, must be interpreted as meaning that only tobacco products which can be consumed in the proper sense only by chewing constitute tobacco products intended to be chewed within the meaning of those provisions, which it is for the national court to determine on the basis of all the relevant objective characteristics of the products concerned, such as their composition, their consistency, their method of dispensation and, where appropriate, their actual use by consumers.

Costs

- ³⁷ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 2(8) 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 Article 2(6) of that directive, must be interpreted as meaning that only tobacco products which can be consumed in the proper sense only by chewing constitute tobacco products intended to be chewed within the meaning of those provisions, which it is for the national court to determine on the basis of all the relevant objective characteristics of the products concerned, such as their composition, their consistency, their method of dispensation and, where appropriate, their actual use by consumers.

[Signatures]