



Reports of Cases

ORDER OF THE GENERAL COURT (Second Chamber)

20 September 2023 *

(Action for annulment – Public health – Withdrawal of certain exemptions for heated tobacco products – Direct concern – Lack of individual concern – Inadmissibility)

In Case T-706/22,

Nicoventures Trading Ltd, established in London (United Kingdom), and the other applicants whose names are listed in the annex,¹ represented by L. Van den Hende, M. Schonberg, J. Penz-Evren and P. Wytinck, lawyers,

applicants,

v

European Commission, represented by H. van Vliet, A. Becker and F. van Schaik, acting as Agents,

defendant,

THE GENERAL COURT (Second Chamber),

composed of A. Marcoulli, President, S. Frimodt Nielsen (Rapporteur) and R. Norkus, Judges,

Registrar: V. Di Bucci,

having regard to the written part of the procedure, in particular the decision of 1 February 2023 refusing the applicants' request for an expedited procedure,

having regard to the order of 2 February 2023, *Nicoventures Trading and Others v Commission* (T-706/22 R, not published, EU:T:2023:39), dismissing the application for interim measures,

makes the following

* Language of the case: English.

¹ The list of the other applicants is annexed only to the version sent to the parties.

Order

- 1 By their action under Article 263 TFEU, the applicants, Nicoventures Trading Ltd and the other legal persons whose names are listed in the annex, seek the annulment of Commission Delegated Directive (EU) 2022/2100 of 29 June 2022 amending Directive 2014/40/EU of the European Parliament and of the Council as regards the withdrawal of certain exemptions in respect of heated tobacco products (OJ 2022 L 283, p. 4; ‘the contested measure’).

Background to the dispute

- 2 The British American Tobacco group (‘the BAT group’), to which the applicants belong, manufactures and markets tobacco products, including heated tobacco products. One of the applicants, Nicoventures Trading, was established in 2011 within the BAT Group to focus exclusively on the development and commercialisation of innovative non-combustible products, which include heated tobacco products. Nicoventures Trading sells BAT Group heated tobacco products to other companies in the group, including the other applicants. The latter distribute or intend to distribute the products of Nicoventures Trading on the markets of 14 Member States.
- 3 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) regulates the placing on the market of tobacco products. To that end, it seeks to approximate the laws, regulations and administrative provisions of the Member States concerning, inter alia, the ingredients, labelling and packaging of tobacco products.
- 4 Article 7(1) and (7) of Directive 2014/40 provides that Member States are to prohibit the placing on the market of tobacco products with a characterising flavour and of those containing flavourings in any of their components. Article 7(12) of that directive, before it was amended by the contested measure, exempted tobacco products other than cigarettes and roll-your-own tobacco from the prohibitions laid down in paragraphs 1 and 7 of that article. Similarly, the first subparagraph of Article 11(1) of Directive 2014/40, before it was amended by the contested measure, provided that the Member States could exempt tobacco products for smoking other than cigarettes, roll-your-own tobacco and waterpipe tobacco from certain obligations concerning the labelling of tobacco products and the mandatory affixing on the packaging of certain warnings, information messages and combined health warnings. In addition, Article 7(12) and Article 11(6) of that directive state that the European Commission is to adopt delegated acts to withdraw the exemptions referred to in Article 7 or the possibility of granting the exemptions referred to in Article 11 for a particular product category if there is a substantial change of circumstances as established in a report drawn up by the Commission.
- 5 On 15 June 2022, the Commission, in accordance with Directive 2014/40, published a report establishing a substantial change of circumstances for heated tobacco products.
- 6 Following that report, the Commission adopted the contested measure on 29 June 2022. Article 1 of the contested measure amended Article 7(12) and Article 11(1) of Directive 2014/40. As from 23 October 2023 – the date by which the measures provided for in the contested measure must have been transposed – heated tobacco products will no longer be exempted from the prohibitions relating to flavourings referred to in Article 7(1) and (7) of Directive 2014/40. In

addition, as from that date, heated tobacco products for smoking which are not prohibited will be subject to the same constraints concerning labelling on packaging as other tobacco products for smoking which are not exempted.

Forms of order sought

7 The applicants claim that the Court should:

- annul the contested measure;
- order the Commission to pay the costs.

8 The Commission contends that the Court should:

- dismiss the action as inadmissible;
- order the applicants to pay the costs.

9 In their observations on the plea of inadmissibility, the applicants claim that the Court should:

- primarily, dismiss the plea of inadmissibility;
- in the alternative, reserve its decision on the plea of inadmissibility until it rules on the substance of the case;
- order the Commission to pay the costs.

Law

10 Under Article 130(1) and (7) of the Rules of Procedure of the General Court, on the application of the defendant, the General Court may decide on inadmissibility or lack of competence without going to the substance of the case. In the present case, as the Commission has applied for a decision on inadmissibility, the Court, considering that it has sufficient information available to it from the material in the file, has decided to give a decision on that application without taking further steps in the proceedings.

11 In support of the plea of inadmissibility, the Commission submits that the applicants are neither directly nor individually concerned by the contested measure.

The conditions of admissibility of the action

12 Under the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and which does not entail implementing measures.

- 13 At the outset, it should be borne in mind that the present case is not covered by the last situation provided for in the fourth paragraph of Article 263 TFEU, a situation which, moreover, is not relied on either by the applicants or by the Commission. The concept of ‘regulatory act’ within the meaning of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application other than legislative acts (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 60 and 61). In the present case, the contested measure, which entails measures of general application, such as those referred to in paragraphs 4 and 6 above, and which has not been adopted under one of the legislative procedures referred to in Article 289 TFEU, is a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU. However, Article 2 of the contested measure provides for implementing measures, namely transposing measures that the Member States are to adopt. Therefore, the present action cannot in fact be covered by the last situation provided for in the fourth paragraph of Article 263 TFEU.
- 14 Furthermore, since the applicants are not addressees of the contested measure, the first situation provided for in the fourth paragraph of Article 263 TFEU is also not applicable in the present case. Consequently, it should be determined whether the applicants come within the second situation provided for in the fourth paragraph of Article 263 TFEU, namely whether they are directly and individually concerned by the contested measure (see, to that effect, judgment of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, EU:C:2002:462, paragraphs 35 to 37 and the case-law cited). Moreover, they do not dispute that those two conditions relating to standing to bring proceedings are applicable to the present action.
- 15 In that context, as regards the applicants’ argument that the admissibility of actions brought against regulatory acts should be assessed less restrictively than in the case of other acts, an argument which they consider themselves able to infer from the judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, EU:C:2013:625), it should be observed that, in paragraph 57 of that judgment, the Court of Justice expressly bases its analysis on the category of ‘regulatory acts which do not entail implementing measures’, to which, as noted above, the contested measure does not belong. Contrary to what the applicants submit, the Court of Justice does not state that the analysis of the conditions of admissibility of an action for annulment, as regards the category of regulatory acts in general, must be subject to a less restrictive approach than in other cases.
- 16 The amendment made by the Treaty of Lisbon to the fourth paragraph of Article 263 TFEU was intended to subject certain acts of general application capable of governing the legal position of individuals to judicial review by means of an action for annulment, whereas they had no possibility, before that amendment, of challenging them either by means of a direct action, unless the condition relating to their individual concern was satisfied, or by means of a question for a preliminary ruling on validity, in the absence of implementing measures. However, that amendment had no effect on the scope of the conditions relating to the standing of natural and legal persons to bring proceedings, since those conditions remain applicable (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 70 and 71).
- 17 It should therefore be examined whether the Commission is justified in pleading that the applicants are neither directly nor individually concerned by the contested measure.

Direct concern

- 18 The Commission submits that, according to settled case-law, in order for an applicant to be regarded as directly concerned within the meaning of Article 263 TFEU, the contested measure must, first, directly affect his or her legal situation and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules.
- 19 In the first place, the Commission submits that the applicants do not demonstrate that the contested measure has any negative impact on their legal situation. In particular, account should be taken of the fact that the applicants' customers already have the heating device marketed by the applicants and that they will be able to continue to use it to consume heated tobacco products which will not be prohibited by the contested measure. The contested measure does not have the effect of prohibiting heated tobacco products, but of regulating their authorised ingredients and the information which must appear on the packaging. Thus, the sole effect of the contested measure is to make heated tobacco products subject to the general rules concerning contents and labelling, to which, for example, cigarettes and roll-your-own tobacco are subject.
- 20 In the second place, the Commission observes that the claims put forward by the applicants in an attempt to establish that they are directly concerned are not legal, but factual in nature. Thus, they submit that the contested measure will likely result in the loss of an opportunity to make a profit, but do not demonstrate that it directly affects their legal situation.
- 21 In the third place, even if the contested measure were to produce effects on the applicants' legal situation, the fact remains that they would be indirect. Any future, possible and purely speculative effects would result not from the entry into force of the contested measure, but from decisions adopted by the Member States. In the present case, in order for it to produce effects on the applicants' legal situation, the contested measure requires transposing measures, with the result that its implementation is not purely automatic as required by the case-law.
- 22 In the fourth place, the present case differs from the case that gave rise to the judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council* (C-348/20 P, EU:C:2022:548). The directive at issue in that case governs the rights of operators, whereas the contested measure lays down rules of general application applicable to products.
- 23 The applicants dispute those arguments and maintain that they are directly concerned by the contested measure.
- 24 According to settled case-law, the condition that a natural or legal person must be directly concerned by the measure being challenged requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of that person and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules (see judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council*, C-348/20 P, EU:C:2022:548, paragraph 43 and the case-law cited).
- 25 The action for annulment provided for in Article 263 TFEU is available in the case of all measures adopted by the institutions, whatever their form, which are intended to have binding legal effects. In order to determine whether an act produces such effects, it is necessary to examine the

substance of that act and to assess its effects in the light of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act. Accordingly, whether an act is capable of directly affecting the legal situation of a natural or legal person cannot be assessed with regard solely to the fact that that act takes the form of a directive (see judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council*, C-348/20 P, EU:C:2022:548, paragraphs 62 to 64 and the case-law cited).

- 26 Any act, whether regulatory or another type of act, may, in principle, directly affect the legal situation of a natural or legal person, irrespective of whether it entails implementing measures, including, in the case of a directive, transposing measures. Accordingly, in a case where a directive has such effects, the fact that measures transposing that directive have been adopted or have yet to be adopted is not, in itself, relevant since they do not call into question the direct nature of the connection between that directive and those effects. That is the case provided that the directive does not leave any discretion to the Member States as to the imposition of those effects on that individual (judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council*, C-348/20 P, EU:C:2022:548, paragraph 74).
- 27 As set out in paragraphs 4 to 6 above, the contested measure has the effect of prohibiting the marketing of heated tobacco products with a characterising flavour and of subjecting heated tobacco products for smoking which contain no characterising flavour to the same labelling obligations as certain other tobacco products for smoking, namely cigarettes, roll-your-own tobacco and waterpipe tobacco. Under Article 2 of the contested measure, Member States are required to adopt the transposing measures necessary to implement that new prohibition and those new obligations before 23 October 2023.
- 28 Therefore, the legal situation of operators which, like the applicants, market or intend to market heated tobacco products with a characterising flavour is affected in that the marketing of those products will become unlawful. Those operators will also be obliged to display on the packaging of heated tobacco products for smoking which are not prohibited the same health warnings as those that are to appear on the packaging of certain other tobacco products for smoking. The applicants are thus subject to a prohibition and to obligations arising directly from the contested measure, irrespective of whether that measure entails implementing measures, namely transposing measures. The condition that the act which forms the subject matter of an action must directly concern an applicant and the condition that such an act must not entail implementing measures are not to be confused (see, to that effect, judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council*, C-348/20 P, EU:C:2022:548, paragraphs 71 and 72). In the present case, the transposing measures provided for in the contested measure are necessary only for the implementation in full of the prohibition and obligations in question in the laws of the Member States, without the Member States having any discretion of their own, since the contested measure does not leave any discretion to the Member States in those respects. The applicants must therefore be regarded as being directly concerned by the contested measure.
- 29 None of the arguments put forward by the Commission is capable of calling those assessments into question.
- 30 First, the Commission submits that the contested measure does not have the effect of prohibiting the marketing of heated tobacco products, but only of regulating their contents by prohibiting characterising flavours. In that regard, it is sufficient to observe that the applicants market heated tobacco products with characterising flavours and will be deprived of the possibility of doing so at

the end of the period for transposition laid down by the contested measure. Therefore, the Commission cannot claim that the contested measure merely regulates the contents of those products and does not affect the rights of operators.

- 31 Secondly, the Commission observes that the applicants put forward arguments relating to the impact on their factual situation rather than to the impact on their legal situation. Nonetheless, the fact that the applicants rely on an adverse effect on their factual situation, by invoking the significant proportion of heated tobacco products with characterising flavours in their total sales, their market share and the investments they have made, does not mean that their legal situation cannot also be affected.
- 32 Thirdly, in the Commission's view, the effects of the contested measure on the applicants' legal situation are, at most, indirect because that measure provides for transposing measures. In that regard, as observed in paragraph 28 above, the contested measure leaves no discretion to the Member States as regards the prohibition of the marketing of heated tobacco products with characterising flavours and the labelling obligation in respect of heated tobacco products which are not prohibited.
- 33 It follows that the plea of inadmissibility raised by the Commission and alleging that the applicants are not directly concerned by the contested measure must be rejected.

Individual concern

- 34 The Commission submits that the applicants must establish that they are individually concerned by the contested measure. Since they are not the addressees of that measure, they cannot be individually concerned unless the contested measure affects them by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as an addressee. The Commission disputes that that is the case.
- 35 The applicants submit that they are individually concerned by the contested measure. In that regard, they submit that they are in the situation, envisaged in the judgment of 15 July 1963, *Plaumann v Commission* (25/62, EU:C:1963:17), of persons affected by reason of certain attributes peculiar to them, or by reason of a situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision. In their view, that is the case for two sets of reasons set out in the case-law of the Court of Justice. First, they belong to a closed class of operators. Secondly, the contested measure is liable substantially to affect their market position.
- 36 Although, in principle, measures of general application may be challenged only by the privileged applicants referred to in the second and third paragraphs of Article 263 TFEU, such measures may nevertheless, in certain circumstances, be of individual concern to certain natural or legal persons and are thus in the nature of a decision in their regard. That is so where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as the addressee (judgment of 15 July 1963, *Plaumann v Commission*, 25/62, EU:C:1963:17, p. 107; see also judgment of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, EU:C:2002:462, paragraphs 35 and 36 and the case-law cited).

- 37 The general applicability and, thus, the legislative nature of a measure are not called into question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, as long as it is established that it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (see judgment of 18 May 1994, *Codorniu v Council*, C-309/89, EU:C:1994:197, paragraph 18 and the case-law cited).
- 38 It should be noted at the outset that, although the applicants seek the annulment of the contested measure in its entirety, they focus their arguments on the consequences of the prohibition of heated tobacco products with one or more characterising flavours for their factual situation.
- 39 In the first place, the applicants claim to belong to a closed category of economic operators identifiable, and indeed identified, when the contested measure was adopted. The category of operators which are individually concerned by the contested measure includes those which, on the date of its adoption, marketed or held authorisations to market the newly restricted products. In the applicants' view, the members of that class were identifiable when the contested measure was adopted, since they all held authorisations to market heated tobacco products with characterising flavours, which had been issued to them by Member States, or had made requests to that effect. The class is closed in that, because of the prohibition of the products at issue, it will not be extended. In addition, that class is limited on account of the small number of operators that are members thereof, since it includes only two groups of undertakings with significant market shares. Lastly, contrary to the Commission's claims, the applicants' situation differs from that of undertakings that are upstream and downstream in the production and distribution chain of the products in question.
- 40 The Court of Justice has indeed accepted the individual concern of a legal person holding an intellectual property right which was particularly affected by a legislative act intended to govern a group of persons defined in a general and abstract manner (judgment of 18 May 1994, *Codorniu v Council*, C-309/89, EU:C:1994:197, paragraphs 19 to 23).
- 41 Similarly, the Court of Justice has held to be admissible an action against a measure of general application brought by undertakings holding acquired rights, for example because the measure had an adverse effect on the performance of an existing contract (judgment of 17 January 1985, *Piraiki-Patraiki and Others v Commission*, 11/82, EU:C:1985:18, paragraph 31) or on exclusive broadcasting rights, making it possible to regard the holders of those rights, which were clearly identifiable when the contested measure was adopted, as forming part of a 'limited class' (judgment of 13 March 2008, *Commission v Infront WM*, C-125/06 P, EU:C:2008:159, paragraphs 71 to 77), or called into question a positive decision relating to a State aid scheme from which the appellants benefited (judgment of 27 February 2014, *Stichting Woonpunt and Others v Commission*, C-132/12 P, EU:C:2014:100, paragraphs 59 to 63).
- 42 In order to prove that they belong to a limited class within the meaning of the case-law cited above, the applicants rely, essentially, on the fact that they have made the declarations provided for in Article 5 of Directive 2014/40 and the notifications provided for in Article 19 of that directive for heated tobacco products with characterising flavours to the competent authorities and, in addition, that some of them have been granted, in the Member States which have introduced an authorisation system in accordance with Article 19(3) of Directive 2014/40, marketing authorisations for heated tobacco products with characterising flavours. Without disputing those facts, the Commission contends that they are not sufficient to distinguish the applicants individually in the same way as the addressee of a decision.

- 43 In that regard, Directive 2014/40 provides for the need to establish a common format for the reporting of ingredients contained in tobacco products and emissions of certain toxic substances released by them (recitals 13 to 15) and the obligation for manufacturers and importers to notify novel tobacco products, without prejudice to the power of the Member States to ban or to authorise such novel products (recital 34). Those principles are implemented in Articles 5 and 19 of Directive 2014/40. It follows from all of those provisions that manufacturers and importers may place on the market only tobacco products which comply with the requirements of that directive and which have been the subject of the declarations and notifications provided for therein, and, as the case may be, of the authorisations required by the Member States which have introduced an authorisation system. The requirements laid down by that directive concern, inter alia, in addition to the indication of ingredients and emissions, the absence of prohibited ingredients and the communication of the required studies inter alia on the toxicity, addictiveness and attractiveness of the product concerned and its impact on consumption behaviour. Such requirements thus constitute general and abstract criteria, applicable to all those placing or intending to place a tobacco product on the market.
- 44 It is therefore appropriate to examine whether the making of the statements and notifications in question or the holding of the authorisations in question is sufficient to distinguish all or some of the applicants individually in the same way as the person addressed by a decision.
- 45 First, the sole fact that the operators which have made a declaration or notification or hold an authorisation were identifiable at the time of the adoption of the contested measure cannot suffice to establish that they are individually concerned where that measure applies by virtue of general and abstract considerations (see judgment of 16 December 2011, *Enviro Tech Europe and Enviro Tech International v Commission*, T-291/04, EU:T:2011:760, paragraph 104 and the case-law cited) and the Commission was not required to take particular account of their situation when adopting the contested measure (see, to that effect, judgment of 2 March 2010, *Arcelor v Parliament and Council*, T-16/04, EU:T:2010:54, paragraph 102 and the case-law cited).
- 46 Secondly, the argument – which is, moreover, disputed by the Commission – based on the small number of undertakings affected by the contested measure cannot succeed either. It should be recalled that natural or legal persons cannot be individually concerned by a measure of general application unless they are affected by it by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as an addressee. The number of natural or legal persons affected by such a measure is not, however, decisive (see, to that effect, judgment of 1 April 2004, *Commission v Jégo-Quéré*, C-263/02 P, EU:C:2004:210, paragraphs 43 to 46 and the case-law cited).
- 47 Thirdly, contrary to the Commission's claims, since the authorisations granted under Directive 2014/40 relate to the marketing of tobacco products which comply with the requirements of that directive, there is no doubt that the absolute prohibition on marketing heated tobacco products with characterising flavours laid down in the contested measure will necessarily have the effect of calling into question the authorisations held by some of the applicants. Such authorisations, however, cannot be regarded as differentiating the position of the holders of those authorisations and distinguishing that position individually with regard to the contested measure as if those holders had been its addressees. Moreover, the authorisations in question do not confer on their holders rights comparable to those enjoyed by the applicants and appellants in the cases referred to in paragraphs 40 and 41 above.

- 48 First of all, the effects of the contested measure are produced in the same way both in respect of operators which have been granted an authorisation in the Member States which have introduced an authorisation mechanism in accordance with Article 19(3) of Directive 2014/40 for heated tobacco products with characterising flavours and in respect of operators which have made the declarations provided for in Article 5 of that directive or the notifications provided for in Article 19 thereof for those products, or even in respect of operators which have not yet been granted an authorisation or made a declaration or notification, but which intend to place such products on the market. Thus, none of the operators in those situations is distinguished individually with regard to the contested measure.
- 49 Next, as has been noted in paragraph 43 above, the authorisations and the declarations or notifications meet objective requirements concerning tobacco products as laid down in Directive 2014/40, which are determined in a general and abstract manner for all operators. It follows that the authorisations issued by Member States are granted without exclusivity, on the sole basis of the compliance of the products, just as no exclusivity results from the declarations or notifications made by operators.
- 50 Lastly, Directive 2014/40 provides that various delegated acts may specify or amend the conditions for marketing tobacco products falling within its scope. That is true in particular, as regards the withdrawal of the exemption in question in the present case, of Article 7(12) of that directive. It follows that the authorisations to market heated tobacco products with characterising flavours granted to some of the applicants, like the right to market such products following a declaration or a notification, could not be regarded as having been acquired indefinitely.
- 51 Fourthly, the circumstance, relied on by the applicants in response to the plea of inadmissibility raised by the Commission, that manufacturers and importers of heated tobacco products with a characterising flavour are not, having regard to the contested measure, in the same situation as the industries upstream and downstream in the production and distribution chain is irrelevant to the question whether the applicants belong to a limited class within the meaning of the case-law referred to in paragraph 41 above. The applicants, for the purpose of demonstrating that they are individually concerned by the contested measure, must prove not that they are affected in a way which is different from other operators, but that they are affected by reason of an attribute or a factual situation which is peculiar to them and which distinguishes them in the same way as the addressee of a decision (see, to that effect, order of 12 December 2003, *Bactria v Commission*, C-258/02 P, EU:C:2003:675, paragraph 34 and the case-law cited).
- 52 It follows from the foregoing that the authorisations, declarations and notifications on which the applicants rely do not make it possible to prove that they are individually concerned by the contested measure.
- 53 In the second place, the applicants submit that the contested measure has a substantial effect on their competitive position. In that regard, they maintain that they hold a significant share of the market for heated tobacco products, that the prohibited products constitute a very large proportion of their sales and that they have incurred considerable investment expenditure for the purpose of developing the products in question.

- 54 However, the fact that certain operators are more affected economically by a measure of general application than others is not sufficient to distinguish them individually from all other operators, since the application of that measure takes effect by virtue of an objectively determined situation (see judgment of 2 March 2010, *Arcelor v Parliament and Council*, T-16/04, EU:T:2010:54, paragraph 106 and the case-law cited).
- 55 In addition, the mere fact that natural or physical persons may lose a major source of income as a result of new legislation does not prove that they are in a specific situation and is not sufficient to establish that that legislation applies to them individually, those persons having to adduce proof of circumstances which make it possible to consider that the harm allegedly suffered is such as to distinguish them individually from all other economic operators concerned by that legislation in the same way as they are (see, to that effect, order of 29 June 2006, *Nürburgring v Parliament and Council*, T-311/03, not published, EU:T:2006:179, paragraphs 65 and 66 and the case-law cited).
- 56 It follows from all of the foregoing that the applicants are not justified in claiming that they are individually concerned by the contested measure and that the action must therefore be dismissed as inadmissible.

The applications to intervene

- 57 By documents lodged at the Registry of the General Court on 16 February and 8 March 2023, respectively, the Council of the European Union and the French Republic sought leave to intervene in support of the Commission.
- 58 By document lodged at the Court Registry also on 8 March 2023, Philip Morris Products SA, Papastratos Cigarettes Manufacturing Company Single Member SA, Philip Morris Manufacturing & Technology Bologna SpA, Philip Morris Romania SRL and Philip Morris Ltd sought leave to intervene in support of the applicants.
- 59 Under Article 142(2) of the Rules of Procedure, the intervention becomes devoid of purpose if, inter alia, the application is declared inadmissible. In the present case, since the action has been dismissed as inadmissible, there is no longer any need to adjudicate on the applications to intervene.

Costs

- 60 In the first place, under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful in their action, they must be ordered to bear their own costs and to pay those of the Commission, in accordance with the form of order sought by the Commission, with the exception of those relating to the applications to intervene.
- 61 In the second place, under Article 144(10) of the Rules of Procedure, if the proceedings in the main case are concluded before the application to intervene has been decided upon, the applicant for leave to intervene and the main parties must each bear their own costs relating to the application to intervene. In the present case, the applicants, the Commission, the French Republic, the Council, Philip Morris Products, Papastratos Cigarettes Manufacturing Company Single Member, Philip Morris Manufacturing & Technology Bologna, Philip Morris Romania and Philip Morris shall each bear their own costs relating to the applications to intervene.

62 In the third place, in accordance with Article 158(5) of the Rules of Procedure, the order of 2 February 2023, *Nicoventures Trading and Others v Commission* (T-706/22 R, not published, EU:T:2023:39), closing the proceedings for interim relief has reserved the costs until the decision of the General Court on the substance of the case. Since the applicants have been unsuccessful both in the proceedings for interim relief and in the main proceedings, they must be ordered to pay all the costs relating to the proceedings for interim relief, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby orders:

1. **The action is dismissed as inadmissible.**
2. **There is no longer any need to adjudicate on the applications to intervene submitted by the French Republic, the Council of the European Union, Philip Morris Products SA, Papastratos Cigarettes Manufacturing Company Single Member SA, Philip Morris Manufacturing & Technology Bologna SpA, Philip Morris Romania SRL and Philip Morris Ltd.**
3. **Nicoventures Trading Ltd and the other applicants whose names are listed in the annex shall bear their own costs and pay those of the European Commission, with the exception of those relating to the applications to intervene.**
4. **Nicoventures Trading and the other applicants whose names are listed in the annex, the Commission, the French Republic, the Council, Philip Morris Products, Papastratos Cigarettes Manufacturing Company Single Member, Philip Morris Manufacturing & Technology Bologna, Philip Morris Romania and Philip Morris shall each bear their own costs relating to the applications to intervene.**
5. **Nicoventures Trading and the other applicants whose names are listed in the annex shall pay the costs relating to the proceedings for interim relief.**

Luxembourg, 20 September 2023.

V. Di Bucci
Registrar

A. Marcoulli
President