**Comments and Proposals by the European Union Policies Committee**

30 January 2013

*Comments on document:*

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 (COM(2012) 788)

The European Union Policies Committee, following consideration of the above-mentioned document, considering that it purports to:

– review directive 2001/37/EC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products; and that, in addition to being foreseen by Article 11 of that directive, such review was also called for by the European Council (recommendation of 30 November 2009) and the European Parliament (resolutions of 15 September 2011 and 24 October 2007);

 – adapt the directive to market developments (in view of the emergence of products like electronic cigarettes), international developments (following the adoption of the WHO Framework Convention on Tobacco Control in 2003) and scientific advancement;

also considering:

the judgment of the Court of Justice of 10 December 2002 on Case C-491/01, which confirmed the validity of Directive 2001/37/EC and upheld its legal basis and its compliance with the subsidiarity and proportionality principle;

the adoption of the WHO Framework Convention on Tobacco Control in May 2003;

the outcome of the public consultation promoted by the Commission between 24 September and 17 December 2010 and the Euro barometer survey of May 2012;

fully sharing the objectives of:

– discouraging young people from smoking;

– ensuring that tobacco consumption should at least be based on adequately informed decisions;

finally sharing the premise whereby "tobacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco, health protection should be given high importance, in particular to reduce smoking prevalence among young people",

issues, as far its remit is concerned and with particular reference to the power to adopt delegated acts conferred on the Commission under Article 22, a negative opinion under Protocol (No 2) on the application of the principles of subsidiarity and proportionality (TFUE).

Under Article 22 of the proposal, power is delegated on essential elements of the act, that may not be the object of delegation under Art. 290 TFEU. This is the case with the instances of delegation under Article 3(2) and (3), Article 6 (3) and (9), Article 18 (2) and (5). In the first two cases, the Commission may bar certain products from sale within the EU. In the third case, the Commission would be authorised to change the description of certain products for the purposes of marketing regulation. In all such cases, the scope of the directive and the products regulated by such instrument would be altered.

Article 114 TFEU was rightly cited as the legal basis of the act. Only within the remit of the Union can the Commission – according to the European law-maker – be vested with the authority to adopt certain non-legislative acts of general application in compliance with Article 290 TFEU (whereby "the essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power").

A delegation of power on such essential elements as indicated above accounts – with respect to the EU jurisdiction under Article 114 – for an excessive and unjustified conferment of power on the Commission, which–

– produces an excess of federal over national regulatory authority, thus affecting the competence of Member States under Article 5(3) of the Treaty on European Union;

– infringes on the competence of national Parliaments, by depriving them of subsidiarity and proportionality assessment on all delegated acts.

In other words, in spite of the competence of the Union in the regulation of tobacco and related products, action by the Commission outside the criteria of necessity and added value is unjustified and prejudicial to the competence of Member States. Further action on the matters regulated by Article 3(2) and (3), Article 6(3) and (9) and Article 18(2) and (5) may well be taken by co-legislators.

Still with respect to delegations, the committee expresses strong reservations on the indefinite duration of delegated power and on the power vested into the Commission to withdraw certain exemptions in indefinite and broad circumstances ("if there is a substantial change of circumstances as established in a Commission report"). This applies to Article 6(10), Article 10(5) and Article 13(4).

Lastly, with reference to the contents of the measure, careful consideration should be given to using the potential of:

– "low risk" or "novel tobacco products" (Articles 17-19);

– keeping smaller content packets and slim cigarettes available on the market.

These products may be useful as a means to progressively discourage or stop smoking altogether. In other words, containing the availability of tobacco products or standardising supply does not, *per se*, have an effect on smoking propensity. Quite on the contrary, it might lead to an increase in smuggling and be detrimental to smokers who have developed a motivation to break the addiction.

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