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## **Advocate General Kokott considers the new EU tobacco directive of 2014 to be valid**

*In particular the extensive standardisation of packaging, the future EU-wide prohibition on menthol cigarettes and the special rules for e-cigarettes are lawful*

In her Opinions issued today, Advocate General Juliane Kokott **concludes** that the **new EU tobacco directive of 2014**<sup>1</sup> was **lawfully adopted**. This applies in particular to the standardisation of the labelling and packaging of tobacco products (such as size, minimum content, warnings and permitted information), the EU-wide prohibition on sales of menthol cigarettes applicable from 20 May 2020 and the special rules for e-cigarettes. None of the arguments invoked by Poland — supported by Romania — against the prohibition on menthol cigarettes<sup>2</sup> is well founded, with the result that Poland's action for annulment must be dismissed. The examination of the questions posed by the English High Court, before which several undertakings<sup>3</sup> challenged the implementation of the directive into law in the UK, also reveals no factors such as to affect the validity of the directive.

In Advocate General Kokott's view, the EU legislature **did not exceed** the considerable **latitude** to be given to it in ensuring that tobacco and related products may be placed on the market under uniform conditions throughout the EU without losing sight of the fundamental objective of a high level of health protection.

In so far as the directive must be examined in this context, it is based on the correct legal basis (that is the legal basis for internal market harmonisation measures)<sup>4</sup> and does not infringe the principles of equal treatment, free competition, proportionality, legal certainty and subsidiarity or the obligation to provide a statement of reasons, or the fundamental rights of the manufacturers or retailers, in particular the freedom to conduct a business, the freedom of expression and the right to property.

**Concerning the standardisation of the labelling and packaging of tobacco products**, Advocate General Kokott finds that the requirements relating to the shape (cuboid), size and minimum content of cigarette packets are proportionate. They make a particular contribution to increasing the visibility of health warnings and maximising their efficacy. The coolness or fun factor that may be associated with unusual or particularly striking packaging and the curiosity that may be inherent in new or unusual packaging then has a lesser influence on the decision to purchase. Moreover, the minimum content of 20 cigarettes increases the psychological barrier to making a

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<sup>1</sup>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).

<sup>2</sup>The directive imposes a general prohibition on the sale of cigarettes (and roll-your-own tobacco) with characterising flavours. However, if the Union-wide sales volumes amount to 3% or more, as with menthol cigarettes, the prohibition is to apply only from 20 May 2020. By its action, Poland opposed only the prohibition on sales of menthol cigarettes.

<sup>3</sup>The UK undertaking Pillbox, which, trading under the name 'Totally Wicked', manufactures and markets e-cigarettes, and several manufacturers of tobacco products, namely Philip Morris Brands SARL, Philip Morris Limited (PMI) and British American Tobacco UK Limited (BAT), with the involvement of other manufacturers of tobacco products or suppliers to the tobacco industry, namely Imperial Tobacco Limited, JT International SA, Gallaher Limited, Tann UK Limited, Tannpapier GmbH, V. Mane Fils, Deutsche Benkert GmbH & Co KG, Benkert UK Limited and Joh. Wilh. Von Eicken GmbH.

<sup>4</sup>Article 114 TFEU.

purchase, particularly for adolescents and young adults. In addition, it is neither arbitrary nor disproportionate to give health warnings (consisting of a prescribed text and a corresponding photograph) from now on,<sup>5</sup> a coverage of 65% of both the front surface and the back surface of the unit packet. The directive rightly also prohibits true statements on product packaging where those statements cast a tobacco product in a deceptively positive light and thus create an additional inducement to purchase and consume the product. Even an organically farmed cigarette, for example, is still a product that is extremely harmful to health. Since the directive specifies only a basic design, it also still leaves scope for additional national packaging standards, for example in respect of the colouring of surfaces not reserved for warnings (possibly through to the introduction of 'plain packaging').

**Concerning the prohibition on menthol cigarettes**, Advocate General Kokott emphasises that, in common with all other characterising flavours, menthol can, as a rule, reduce or camouflage the generally very bitter and even pungent taste of tobacco smoke. This creates a serious risk that flavoured cigarettes will facilitate initiation of tobacco consumption for non-smokers and make it more difficult for habitual smokers to escape nicotine addiction. The previous national rules on the use of characterising flavours in tobacco products resembled a patchwork quilt. There were also differences specifically in relation to menthol cigarettes. The EU legislature cannot be accused of a manifest error of assessment if it takes the view that this is a problem that has a cross-border dimension which cannot be resolved at Member State level alone, but only at EU level. The necessity of an EU-wide prohibition on all characterising flavours, including menthol, cannot seriously be called into question, particularly in view of the precautionary principle and the standards of the WHO. It is in any case not manifestly disproportionate, also in view of the generous transitional period for menthol cigarettes, to give precedence, in adopting internal market harmonisation measures, to the high level of health protection sought in the EU over any economic and social interests.

**Concerning the special rules for e-cigarettes**, Advocate General Kokott states that those rules differ appreciably in several respects from the rules for conventional tobacco products. For example, the special rules for e-cigarettes provide for, inter alia, a duty to submit a notification with a six-month standstill period, specific warnings, a maximum nicotine content of 20 mg/ml, a leaflet requirement, a separate prohibition on advertising and sponsorship and annual reporting obligations. Those special rules are, however, relatively moderate, both in comparison with the rules for conventional tobacco products and by international standards, and are ultimately not disproportionate. Advocate General Kokott emphasises in that regard that e-cigarettes are a novel and — for large parts of the population at least — still relatively little known product for which there is a rapidly developing market. In addition, it is not manifestly wrong or unreasonable to accept, in adopting internal market harmonisation measures, that e-cigarettes possibly cause risks to human health and that that product could — above all in the case of adolescents and young adults — develop into a gateway to nicotine addiction and, ultimately, traditional tobacco consumption. Also in the case of e-cigarettes, the EU legislature was entitled to take the view, having regard in particular to the fundamental differences between the Member States' rules and the cross-border dimension of the problem, that rules at Union level are required.

With regard to compliance with the **principle of subsidiarity** in adopting the new tobacco directive, Advocate General Kokott takes the view that it is adequately documented that the EU legislature had comprehensive material on which it could base its evaluation of compliance with the principle of subsidiarity. Nevertheless, she strongly advises the Union legislature to **avoid in future empty formulas** on the principle of subsidiarity like the one contained in the directive and instead to enhance the preamble to the EU measure in question with sufficiently substantial statements regarding the principle of subsidiarity which are tailored to the measures in question.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are

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<sup>5</sup>Until now the requirement has been 30% for the front surface of the unit packet and 40% for the back surface of the unit packet.

responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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*Unofficial document for media use, not binding on the Court of Justice.*

The full texts ([C-358/14](#), [C-477/14](#) and [C-547/14](#)) of the Opinions are published on the CURIA website on the day of delivery.

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# EU tobacco regulation on track following three challenges

Category: **News report**

 23 December 2015

 In collaboration with the Press Association



The EU acted lawfully in adopting rules around tobacco regulation within its Member States, according to a  [preliminary European Court of Justice \(ECJ\) Opinion](#).

Challenges to three areas of its 2014 Tobacco Products Directive (TPD) – relating to the ban on menthol flavouring in cigarettes, regulation of electronic cigarettes and the overall legality of the TPD itself – have been effectively dismissed by the Advocate General of the EJC.

Cancer Research UK has welcomed the Opinion of Advocate General Kokott, who concluded today that the Directive has firm legal grounding.

**“The big tobacco companies are throwing all their**

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**BBC Panorama’s tobacco**

Alison Cox, Cancer Research UK's director of prevention, said: "This is a welcome Opinion by the Advocate General and a further step on the road to reducing the devastating impact of smoking."

Kokott emphasised that standardising the labelling and packaging of tobacco products – including pack size, minimum numbers of cigarettes they contain and health warnings – is legally valid, and that there is potential for EU members to take these measures further.

These and other measures introduced, she believes, do not infringe the principles of equal treatment, free competition, proportionality or the fundamental rights of manufacturers to conduct business.

Kokott dismissed a case put forward by the Polish government which challenges the ban on menthol flavouring in cigarettes. She says menthol has the potential to aid people in taking up smoking by masking the taste of tobacco.

E-cigarette maker, Totally Wicked, also saw its case dismissed. It claims the law to apply a ban on advertising for electronic devices is a contravention of EU law, but Kokott deemed that the special rules are proportionate.

Cancer Research UK's Alison Cox said that there was an important balance to be made in ensuring e-cigarettes are regulated to protect non-smokers and children while still ensuring they don't prevent smokers from using the devices.

**might into thwarting measures that will protect children from a deadly addiction" -**

*Alison Cox, Cancer Research UK*

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“We believe e-cigarettes need light touch regulations which will help guarantee products are safe and effective, and prevent them being promoted to non-smokers and children,” she said.

“But the implementation of these regulations needs to be monitored to ensure that they don't prevent smokers who want to use e-cigarettes from doing so. It's important that people who want to, are able to move away from tobacco cigarettes, which are responsible for one in four cancer deaths.”

The final challenge to the TPD came from tobacco giants Philip Morris International and British American Tobacco, who combined in an attempt to overthrow the entire Directive. The challenge argued that the regulations infringe the principle of subsidiarity – in this case referring to the devolution of power to individual Member States. This challenge was also dismissed in Kokott's preliminary Opinion.

“The big tobacco companies are throwing all their might into thwarting measures that will protect children from a deadly addiction,” said Cox.

“The Tobacco Products Directive is evidence based and designed to help end the smoking epidemic that kills 100,000 people in the UK alone each year,” she added.

Today's ruling is preliminary, with the court's final decision to follow later in 2016.

Deborah Arnott, chief executive of health charity ASH, said: “The Advocate General's Opinion is very clear: the Directive is lawful and the UK is allowed to go

further in standardising the pack. We await the final judgement of the European Court of Justice but it is unlikely to differ from the Opinion.”

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**Reference for a preliminary ruling from High Court of Justice Queen's Bench Division  
(Administrative Court) (England and Wales) (United Kingdom) made on 27 October 2014 –  
Pillbox 38 (UK) Limited, trading as "Totally Wicked" v Secretary of State for Health  
(Case C-477/14)**

*Language of the case: English*

**Referring court**

High Court of Justice Queen's Bench Division (Administrative Court)

**Parties to the main proceedings**

*Applicant:* Pillbox 38 (UK) Limited, trading as « Totally Wicked »

*Defendant:* Secretary of State for Health

**Questions referred**

Is Article 20 of Directive 2014/40/EU of the European Parliament and of the Council of April 2014<sup>1</sup> 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<sup>2</sup> invalid, either in whole or in a relevant part, for one or more of the following reasons:

It imposes either as a whole or in a relevant part a series of obligations on electronic cigarette





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## E-cigarettes

# E-cigarette restrictions 'would not break EU law', advocate general says

Manufacturers say EU rulings limiting advertising and strengths of electronic cigarettes, due next year, will damage industry





📷 The advocate general's opinion, summarised in a court press statement, is that e-cigarette rules are relatively moderate compared with those for tobacco products. Photograph: Tim Ireland/PA

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## James Meikle

Wednesday 23 December 2015 06.34 EST



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Rules on e-cigarette production, sales and marketing due to come into force across Europe next year are relatively moderate and would not break European law, a senior legal officer at the [European court of justice](#) has said.

The opinion of the advocate general, Juliane Kokott, is a severe blow to e-cigarette manufacturers who have claimed the new rules risk the future of

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the nicotine-based products, even though the NHS has said they are [95% less harmful than tobacco cigarettes](#).

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**UK e-cigarette firm fights EU vaping laws in European court**

The [opinion](#) does not mean the court will automatically dismiss the legal challenge headed by Blackburn-based [Totally Wicked](#), and supported by other manufacturers, but most judgments later endorse the position of advocate generals. The ruling in this case is expected early next year.

Totally Wicked, which also operates in the US and Germany, has argued the limits on the size of bottles of e-liquids, restrictions on nicotine strengths and curbs on advertising and sponsorship, plus other measures, would damage an emerging industry and make it subject to more stringent regulation than some tobacco products.

Kokott's opinion, summarised in a court press statement, is that the rules are relatively moderate compared with those for tobacco products. It emphasised that e-cigarettes are, for large parts of the population, "still relatively little known products for which there is a rapidly developing market".

She said it is not unreasonable or wrong to accept that e-cigarettes possibly cause risks to human health and that they "could - above all in the case of adolescents and young adults - develop into a gateway to nicotine addiction

and, ultimately, traditional tobacco consumption”.

Ian Gregory, a leader of the 100K group, representing several independent e-cigarette companies, claimed that if the court backed their legal officer, vapers would start playing “a game of ‘Brexit poker’” by threatening to vote to leave the EU in the forthcoming referendum unless there was a British opt-out on the issue.

“Britain’s vapers are determined to save the devices which they believe save their lives,” he said.

Dan Marchant, owner of the e-cigarette retailer Vape Club, which is part of the group, said there was little awareness of how the new rules would damage the industry. “Nearly every current device could become illegal.”

Fraser Cropper, Totally Wicked’s managing director, said: “This is not a formal decision, nor a legal judgment on the questions we raised in our challenge ... It is not binding on the judges.”

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