

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

15 May 2025 (\*)

( Reference for a preliminary ruling – Approximation of laws – Manufacture, presentation and sale of tobacco products – Directive 2014/40/EU – Article 2(40) – Concept of ‘placing on the market’ – Article 23(2) – Enforcement – Scope – Placing on the market of tobacco products the packaging of which includes non-compliant elements – Supply of tobacco products by a wholesaler to a retail outlet – Fine imposed on the managing director of a company acting as a wholesaler )

In Case C-717/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 17 November 2023, received at the Court on 27 November 2023, in the proceedings

**Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz**

v

**MM,**

interested party:

**Bezirkshauptmannschaft Grieskirchen,**

THE COURT (Second Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, M. Gavalec, Z. Csehi and F. Schalin, Judges,

Advocate General: M. Szpunar,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 23 October 2024,

after considering the observations submitted on behalf of:

- MM, by C. Schneider, Rechtsanwalt,
- the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,
- the Belgian Government, by C. Jacob and L. Van den Broeck, acting as Agents,
- the Netherlands Government, by M.K. Bulterman and P.P. Huurnink, acting as Agents,
- the European Commission, by E. Schmidt and F. van Schaik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2025,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 2(40), Article 13(1)(c) and Article 23(2) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the

manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

- 2 The request has been made in proceedings between the Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz (Federal Minister for Social Affairs, Health, Care and Consumer Protection, Austria) ('the Minister') and MM, the managing director of a tobacco wholesaler, concerning a fine imposed by the Bezirkshauptmannschaft Grieskirchen (District Administrative Authority, Grieskirchen, Austria) ('the administrative authority') on MM following the placing on the market of tobacco products the unit packet labelling of which infringes the requirements relating to the presentation of those products.

## Legal context

### *European Union law*

#### *Directive 2014/40*

- 3 Recitals 8 and 59 of Directive 2014/40 state:

'(8) In accordance with Article 114(3) [TFEU], a high level of health protection should be taken as a base for legislative proposals and, in particular, any new developments based on scientific facts should be taken into account. Tobacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco on human health, health protection should be given high importance, in particular, to reduce smoking prevalence among young people.

...

(59) ... It is ... necessary to ensure that the obligations imposed on manufacturers, importers and distributors of tobacco and related products not only guarantee a high level of health and consumer protection, but also protect all other fundamental rights and are proportionate with respect to the smooth functioning of the internal market. ...'

- 4 Article 1 of that directive, entitled 'Subject matter', is worded as follows:

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

...

(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;

...

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 [World Health Organization Framework Convention for Tobacco Control].'

- 5 Article 2 of that directive, entitled 'Definitions', provides:

'For the purposes of this Directive, the following definitions shall apply:

...

(40) "placing on the market" means to make products, irrespective of their place of manufacture, available to consumers located in the [European] Union, with or without payment, including by means of distance sale; in the case of cross-border distance sales the product is deemed to be placed on the market in the Member State where the consumer is located;

(41) "retail outlet" means any outlet where tobacco products are placed on the market including by a natural person.'

- 6 Article 13 of that directive, entitled 'Product presentation', provides:

‘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;

...’

7 Article 23 of Directive 2014/40, entitled ‘Cooperation and enforcement’, provides, in paragraphs 2 and 3 thereof:

‘2. Member States shall ensure that tobacco and related products which do not comply with this Directive, including the implementing and delegated acts provided for therein, are not placed on the market. Member States shall ensure that tobacco and related products are not placed on the market if the reporting obligations set out in this Directive are not complied with.

3. Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures that are necessary to ensure that these penalties are enforced. The penalties provided for shall be effective, proportionate and dissuasive. Any financial administrative penalty that may be imposed as a result of an intentional infringement may be such as to offset the economic advantage sought through the infringement.’

*Regulation (EU) 2019/1020*

8 Recitals 12, 14 and 43 of Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 (OJ 2019 L 169, p. 1) state:

‘(12) Economic operators throughout the entire supply chain should be expected to act responsibly and in full accordance with the legal requirements applicable when placing or making products available on the market, so as to ensure compliance with the Union harmonisation legislation on products. ...

...

(14) Modern supply chains encompass a wide variety of economic operators who should all be subject to enforcement of Union harmonisation legislation, while taking due consideration of their respective roles in the supply chain, and the extent to which they contribute to the making available of products on the Union market. Therefore, it is necessary to apply this Regulation to economic operators that are directly concerned by Union harmonisation legislation listed in Annex I to this Regulation, ...

...

(43) Market surveillance authorities act in the interest of economic operators, of end users, and of the public, to ensure that public interests covered by relevant Union harmonisation legislation on products are consistently preserved and protected through appropriate enforcement measures, and that compliance with such legislation is ensured across the supply chain through appropriate checks, taking into consideration the fact that administrative checks alone, in many cases, cannot replace physical and laboratory checks in order to verify the compliance of products with the relevant Union harmonisation legislation. Consequently, market surveillance authorities should ensure a high level of transparency while performing their activities and should make available to the public any information that they consider to be relevant in order to protect the interests of end users in the Union.’

9 Article 1 of Regulation 2019/1020, entitled ‘Subject matter’, provides, in paragraph 1 thereof:

‘The objective of this Regulation is to improve the functioning of the internal market by strengthening the market surveillance of products covered by the Union harmonisation legislation referred to in Article 2, with a view to ensuring that only compliant products that fulfil requirements providing a high level of protection of public interests, such as health and safety in general, health and safety in the workplace, the protection of consumers, the protection of the environment and public security and any other public interests protected by that legislation, are made available on the Union market.’

10 Article 2 of that regulation, entitled ‘Scope’, provides, in paragraph 1 thereof:

‘This Regulation shall apply to products that are subject to the Union harmonisation legislation listed in Annex I (“Union harmonisation legislation”), in so far as there are no specific provisions with the same objective in the Union harmonisation legislation, which regulate in a more specific manner particular aspects of market surveillance and enforcement.’

11 Under Article 3 of that regulation, entitled ‘Definitions’:

‘For the purposes of this Regulation, the following definitions shall apply:

- (1) “making available on the market” means any supply of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge;
  - (2) “placing on the market” means the first making available of a product on the Union market;
- ...’

12 Article 16 of Regulation 2019/1020, entitled ‘Market surveillance measures’, provides, in paragraph 3 thereof:

‘For the purposes of paragraph 2, the corrective action required to be taken by the economic operator may include, inter alia:

...

- (b) preventing the product from being made available on the market;

...’

13 Annex I to Regulation 2019/1020, entitled ‘List of Union harmonisation legislation’, lists the EU acts which fall within the EU harmonisation legislation referred to in Article 2 of that regulation. Those acts include, in point 55 of that annex, Directive 2014/40.

#### *Austrian law*

14 Paragraph 1 of the Tabak- und Nichtraucherinnen- bzw. Nichtrauchererschutzgesetz (Law on tobacco and the protection of non-smokers) (BGBl. I, 431/1995), in the version applicable to the case in the main proceedings (BGBl. I, 66/2019) (‘the Law on tobacco’), provides:

‘For the purposes of this Law:

...

2. “placing on the market” means to make products, irrespective of their place of manufacture, available to consumers located in the Union, with or without payment,

...’

15 Under Paragraph 2(1)(1) of the Law on tobacco, the placing on the market of ‘tobacco and related products which do not comply with Paragraphs 4 to 10e or the regulations made’ pursuant to that law is prohibited.

16 Paragraph 5d of the Law on tobacco 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:

...

3. refers to taste, smell, any flavourings or other additives or the absence thereof;

...

(3) The elements and features that are prohibited pursuant to subparagraphs 1 and 2 include, in particular, texts, symbols, names, trade marks, figurative or other signs.

...’

17 Paragraph 14 of the Law on tobacco states, in subparagraph 1 thereof:

‘Any person who

1. places tobacco or related products on the market contrary to Paragraph 2,

...

commits an administrative offence, unless the facts are such that a more severe penalty can be imposed pursuant to other administrative provisions, and shall be penalised by way of an administrative fine of up to EUR 7 500, or up to EUR 15 000 in the event of a repeat offence.

...’

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 18 By a decision of 30 May 2022, the administrative authority imposed on MM, the managing director of a company acting as a tobacco wholesaler, an administrative fine of EUR 1 000, which, if not paid, was liable to be converted to a custodial sentence in lieu of a fine, on the ground that that company had supplied cigarettes to a tobacconist in a unit packet bearing the words ‘perfectly rounded’ and ‘with slow curing’, which referred to taste, contrary to Paragraph 14(1)(1) of the Law on tobacco, read in conjunction with Paragraph 2(1)(1) and Paragraph 5d(1)(3) of that law.
- 19 MM brought an action against that decision before the Landesverwaltungsgericht Oberösterreich (Regional Administrative Court, Upper Austria, Austria), which, by a judgment of 1 September 2022, upheld that action, annulled the decision of 30 May 2022 and terminated the administrative penalty proceedings brought against MM.
- 20 The Landesverwaltungsgericht Oberösterreich (Regional Administrative Court, Upper Austria) held that, in its decision, the administrative authority had relied on the fact that the supply of the tobacco product to the tobacconist had led to the product’s being ‘placed on the market’ within the meaning of Paragraph 1(2) of the Law on tobacco. Since that provision sets out the definition of the concept of ‘placing on the market’ that appears in Article 2(40) of Directive 2014/40, that court considered that that concept had to be interpreted restrictively, as referring to the making available of products, irrespective of their place of manufacture, to consumers, with or without payment. Since that directive does not define what is to be understood by such ‘making available’, that court considered that it was necessary to rely on the definition of the concept of ‘retail outlet’ in Article 2(41) of that directive.
- 21 It follows that a product should be considered to be ‘placed on the market’ when it is available at retail outlets or by distance sales. The holding of a stock of tobacco products for direct supply to consumers, that is to say, at the final stage preceding the sale to consumers, which generally takes place in a tobacconist, would thus fall within the scope of ‘making available’.
- 22 The Landesverwaltungsgericht Oberösterreich (Regional Administrative Court, Upper Austria) thus concluded that the company of which MM is the managing director had not ‘placed on the market’ the tobacco product at issue, because it had supplied it to a retail outlet which is an undertaking and not a consumer.
- 23 The administrative authority brought an appeal on a point of law (*Revision*) against the judgment of 1 September 2022 before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), which is the referring court. The Minister then intervened in place of the administrative authority in those proceedings.
- 24 The referring court considers that, in order to rule on the dispute in the main proceedings, it must decide whether the prohibition on the placing on the market of a tobacco product the unit packet of which has labelling that infringes the requirements relating to the presentation of that product laid down in both EU and national law applies from the stage of the supply of that product by a wholesaler to a retail outlet, or solely to the stage at which that product is supplied by that retail outlet to a consumer.
- 25 The referring court notes, in that regard, that, according to Article 23(2) of Directive 2014/40, Member States must ensure that tobacco and related products which do not comply with that directive are not placed on the market. Under Article 2(40) of that directive, the concept of ‘placing on the market’ designates the making available of products, irrespective of their place of manufacture, to consumers located in the European Union, with or without payment, including by means of distance sale. However, that directive does not contain a definition of the concept of ‘making products available’, which is, however, crucial to the interpretation of the aforementioned concept of ‘placing on the market’.

- 26 In that context, the referring court states that, first, the German-language version of Article 2(40) of Directive 2014/40 does not preclude an interpretation of the concept of ‘placing on the market’ which includes making the product available to a retail outlet.
- 27 Secondly, the Court of Justice held, in paragraph 20 of its judgment of 9 March 2023, *Pro Rauchfrei II* (C-356/22, EU:C:2023:174), that, according to the usual meaning of the words ‘make available’ used in that provision, a tobacco product must be regarded as having been ‘placed on the market’ when consumers can acquire it. According to the referring court, that is the case only where that product is made available for sale, even before it has been purchased and payment has been made.
- 28 However, the case which gave rise to that judgment, which related to the interpretation of another provision of that directive, concerned the application of the concept of ‘placing on the market’ to a particular form of sale of tobacco products to consumers at a retail outlet and not, as in the case in the main proceedings, to the making available of tobacco products by a wholesaler to a retail outlet. The referring court asks, therefore, whether the interpretation adopted by the Court in that judgment must be understood as meaning that the ‘placing on the market’ of tobacco products always presupposes, irrespective of the relevant provision of that directive, that the tobacco product is made available to a consumer directly, and not at an earlier stage of the supply chain.
- 29 Thirdly, the referring court notes that, unlike the Austrian legislature, the German legislature had specified, for the purpose of defining the concept of ‘placing on the market’, that the making available of products includes any supply of a product for distribution, consumption or use on the EU market in the course of a commercial activity. The German legislature had thus adopted the definition of the concept of ‘placing on the market’ which now appears in Article 3(2) of Regulation 2019/1020, to ensure consistency between the basic provisions and the market surveillance measures.
- 30 In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
- ‘Should Article 23(2) in conjunction with [Article 2(40)] and Article 13(1)(c) of [Directive 2014/40] be interpreted as meaning that the prohibition on placing a tobacco product on the market in a unit packet having elements or features relating to taste also covers the supplying of such a tobacco product by a wholesaler to a retail outlet or only covers the sale of such a tobacco product by a retail outlet to a consumer?’

### Consideration of the question referred

- 31 It is established case-law that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end the Court of Justice may have to reformulate the questions referred to it. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute (see, to that effect, judgments of 29 November 1978, *Redmond*, 83/78, EU:C:1978:214, paragraph 26; of 28 November 2000, *Roquette Frères*, C-88/99, EU:C:2000:652, paragraph 18; and of 30 April 2024, *M.N. (EncroChat)*, C-670/22, EU:C:2024:372, paragraph 78).
- 32 In the present case, as is apparent from the order for reference, it is common ground that the company of which MM is the managing director supplied a retail business with tobacco products the unit packet labelling of which included an element or feature referring to taste, within the meaning of Article 13(1)(c) of Directive 2014/40. It is not apparent, however, from that order for reference that the interpretation of that provision is necessary to enable the referring court to rule on the dispute in the main proceedings.
- 33 In those circumstances, it must be held that, by its question, the referring court asks, in essence, whether Article 23(2) of Directive 2014/40, read in conjunction with Article 2(40) thereof, must be interpreted as meaning that the obligation of the Member States to ensure that tobacco products whose unit packet labelling infringes the requirements relating to their presentation are not placed on the market is limited to the stage at which those products are supplied by a retail outlet to the consumer.
- 34 Under Article 23(2) of Directive 2014/40, Member States are to ensure that tobacco and related products which do not comply with that directive, and with the implementing and delegated acts provided for therein, are not placed on the market. Article 2(40) of that directive defines the concept of ‘placing on the market’ as making products, irrespective of their place of manufacture, available to consumers located in the European Union, with or without payment, including by means of distance sale.

- 35 On the basis of that definition, the Court has held that a tobacco product must be regarded as having been ‘placed on the market’ when consumers can acquire it, that is to say, as soon as that product is made available for sale (see, to that effect, judgment of 9 March 2023, *Pro Rauchfrei II*, C-356/22, EU:C:2023:174, paragraph 20).
- 36 However, that interpretation of the concept of ‘placing on the market’, based on the ordinary meaning of the words ‘to make ... available’ in Article 2(40) of Directive 2014/40, does not make it possible, as the Advocate General observed, in essence, in points 46 and 49 of his Opinion, to determine whether the Member States are required, in order to comply with the obligation laid down in Article 23(2) of that directive, to carry out checks solely at the stage of sale by the retail outlet to the consumer or at an earlier stage of the supply chain as well.
- 37 Furthermore, the German-language version of that provision, to which the referring court refers, which differs in particular from the French-language or English-language versions of that provision, cannot be decisive either. In accordance with settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions (see, to that effect, judgments of 12 November 1969, *Stauder*, 29/69, EU:C:1969:57, paragraph 3, and of 21 March 2024, *Cobult*, C-76/23, EU:C:2024:253, paragraph 25).
- 38 In order to answer the question raised by the referring court, it is therefore necessary to consider the context in which Article 23(2) of Directive 2014/40 occurs and the objects of the rules of which it is part (see, to that effect, judgment of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, paragraph 60).
- 39 As regards, in the first place, the context in which Article 23(2) of Directive 2014/40 occurs, it should be observed, first, that that provision is cross-cutting in its scope in so far as it seeks to ensure that tobacco and related products which do not comply with any of the provisions of that directive, including the implementing and delegated acts provided for therein, are not placed on the market.
- 40 Secondly, as a means of guaranteeing the effectiveness of that provision, Article 23(3) of that directive requires the Member States to lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to that directive and to take all measures that are necessary to ensure that those penalties are enforced. As the Advocate General observed in point 55 of his Opinion, the establishment of those penalties relates to all the provisions of Directive 2014/40, regardless of the stage of the supply chain to which they apply, and is thus not limited to the stage at which a retail outlet supplies non-compliant tobacco products to consumers.
- 41 In those circumstances, to interpret the obligation imposed on the Member States in Article 23(2) of Directive 2014/40 as being limited to the making available of tobacco products to consumers would not only be inconsistent with the possibility, provided for in Article 23(3), of penalising any practices which do not comply with the provisions of that directive, irrespective of the stage of the supply chain to which those provisions apply, but would also undermine the effectiveness of the enforcement obligation imposed on the Member States and, therefore, the directive itself.
- 42 Thirdly, the interpretation of that obligation imposed on the Member States, according to which that obligation covers the various stages of the supply chain without being limited solely to the stage of the supply of tobacco products by a retail outlet to consumers, is also supported by the broader regulatory context of Directive 2014/40.
- 43 In that regard, it is apparent from Article 2 of Regulation 2019/1020 and point 55 of Annex I to that regulation that that regulation applies to products which fall within the scope of Directive 2014/40. According to Article 1 of Regulation 2019/1020, the objective of that regulation consists in strengthening the market surveillance of products covered by EU harmonisation legislation falling within its scope with a view to ensuring that only compliant products are made available on the EU market.
- 44 According to Article 3(2) of Regulation 2019/1020, the concept of ‘placing on the market’ must be understood as meaning ‘the first making available of a product on the Union market’, that is to say, in accordance with Article 3(1) of that regulation, the first ‘supply of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge’.
- 45 An interpretation of the obligation imposed on the Member States in Article 23(2) of Directive 2014/40 that is limited to the supply by a retail outlet of tobacco products to consumers would not be consistent with the object of Regulation 2019/1020, particularly since, as is apparent from recitals 12 and 14 of that regulation, the regulation should be applied to all economic operators that are active in supply chains and directly concerned by the EU harmonisation legislation referred to therein.
- 46 In addition, recital 43 of that regulation states that market surveillance authorities act in the interest of economic operators, of end-users and of the public, to ensure compliance with such legislation across the supply chain through appropriate checks. The market surveillance measures that may be imposed by those authorities include,

in Article 16(3)(b) of Regulation 2019/1020, the possibility of preventing a product from being made available on the market.

47 It is thus apparent from the context of Article 23(2) of Directive 2014/40 that the obligation imposed on the Member States that is referred to in that provision cannot be interpreted as being limited to the stage at which tobacco products are supplied by a retail outlet to consumers.

48 In the second place, the objective of the protection of health and consumers pursued by that directive supports such an interpretation.

49 Based as it is on Article 114 TFEU, Directive 2014/40 pursues a twofold objective, according to Article 1 thereof, namely to facilitate the smooth functioning of the internal market in tobacco and related products while taking as a base a high level of protection of human health, especially for young people (judgments of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, paragraph 80, and of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, paragraph 38). The intention of the EU legislature to guarantee a high level of health and consumer protection is expressed unambiguously in recitals 8 and 59 of Directive 2014/40.

50 If the enforcement obligation imposed on the Member States in Article 23(2) of Directive 2014/40 were to be limited to the stage at which tobacco products are supplied by a retail outlet to consumers, that would result, as the Advocate General noted in point 69 of his Opinion, in a non-negligible risk of products which do not comply with that directive, and which are thus harmful to the health of consumers, being made available to them.

51 In order for the objective of guaranteeing a high level of health and consumer protection to be attained, that enforcement obligation presupposes surveillance at the various stages of the supply chain, requiring Member States to ensure that the requirements of Directive 2014/40 are met whenever a transaction takes place which leads to the product ultimately being made available to consumers.

52 In the light of all the above considerations, the answer to the question raised is that Article 23(2) of Directive 2014/40, read in conjunction with Article 2(40) thereof, must be interpreted as meaning that the obligation of the Member States to ensure that tobacco products whose unit packet labelling infringes the requirements relating to their presentation are not placed on the market is not limited to the stage at which those products are supplied by a retail outlet to the consumer.

### Costs

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

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

**Article 23(2) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, read in conjunction with Article 2(40) of Directive 2014/40,**

**must be interpreted as meaning that the obligation of the Member States to ensure that tobacco products whose unit packet labelling infringes the requirements relating to their presentation are not placed on the market is not limited to the stage at which those products are supplied by a retail outlet to the consumer.**

[Signatures]

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\* Language of the case: German.