Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

4 May 2016*

(Action for annulment — Approximation of laws — Directive 2014/40/EU — Article 2(25), Article 6(2)(b), Article 7(1) to (5), the first sentence of Article 7(7), Article 7(12) to (14) and Article 13(1)(c) — Validity — Manufacture, presentation and sale of tobacco products — Prohibition on the placing on the market of tobacco products with characterising flavours — Tobacco products containing menthol — Legal basis — Article 114 TFEU — Principle of proportionality — Principle of subsidiarity)

In Case C-358/14,

ACTION for annulment under Article 263 TFEU, brought on 22 July 2014,

Republic of Poland, represented by B. Majczyna and M. Szwarc, acting as Agents,

applicant,

supported by

Romania, represented by R.-H. Radu, D.M. Bulancea and A. Vacaru, acting as Agents,

intervener,

v

European Parliament, represented by L. Visaggio, J. Rodrigues and A. Pospíšilová Padowska, acting as Agents, with an address for service in Luxembourg,

Council of the European Union, represented by O. Segnana, J. Herrmann, K. Pleśniak and M. Simm, acting as Agents,

defendants,

supported by

Ireland, represented by J. Quaney and A. Joyce, acting as Agents, and by E. Barrington SC and J. Cooke SC and E. Carolan, Barrister-at-Law,

French Republic, represented by D. Colas and S. Ghiandoni, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by V. Kaye, C. Brodie and M. Holt, acting as Agents, and by I. Rogers QC and S. Abram and E. Metcalfe, Barristers,

* Language of the case: Polish.

European Commission, represented by M. Van Hoof, C. Cattabriga and M. Owsiany-Hornung, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça, A. Arabadjiev (Rapporteur), C. Lycourgos and J.-C. Bonichot, Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 30 September 2015,

after hearing the Opinion of the Advocate General at the sitting on 23 December 2015,

gives the following

Judgment

1 By its application, the Republic of Poland seeks the annulment of Article 2(25), Article 6(2)(b), Article 7(1) to (5), the first sentence of Article 7(7), Article 7(12) to (14) and Article 13(1)(c) 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).

Legal context

The World Health Organisation Framework Convention on Tobacco Control

2 In the words of the preamble to the World Health Organisation Framework Convention on Tobacco Control, signed in Geneva on 21 May 2003 ('the FCTC'), to which the European Union and its Member States are party, the Parties to that convention recognise, first, that 'scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability', and, secondly, that 'cigarettes and some other products containing tobacco are highly engineered so as to create and maintain dependence, and that many of the compounds they contain and the smoke they produce are pharmacologically active, toxic, mutagenic and carcinogenic, and that tobacco dependence is separately classified as a disorder in major international classifications of diseases'.

3 Article 7 of the FCTC, which is entitled 'Non-price measures to reduce the demand for tobacco', provides:

'… Each Party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation. The Conference of the Parties shall propose appropriate guidelines for the implementation of the provisions of these Articles.'

4 Article 9 of the FCTC, which is entitled ‘Regulation of the contents of tobacco products’, states:

‘The Conference of the Parties, in consultation with competent international bodies, shall propose guidelines for testing and measuring the contents and emissions of tobacco products, and for the regulation of these contents and emissions. Each Party shall, where approved by competent national authorities, adopt and implement effective legislative, executive and administrative or other measures for such testing and measuring, and for such regulation.’

5 Under section 1.1 of the Partial Guidelines for Implementation of Articles 9 and 10 of the World Health Organisation Framework Convention on Tobacco Control (‘the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC’), the parties ‘are … encouraged to implement measures beyond those recommended by these guidelines’.

6 Section 3.1.2 of those guidelines, which is headed ‘Ingredients (Regulation)’, describes the measures that the Contracting Parties could introduce to regulate ingredients, stating as follows:

‘...

3.1.2.1 Background Regulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users ... ...

3.1.2.2 Tobacco products

(i) Ingredients used to increase palatability The harsh and irritating character of tobacco smoke provides a significant barrier to experimentation and initial use. Tobacco industry documents have shown that significant effort has been put into mitigating these unfavourable characteristics. Harshness can be reduced in a variety of ways including: adding various ingredients, eliminating substances with known irritant properties, balancing irritation alongside other significant sensory effects, or altering the chemical properties of tobacco product emissions by adding or removing specific substances. ... Masking tobacco smoke harshness with flavours contributes to promoting and sustaining tobacco use. Examples of flavouring substances include benzaldehyde, maltol, menthol and vanillin. Spices and herbs can also be used to improve the palatability of tobacco products. Examples include cinnamon, ginger and mint.

Recommendation Parties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products. ...’

Directive 2014/40

7 Recitals 4, 7, 15 to 17, 33 and 60 of Directive 2014/40 state:

‘(4) In other areas there are still substantial differences between the Member States’ laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco and related products which present obstacles to the smooth functioning of the internal market. In the light of scientific, market and international developments these discrepancies are expected to increase. This also applies to electronic cigarettes and refill containers for electronic cigarettes (“refill containers”), herbal products for smoking, ingredients and emissions from tobacco products, certain aspects of labelling and packaging and to cross-border distance sales of tobacco products.

...

(7) Legislative action at Union level is also necessary in order to implement the [FCTC], the provisions of which are binding on the Union and its Member States. The FCTC provisions on the regulation of the contents of tobacco products, the regulation of tobacco product disclosures, the packaging and labelling of tobacco products, advertising and illicit trade in tobacco products are particularly relevant. The Parties to the FCTC, including the Union and its Member States, adopted a set of guidelines for the implementation of FCTC provisions by consensus during various Conferences.

...

(15) The lack of a harmonised approach to regulating the ingredients of tobacco products affects the smooth functioning of the internal market and has a negative impact on the free movement of goods across the Union. Some Member States have adopted legislation or entered into binding agreements with the industry allowing or prohibiting certain ingredients. As a result, some ingredients are regulated in certain Member States, but not in others. Member States also take differing approaches as regards additives in the filters of cigarettes as well as additives colouring the tobacco smoke. Without harmonisation, the obstacles to the smooth functioning of the internal market are expected to increase in the coming years, taking into account the implementation of the FCTC and the relevant FCTC guidelines throughout the Union and in the light of experience gained in other jurisdictions outside the Union. The FCTC guidelines in relation to the regulation of the contents of tobacco products and regulation of tobacco product disclosures call in particular for the removal of ingredients that increase palatability, create the impression that tobacco products have health benefits, are associated with energy and vitality or have colouring properties.

(16) The likelihood of diverging regulation is further increased by concerns over tobacco products having a characterising flavour other than one of tobacco, which could facilitate initiation of tobacco consumption or affect consumption patterns. Measures introducing unjustified differences of treatment between different types of flavoured cigarettes should be avoided. However, products with characterising flavour with a higher sales volume should be phased out over an extended time period to allow consumers adequate time to switch to other products.

(17) The prohibition of tobacco products with characterising flavours does not preclude the use of individual additives outright, but it does oblige manufacturers to reduce the additive or the combination of additives to such an extent that the additives no longer result in a characterising flavour ...

...

(33) Cross-border distance sales of tobacco products could facilitate access to tobacco products that do not comply with this Directive. There is also an increased risk that young people would get access to tobacco products. Consequently, there is a risk that tobacco control legislation would be undermined. Member States should, therefore, be allowed to prohibit cross-border distance sales. Where cross-border distance sales are not prohibited, common rules on the registration of retail outlets engaging in such sales are appropriate to ensure the effectiveness of this Directive ...

...

(60) Since the objectives of this Directive, namely to approximate the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, cannot be sufficiently achieved by the Member States, but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may

adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.'

8 Article 1 of Directive 2014/40, which is entitled 'Subject matter', provides:

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

(a) the ingredients and emissions of tobacco products and related reporting obligations, including the maximum emission levels for tar, nicotine and carbon monoxide for cigarettes;

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

(c) the prohibition on the placing on the market of tobacco for oral use;

(d) cross-border distance sales of tobacco products;

(e) the obligation to submit a notification of novel tobacco products;

(f) the placing on the market and the labelling of certain products, which are related to tobacco products, namely electronic cigarettes and refill containers, and herbal products for smoking;

in order to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people, and to meet the obligations of the Union under the [FCTC].'

9 Article 2 of Directive 2014/40, which is entitled 'Definitions', provides, in point 25, that, for the purposes of that directive, the following definition is to apply:

'"characterising flavour" means a clearly noticeable smell or taste other than one of tobacco, resulting from an additive or a combination of additives, including, but not limited to, fruit, spice, herbs, alcohol, candy, menthol or vanilla, which is noticeable before or during the consumption of the tobacco product'.

10 Article 6 of Directive 2014/40, which is entitled 'Priority list of additives and enhanced reporting obligations', states:

'1. In addition to the reporting obligations laid down in Article 5, enhanced reporting obligations shall apply to certain additives contained in cigarettes and roll-your-own tobacco that are included in a priority list. ...

...

2. Member States shall require manufacturers and importers of cigarettes and roll-your-own tobacco containing an additive that is included in the priority list provided for in paragraph 1, to carry out comprehensive studies, which shall examine for each additive whether it:

...

(b) results in a characterising flavour;

…’

11 Article 7 of that directive, which is entitled ‘Regulation of ingredients’, provides:

‘1. Member States shall prohibit the placing on the market of tobacco products with a characterising flavour.

Member States shall not prohibit the use of additives which are essential for the manufacture of tobacco products, for example sugar to replace sugar that is lost during the curing process, provided those additives do not result in a product with a characterising flavour and do not increase to a significant or measureable degree the addictiveness, toxicity or the [carcinogenic, mutagenic or reprotoxic] properties of the tobacco product.

Member States shall notify the Commission of the measures taken pursuant to this paragraph.

2. The Commission shall, at the request of a Member State, or may, on its own initiative, determine by means of implementing acts whether a tobacco product falls within the scope of paragraph 1. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 25(2).

3. The Commission shall adopt implementing acts laying down uniform rules for the procedures for determining whether a tobacco product falls within the scope of paragraph 1. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 25(2).

4. An independent advisory panel shall be established at Union level. Member States and the Commission may consult this panel before adopting a measure pursuant to paragraphs 1 and 2 of this Article. The Commission shall adopt implementing acts laying down the procedures for the establishment and operation of this panel.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 25(2).

5. Where the content level or concentration of certain additives or the combination thereof has resulted in prohibitions pursuant to paragraph 1 of this Article in at least three Member States, the Commission shall be empowered to adopt delegated acts in accordance with Article 27 to set maximum content levels for those additives or combination of additives that result in the characterising flavour.

…

7. Member States shall prohibit the placing on the market of tobacco products containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity. …

…

12. Tobacco products other than cigarettes and roll-your-own tobacco shall be exempted from the prohibitions laid down in paragraphs 1 and 7. The Commission shall adopt delegated acts in accordance with Article 27 to withdraw that exemption for a particular product category, if there is a substantial change of circumstances as established in a Commission report.

13. The Member States and the Commission may charge proportionate fees to manufacturers and importers of tobacco products for assessing whether a tobacco product has a characterising flavour, whether prohibited additives or flavourings are used and whether a tobacco product contains additives in quantities that increase to a significant and measurable degree the toxic or addictive effect or the [carcinogenic, mutagenic or reprotoxic] properties of the tobacco product concerned.

14. In the case of tobacco products with a characterising flavour whose Union-wide sales volumes represent 3% or more in a particular product category, the provisions of this Article shall apply from 20 May 2020.

...'

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

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

...

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

...'

13 Article 18 of that directive, which is entitled 'Cross-border distance sales of tobacco products', provides in particular, in paragraph 1, that Member States may prohibit cross-border distance sales of tobacco products to consumers.

14 Under Article 29 of Directive 2014/40, the provisions of that directive must be transposed into the national legal systems of those Member States by 20 May 2016 and enter into force from that date.

Procedure before the Court and forms of order sought

15 The Republic of Poland claims that the Court should:

— declare invalid Article 2(25), Article 6(2)(b), Article 7(1) to (5), the first sentence of Article 7(7), Article 7(12) to (14) and Article 13(1)(c) of Directive 2014/40 (together 'the contested provisions') and

— order the European Parliament and the Council of the European Union to pay the costs.

16 The Parliament and the Council contend that the Court should:

— dismiss the action and

— order the Republic of Poland to pay the costs.

17 The Parliament and the Council contend, in the alternative, that if the Court intends to annul the contested provisions of Directive 2014/40, it should, in accordance with the second paragraph of Article 264 TFEU, order that the effects of those provisions be maintained until new legislation is adopted in the area under consideration.

18 By decisions of 11 December 2014, Romania was granted leave to intervene in support of the form of order sought by the Republic of Poland, while the French Republic, Ireland, the United Kingdom and the Commission were granted leave to intervene in support of the form of order sought by the Parliament and the Council.

The action

19 In support of its application for annulment, the Republic of Poland raises three pleas in law alleging infringement of Article 114 TFEU, the principle of proportionality and the principle of subsidiarity, respectively.

Admissibility

20 The Council contends that a plea in law of the Republic of Poland which, it is alleged, is based on the infringement of the principle of equal treatment is inadmissible on the ground that it was raised out of time, in the reply, and constitutes, therefore, a new plea in law within the meaning of Article 127(1) of the Rules of Procedure of the Court.

21 That plea of inadmissibility is based, however, on a misreading of the pleas in law and arguments raised by the Republic of Poland. Although that Member State has argued on several occasions, in particular in the application, that mentholated tobacco products enjoy a special status, different from that of the other tobacco products having a characterising flavour, it has not raised a separate plea in law alleging infringement of the principle of equal treatment, as it indeed confirmed at the hearing, but simply substantiated, by that line of argument, the three pleas in law which have been raised.

22 In those circumstances, the plea of inadmissibility must be dismissed.

The legality of the contested provisions

The first plea in law, alleging infringement of Article 114 TFEU

– Arguments of the parties

23 The Republic of Poland submits that Article 114 TFEU is not an adequate legal basis for the adoption of the contested provisions of Directive 2014/40, in so far as those provisions prohibit the placing on the market of tobacco products containing menthol as a characterising flavour or are closely linked to that prohibition.

24 In that regard, the Republic of Poland submits that the EU legislature should, for the purposes of adopting that directive, have distinguished products containing menthol from those with another characterising flavour because of, first, the long-established presence on the market of products containing menthol which gave them a ‘traditional’ nature, secondly, their different qualities in terms of taste, since menthol does not completely eliminate the taste and smell of tobacco and, thirdly, the fact that they are not as attractive to young people as the other tobacco products with a characterising flavour.

25 In the light of the foregoing, the Republic of Poland submits, first of all, that the EU legislature has failed to show that there were divergences, when Directive 2014/40 was adopted, between the national rules as regards specifically the use of menthol as an additive in tobacco products. Next, there were likewise no objective reasons to show that divergences between those rules are likely to emerge in the

future. Lastly, since the concept of 'characterising flavour' is not sufficiently detailed in Directive 2014/40, its transposition and application at the national level would give rise to divergences between national rules and practices in the field.

26 Romania submits that the aim of the contested provisions is not to improve the conditions for the functioning of the internal market as required by Article 114 TFEU, but that they seek, principally, to ensure a high level of health protection, even though Article 168(5) TFEU excludes any harmonisation in that area. Given the considerable differences between the levels of consumption of mentholated tobacco products in the Member States, the negligible market share of those products and the small volume of intra-Community trade, the prohibition on placing those products on the market does not contribute to the smooth functioning of the internal market.

27 The Parliament, the Council and the Commission contend, first, that since the EU legislature decided to treat all flavourings identically, it must be ascertained whether there are divergences between the national rules likely to have an influence on the functioning of the internal market as regards all the additives which might impart a characterising flavour, as a whole. According to those institutions, Ireland and the United Kingdom, the existence of such divergences is clear from the Commission's 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').

28 Secondly, it is likely that there will be divergences between the relevant national rules in the light, in particular, of the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC. As an example, the Federal Republic of Germany has prohibited the placing on the market of menthol capsules.

29 Thirdly, the Parliament, the Council and the Commission contend that the concept of 'characterising flavour' is defined in a general and abstract manner. It is for the Member States, in cooperation with the Commission and in accordance with the criteria prescribed by it, to identify specifically the products with such a flavouring. In that regard, the mechanisms introduced by Article 7(2) and (5) of Directive 2014/40 ensure legal certainty and the uniform application of the prohibition of characterising flavours.

30 Lastly, those institutions dispute the claim that the market share of the tobacco products with a characterising flavour and the intra-Community trade in those products are negligible.

– Findings of the Court

31 Article 114(1) TFEU establishes that the Parliament and the Council are to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

32 In that regard, while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU, it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (see, to that effect, judgments in *Germany* v *Parliament and Council*, C-376/98, EU:C:2000:544, paragraphs 84 and 95; *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 59 and 60; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 30; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 29; *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 37; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 32).

33 It is also settled case-law that, although recourse to Article 114 TFEU as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade as a result of divergences in national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 61; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 31; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 30; *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 38; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 33).

34 The Court has also held that, provided that the conditions for recourse to Article 114 TFEU as a legal basis are fulfilled, the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 62; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 32; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 31; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 39).

35 The point should also be made that the first subparagraph of Article 168(1) TFEU provides that a high level of human health protection is to be ensured in the definition and implementation of all EU policies and activities, and that Article 114(3) TFEU explicitly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed (judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 62; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 33; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 32; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 40).

36 It follows from the foregoing that when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products such as to bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the European Union, Article 114 TFEU authorises the EU legislature to intervene by adopting appropriate measures, in compliance with Article 114(3) TFEU and with the legal principles mentioned in the FEU Treaty or identified in the case-law, in particular the principle of proportionality (judgments in *Arnold André*, C-434/02, EU:C:2004:800, paragraph 34; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 33; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 41).

37 It is also to be observed that, by using the words ‘measures for the approximation’ in Article 114 TFEU, the authors of the Treaty intended to confer on the EU legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features (see judgments in *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 42, and *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 102).

38 Depending on the circumstances, such measures for approximation may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products (judgments in *Arnold André*, C-434/02, EU:C:2004:800, paragraph 35; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 34; *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2005:449, paragraph 33; and *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 43).

39 The question whether the conditions for recourse to Article 114 TFEU as a legal basis for the contested provisions of Directive 2014/40 are met must be determined in the light of those principles.

40 The arguments relied upon by the Republic of Poland in support of its application for annulment concern more specifically the prohibition of menthol as a characterising flavour. That line of argument is thus based upon the premiss that mentholated tobacco products enjoy a special status compared with the other tobacco products with a characterising flavour, so that the EU legislature could not have recourse to Article 114 TFEU as a legal basis for prohibiting them without establishing beforehand that there were actual or likely divergences between Member States' rules as regards the placing on the market of tobacco products containing, in particular, menthol.

41 It must, therefore, be ascertained, in the first place, whether, in order for Article 114 TFEU to be capable of constituting an adequate legal basis for the adoption of the contested provisions, the EU legislature had to establish that divergences existed between the national rules as regards, specifically, tobacco products containing menthol as a characterising flavour, such as to present obstacles to the free movement of tobacco products, or that it is likely that such divergences will emerge in the future.

42 It must be noted in this regard that the EU legislature decided to adopt uniform rules for all tobacco cigarettes, including roll-your-own cigarettes, with a characterising flavour. It took the view, as can be seen from recital 16 of Directive 2014/40, that those products could facilitate initiation of tobacco consumption or affect consumption patterns.

43 In addition, the EU legislature took into account, as recital 15 of the directive confirms, the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC, which call in particular for the removal of ingredients that increase palatability, create the impression that tobacco products have health benefits, are associated with energy and vitality or have colouring properties.

44 It must be stated in this connection that those partial guidelines likewise do not draw any distinction between the various flavourings that may be added to tobacco products. On the contrary, section 3.1.2.2 of the partial guidelines recommends that parties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products. In this regard, reference is explicitly made in that section to menthol as a flavour which masks tobacco smoke harshness and contributes to promoting and sustaining tobacco use.

45 Whilst it is correct that the FCTC guidelines do not have binding force, they are intended, in accordance with Articles 7 and 9 of the FCTC, to assist the Contracting Parties in implementing the binding provisions of that convention.

46 Furthermore, those guidelines are based on the best available scientific evidence and the experience of the Parties to the FCTC, as can be seen from section 1.1 of the guidelines, and have been adopted by consensus, including by the European Union and its Member States, as is stated in recital 7 of Directive 2014/40.

47 Accordingly, the recommendations thus drawn up are intended to have a decisive influence on the content of the rules adopted by the European Union in the area under consideration, as is confirmed by the EU legislature's express decision to take those recommendations into account when adopting Directive 2014/40, mention of which is made in recitals 7 and 15 of the directive.

48 It follows that tobacco products containing a characterising flavour, whether that is menthol or another flavouring, have certain similar, objective characteristics and similar effects as regards initiating tobacco consumption and sustaining tobacco use.

49 The Republic of Poland's objections in that regard cannot succeed.

50 First of all, the fact that mentholated tobacco products are a 'traditional' product because they have long been established on the European market, does not in any way alter the finding that their objective characteristics are, in essence, similar to those of the other tobacco products with a characterising flavour, in that their flavour masks or reduces the tobacco smoke's harshness.

51 Moreover, as the Advocate General noted in point 54 of her Opinion, although it may be justified to introduce special, if not stricter, rules for certain products by reason of their novelty (judgments in *Arnold André*, C-434/02, EU:C:2004:800, paragraph 69, and *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 71), it cannot, however, be concluded *a contrario* that more relaxed rules should apply to products long established on the market for that reason alone.

52 Next, even if the claim that menthol is not as attractive to young people as other flavourings were true, which the defendants moreover deny, that claim is not conclusive as such. It is sufficient to point out that the attractiveness of the products at issue cannot be assessed in the light solely of the tastes and habits of a single group of consumers disregarding the others.

53 It must be added in that regard that, according to sections 3.1.2.1 and 3.1.2.2 of the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC, menthol, by its pleasant flavour, makes tobacco products more attractive to consumers and that reducing the attractiveness of those products may contribute to reducing the prevalence of tobacco use and dependence among new and continuing users.

54 Lastly, as regards the claim that the qualities of mentholated tobacco products in terms of taste are different from those of the other tobacco products having a charactering flavour in that the former, unlike the latter, do not completely eliminate the taste and smell of tobacco, it must be held that that claim is not sufficiently substantiated. Although it cannot be excluded that certain flavourings alter to varying degrees the taste or smell of tobacco, the fact remains that all flavourings, including menthol, mask or reduce tobacco smoke's harshness and contribute to promoting and sustaining tobacco use, as has been noted in paragraph 44 above.

55 In those circumstances, the Republic of Poland's line of argument seeks, in fact, to establish that there are unjustified differences in treatment within the same category of tobacco products whose objective features and effects are similar.

56 Accordingly, for Article 114 TFEU to be capable of constituting an adequate legal basis for the contested provisions of Directive 2014/40, it is sufficient to establish that divergences exist between the national rules concerning tobacco products containing a characterising flavour, as a whole, which are such as to present obstacles to the free movement of those products, or that it is likely that such divergences will emerge in the future.

57 As regards, in the second place, the existence of such divergences, it is apparent from both recital 15 of the directive and the impact assessment referred to in paragraph 27 above (Part 1, p. 34, and Part 4, p. 6 et seq.), that there were, when the directive was adopted, significant divergences between the regulatory systems of the Member States, given that some of them had established different lists of permitted or prohibited flavourings, whilst others had not adopted any specific rules on the matter.

58 Similarly, it seems likely that, in the absence of any measures at EU level, disparate sets of rules applying to tobacco products containing a characterising flavour, including menthol, would have been implemented at national level.

59 Indeed, as has been stated in paragraph 44 above, the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC recommend that the Parties 'regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products', including menthol.

60 As a result of the broad discretion thus afforded to the Contracting Parties by those partial guidelines, it is foreseeable, with a sufficient degree of probability, that in the absence of measures at EU level, the relevant national rules could have developed in divergent ways, including with regard to the use of menthol.

61 Article 7 of Directive 2014/40, in prohibiting the placing on the market of tobacco products with a characterising flavour, guards precisely against such divergences in the rules of the Member States.

62 As regards, in the third place, the argument that the contested provisions do not seek to improve the conditions for the functioning of the internal market, contrary to the requirements of Article 114 TFEU, it is apparent from the case-law of the Court that the market for tobacco products is one in which trade between Member States represents a relatively large part and that, therefore, national rules laying down the requirements to be met by those products, in particular those relating to their composition, are in themselves liable, in the absence of harmonisation at EU level, to constitute obstacles to the free movement of goods (see, to that effect, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 64).

63 It must also be pointed out that, in accordance with the case-law cited in paragraph 38 above, the measures that may be adopted on the basis of Article 114 TFEU may, in particular, consist in provisionally or definitively prohibiting the marketing of a product or products.

64 Consequently, the elimination of the divergences between the national rules as regards the composition of tobacco products or the prevention of the development of divergences between them, including the prohibition, at EU level, of certain additives, seeks to facilitate the smooth functioning of the internal market in the products concerned.

65 As regards, in the fourth place, the claim that prohibiting characterising flavours does not improve the functioning of the internal market but, on the contrary, produces divergences in the matter at national level when Directive 2014/40 is transposed, because of the imprecise nature of the concept of 'characterising flavour', the Court points out that that concept is defined in Article 2(25) of that directive as meaning 'a clearly noticeable smell or taste other than one of tobacco, resulting from an additive or a combination of additives, including, but not limited to, fruit, spice, herbs, alcohol, candy, menthol or vanilla, which is noticeable before or during the consumption of the tobacco product'.

66 Article 7(2) to (5) of Directive 2014/40 prescribes three mechanisms for determining which tobacco products contain such a flavouring. First, under Article 2(7) the Commission must, at the request of a Member State, or may, on its own initiative, determine by means of implementing acts whether a tobacco product falls within the scope of the prohibition of characterising flavours. Secondly, it is for the Commission, in accordance with Article 7(3), to adopt implementing acts laying down uniform rules for the procedures for determining whether a tobacco product falls within the scope of that prohibition. Thirdly, where the content level or concentration of certain additives or the combination thereof has resulted in prohibitions on placing the products on the market in at least three Member States, the Commission is empowered to adopt delegated acts to set maximum content levels for those additives or combination of additives that result in the characterising flavour.

67 It must, therefore, be found that those mechanisms are intended precisely to establish common rules in the area of tobacco products with a charactering flavour in order to prevent the emergence of divergences when that directive is transposed or applied or to eliminate them should they arise.

68 In accordance with the case-law referred to in paragraph 37 above, Article 114 TFEU confers on the EU legislature a discretion as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features.

69 In the present case, there is nothing to indicate that the EU legislature has failed to observe that discretion in introducing the mechanisms described in paragraph 66 above. On the contrary, those dynamic mechanisms have advantages compared with the adoption — advocated by the Republic of Poland — of lists of permitted or prohibited flavourings, which are likely to be quickly rendered inoperative by the constant development of the commercial strategies of manufacturers or easily circumvented.

70 It follows from the foregoing considerations that the first plea in law, alleging infringement of Article 114 TFEU, must be rejected.

The second plea in law, alleging infringement of the principle of proportionality

– Arguments of the parties

71 The Republic of Poland and Romania submit, in the first place, that the prohibition on the placing on the market of mentholated tobacco products is not an appropriate measure for achieving the objectives pursued by Directive 2014/40, since, on the grounds stated in the last sentence of paragraph 25 above, it would create obstacles to trade. In addition, that prohibition is also unsuitable for ensuring a high level of human health protection because, first, mentholated tobacco products are not as attractive to young people as the other tobacco products with a characterising flavour and, secondly, prohibiting them would not lead to a significant reduction in the number of smokers, a large proportion of whom would, in all likelihood, turn to tobacco products without a characterising flavour. Moreover, the prohibition at issue would lead to the rapid growth in the illicit sale of prohibited products.

72 In the second place, those Member States complain that the EU legislature imposed the most restrictive measure without examining the possibility of favouring other less restrictive measures, such as raising at EU level the age limits from which the consumption of mentholated tobacco products is permitted, the prohibition of cross-border sales of those products and the inclusion on their labelling of a warning stating that those products are as harmful as other tobacco products.

73 In the third place, in the view of those Member States, the social and economic costs of the prohibition on the placing on the market of mentholated tobacco products, in terms of lost jobs and revenue, are disproportionate to any advantages arising from that prohibition, in particular as regards certain Member States, such as Poland, where the manufacture and consumption of mentholated tobacco products are significant.

74 The Parliament, the Council, the Commission, the French Republic, Ireland and the United Kingdom contend that the prohibition at issue is appropriate for achieving the objective pursued by Directive 2014/40.

75 They take the view that none of the less restrictive measures advocated by the Republic of Poland are likely to be as effective in achieving the objective sought.

76 In the Parliament's view, the mere fact that the prohibition at issue may generate higher costs in certain Member States than in others is not sufficient to show that that prohibition is disproportionate. In any event, the effects of the prohibition on the tobacco products market are not as significant as alleged, having regard to the fact that, first, many smokers would turn to non-flavoured tobacco products and, secondly, that the transitional period provided for in Article 7(14) of Directive 2014/40 enables operators to adapt to the new rules.

77 The Council and the Commission further contend that, according to the impact assessment, the prohibition at issue would lead to a fall of 0.5 to 0.8% in the consumption of cigarettes in five years, which cannot give rise to disproportionate consequences for the tobacco industry. In addition, some of the negative consequences of the prohibition at issue could be offset by financial support measures granted under the rural development programme.

– Findings of the Court

78 According to settled case-law, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 122; *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 86; and *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraphs 67 and 91).

79 With regard to judicial review of the conditions referred to in the previous paragraph, the EU legislature must be allowed broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 123).

80 As regards, in the first place, whether the prohibition on the placing on the market of tobacco products having menthol as a characterising flavour is appropriate, it must be noted that, in accordance with Article 1 of Directive 2014/40, that prohibition 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.

81 It must be found in that regard, first, that, as is apparent from paragraphs 61 to 64 above, the prohibition on the placing on the market of tobacco products with a characterising flavour is appropriate for facilitating the smooth functioning of the internal market for tobacco and related products.

82 Secondly, that prohibition is also appropriate for ensuring a high level of protection of human health, especially for young people. It is not disputed that certain flavourings are particularly attractive to them and that they facilitate initiation of tobacco consumption.

83 The Republic of Poland's argument seeking to show, first, that young people are not attracted to menthol so that its use does not facilitate initiation of tobacco consumption and, secondly, that the prohibition of that flavouring does not contribute to the reduction in the number of smokers cannot succeed.

84 That line of argument is ineffective, given that, as has already been noted in paragraph 56 above, the EU legislature could properly make all characterising flavours subject to the same set of legal rules. Accordingly, the appropriateness of that prohibition for the purpose of achieving the object of human health protection pursued by it cannot be called into question solely in respect of a particular flavouring.

85 In addition, according to the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC which should — on account of the findings made in paragraph 46 above — be recognised as being of particularly high evidential value, menthol, amongst other flavours, contributes to promoting and sustaining tobacco use and, because of its palatability, renders tobacco products more attractive to consumers.

86 Directive 2014/40 is aimed at ensuring a high level of health protection for consumers as a whole and consequently its ability to achieve that aim cannot be assessed solely in relation to a single category of consumers.

87 In addition, the argument that the prohibition on the placing on the market of menthol-containing tobacco products does not contribute to the reduction in the number of smokers, even if proved, cannot succeed either, since it disregards the preventive function of that prohibition, which is to reduce the initiation of tobacco consumption.

88 As regards, lastly, the argument that the prohibition of characterising flavours will lead to the rapid growth in the illicit sale of flavoured tobacco products, it must be found that that argument does not take sufficient account of the mechanisms introduced by Directive 2014/40, in particular Articles 15 and 16 thereof, in order to deal with that risk.

89 Accordingly, the prohibition in question cannot be regarded as manifestly inappropriate for achieving the objective of facilitating 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.

90 With regard, in the second place, to whether that prohibition is necessary, it should be borne in mind, first, that, as has already been stated in paragraph 44 above, the Partial Guidelines for Implementation of Articles 9 and 10 of the FCTC recommend that the Parties to the FCTC, inter alia, prohibit ingredients, such as menthol, that may be used to increase palatability in tobacco products. In addition, in accordance with section 1.1 of those partial guidelines, the Parties to that framework convention are encouraged to implement measures beyond those recommended by the guidelines.

91 It was thus lawful for the EU legislature — taking account of those recommendations and in the exercise of its broad discretion — to impose a prohibition on all characterising flavours.

92 Secondly, as regards the less restrictive measures advocated by the Republic of Poland, they do not appear to be equally suitable for achieving the objective pursued.

93 Raising — solely in respect of tobacco products with a characterising flavour — the age limit from which their consumption is permitted is unlikely to reduce the attractiveness of those products and thus prevent persons above that age from starting smoking. In addition, any prohibition on sale resulting from an increase in that age limit can, in any event, be easily circumvented when the products concerned are marketed.

94 The possibility of prohibiting the cross-border sale of tobacco products is in itself already provided for in Article 18 of Directive 2014/40. As is apparent from recital 33 of that directive, such a prohibition seeks, in particular, to prevent circumvention of the compliance rules for tobacco products laid down by that directive. However, that prohibition is not as such appropriate for ensuring a high level of health protection, since, in the absence of a prohibition on the placing on the market of tobacco products with a characterising flavour, those products would continue to attract consumers.

95 As regards affixing a health warning on the labelling stating that tobacco products with a characterising flavour are as harmful to health as other tobacco products, this does not appear to be as appropriate for protecting consumer health as the prohibition on the placing on the market of tobacco products with such a flavouring, since the presence of that flavouring is, by its nature, likely to promote and sustain tobacco use, as is apparent from paragraph 44 above.

96 Consequently, it must be found that the prohibition on the placing on the market of tobacco products with a characterising flavour does not go manifestly beyond what is necessary in order to attain the objective sought.

97 As regards, in the third place, the allegedly disproportionate effects of the prohibition on the use of menthol as a characterising flavour, on account of the negative economic and social consequences to which that prohibition would give rise, it must be noted that, even though it has, in the present case, a broad legislative power, the EU legislature must base its choice on objective criteria and examine whether aims pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators (see, to that effect, judgment in *Luxembourg* v *Parliament and Council*, C-176/09, EU:C:2011:290, paragraph 63 and the case-law cited).

98 Under Article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and the FEU Treaty, draft legislative acts must take account of the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved.

99 In the present case, the EU legislature made sure that the negative economic and social consequences of the prohibition on the placing on the market of tobacco products with a characterising flavour were limited.

100 Thus, first, in order to give both the tobacco industry and consumers time to adapt, Article 7(14) of Directive 2014/40 provides that, in the case of tobacco products with a characterising flavour whose EU-wide sales volumes represent 3% or more in a particular product category, the prohibition on placing those products on the EU market is to apply only from 20 May 2020.

101 Secondly, it can be seen from the impact assessment (Part 1, p. 114, and Part 6, p. 2), which is not disputed on this point, that the prohibition in question is expected to result in a decrease in cigarette consumption in the European Union of 0.5 to 0.8% over a five-year period.

102 Those elements show that the EU legislature weighed up, on the one hand, the economic consequences of that prohibition and, on the other, the requirement to ensure, in accordance with Article 114(3) TFEU, a high level of human health protection with regard to a product which is characterised by properties that are carcinogenic, mutagenic and toxic to reproduction.

103 Moreover, it must be stated that the mere fact an EU legislative act is likely to affect one Member State more than others cannot be contrary to the principle of proportionality, as long as the conditions referred to in paragraph 78 above are met. Directive 2014/40 has an impact in all Member States and requires that a balance between the different interests involved is ensured, taking account of the objectives of that directive. Therefore, the attempt to strike such a balance, taking into account not the particular situation of a single Member State, but that of all EU Member States, cannot be regarded as being contrary to the principle of proportionality (see by analogy, judgment in *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 39).

104 It follows from all of the foregoing considerations that the second plea in law, alleging infringement of the principle of proportionality, must be rejected.

The third plea in law, alleging infringement of the principle of subsidiarity

– Arguments of the parties

105 The Republic of Poland and Romania submit that the principle of subsidiarity must be assessed solely in the light of the objective of protecting public health, since, where there are no divergences between the national rules as regards mentholated tobacco products, as shown in the context of the first plea in law, the objective of improving the conditions for the functioning of the internal market has become devoid of purpose.

106 In the light of the significant differences in the consumption of those products between the Member States, the social, economic and public-health effects of prohibiting them are essentially local in nature, so that action undertaken at the level of the Member States in which the consumption of the products is significant would have been more effective.

107 In addition, the Republic of Poland submits that the wording of recital 60 of Directive 2014/40 is a standard formula with no real significance in the light of the principle of subsidiarity.

108 The Parliament, the Council, the United Kingdom and the Commission contend that the line of argument underlying the third plea in law is ineffective as a whole since, contrary to the Republic of Poland's submissions, the aim of Directive 2014/40 is not to protect public health but to improve the functioning of the internal market, taking as a base a high level of protection of human health.

109 It has been shown to the requisite legal standard, in particular in the impact assessment, mentioned in paragraph 27 above, that the divergences between the national rules justified action at EU level in order to improve the conditions for the functioning of the internal market. The fact that the consequences of such rules are more keenly felt in certain Member States than in others is not sufficient to show that there has been a failure to observe the principle of subsidiarity.

110 As regards the statement of reasons regarding compliance with the principle of subsidiarity, the Parliament, the Council, the United Kingdom and the Commission contend that it is appropriate to take into account not only recital 60 of Directive 2014/40, but also recitals 4, 7, 15 and 16 thereof, which, although not referring to the principle of subsidiarity, show the need to act at EU level.

– Findings of the Court

111 The principle of subsidiarity is set out in Article 5(3) TEU, under which the European Union, in areas which do not fall within its exclusive competence, is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at EU level. Furthermore, Article 5 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and to the FEU Treaty, lays down guidelines for the purpose of determining whether those conditions are met (judgment in *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 44).

112 An initial review of compliance with the principle of subsidiarity is undertaken, at a political level, by national Parliaments in accordance with the procedures laid down for that purpose by Protocol (No 2).

113 Subsequently, responsibility for that review lies with the EU judicature, which must verify both compliance with the substantive conditions set out in Article 5(3) TEU and compliance with the procedural safeguards provided for by that Protocol.

114 As regards, in the first place, the judicial review of compliance with the substantive conditions laid down in Article 5(3) TEU, the Court must determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level.

115 Since the present case concerns an area — the improvement of the functioning of the internal market — which is not among those in respect of which the European Union has exclusive competence, it must be determined whether the objective of Directive 2014/40 could be better achieved at EU level (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 179 and 180).

116 In this regard, as has been mentioned in paragraph 80 above, Directive 2014/40 has two objectives in that it seeks to facilitate the smooth functioning of the internal market for tobacco and related products, while ensuring a high level of protection of human health, especially for young people.

117 Even if the second of those objectives might be better attained at the level of Member States, as argued by the Republic of Poland, the fact remains that pursuing it at that level would be liable to entrench, if not create, situations in which some Member States permitted the placing on the market of tobacco products containing certain characterising flavours, whilst others prohibit it, thus running completely counter to the first objective of Directive 2014/40, namely the improvement of the functioning of the internal market for tobacco and related products.

118 The interdependence of the two objectives pursued by the directive means that the EU legislature could legitimately take the view that it had to establish a set of rules for the placing on the EU market of tobacco products with characterising flavours and that, because of that interdependence, those two objectives could best be achieved at EU level (see, by analogy, judgments in *Vodafone and Others*, C-58/08 EU:C:2010:321, paragraph 78, and *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 48).

119 The Court also points out that the subsidiarity principle is not intended to limit the EU's competence on the basis of the situation of any particular Member State taken individually, but requires only that the proposed action can, by reason of its scale or effects, be better achieved at the level of the European Union in view of the objectives of the European Union set out in Article 3 TEU, and provisions specific to various areas, including the internal market, laid down in the Treaties (see, to that effect, *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 53).

120 In any event, it must be stated that the evidence before the Court does not establish, contrary to the Republic of Poland's claims, that the consumption of mentholated tobacco products is in essence limited in Poland, Slovakia and Finland, while it is negligible in the other Member States. According to the data set out by the Republic of Poland in its application, in at least eight other Member States the national market share of those products is greater than their EU-wide market share.

121 Consequently, the Republic of Poland's arguments intended to show that the objective of protecting human health could have been better achieved at the national level as regards specifically the prohibition on the placing on the market of menthol-containing tobacco products, given that the effects of those products were limited to a small number of Member States, must be rejected.

122 As regards, in the second place, compliance with the formal requirements and, in particular, the statement of reasons for Directive 2014/40 in the light of the principle of subsidiarity, it should be borne in mind that, according to the Court's case-law, observance of the obligation to state reasons must be evaluated not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case (see, to that effect, judgment in *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 61).

123 In the present case, it must be found that the Commission's proposal for Directive 2014/40 and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level.

124 Accordingly, it is established to the requisite legal standard that that information enabled both the EU legislature and national Parliaments to determine whether the proposal complied with the principle of subsidiarity, whilst also enabling individuals to understand the grounds relating to that principle and the Court to exercise its power of review.

125 In any event, it must be stated that the Republic of Poland participated, in accordance with the arrangements laid down in the FEU Treaty, in the legislative procedure which led to the adoption of Directive 2014/40, which is addressed to it in the same way as to the other Member States represented in the Council. Therefore, the Republic of Poland cannot validly complain that the Parliament and the Council, the authors of that directive, did not place it in a position to know the grounds for the choice of measures which they intended to implement (see, to that effect, *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 62).

126 Accordingly, the third plea in law, alleging infringement of the principle of subsidiarity, must be rejected.

127 It follows from all of the foregoing that none of the pleas in law relied on by the Republic of Poland in support of its action may be upheld and, therefore, that action can only be dismissed.

Costs

128 Under Article 138(1) of the Rules of Procedure of the Court, 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 Parliament and the Council have applied for costs to be awarded against the Republic of Poland, and the latter has been unsuccessful, it must be ordered to pay the costs. In accordance with Article 140(1) of those Rules, under which Member States and institutions which have intervened in the proceedings are to bear their own costs, Ireland, the French Republic, Romania, the United Kingdom and the Commission must be ordered to bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the Republic of Poland to pay the costs;**

3. **Orders Ireland, the French Republic, Romania, the United Kingdom of Great Britain and Northern Ireland and the European Commission to bear their own costs.**

[Signatures]