



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General
Legal Service – The Director General

Brussels,
SG/CD

NOTE TO THE ATTENTION OF MS TESTORI COGGI
DIRECTOR GENERAL OF DG SANCO

Subject: Forthcoming legislative proposal on the revision of the tobacco product directive.

We understand that DG SANCO proposes to launch an inter-service consultation for the revision of the tobacco products directive in late August. We consider that there are a number of substantial issues needing further attention before the CIS should be launched on such a proposal.

First, there are doubts about the compatibility of the proposed actions with the proposed legal base. The Legal Service has several times expressed serious doubts about the legal acceptability of the preferred options identified by DG SANCO. The legal basis of the proposal will be Art. 114 TFUE (internal market), whilst the main justifications provided by DG SANCO are based on public health considerations. Article 168.5 TFUE (public health) excludes harmonisation of Member States' legislation.

The choice of 114 TFUE as legal basis could even be questioned for rules addressing the "free circulation" of cigarettes, if Member States would be allowed according to the proposal to impose stricter rules (outside the scope of art 114§4 and 5) on imported products. This would totally undermine the internal market objective of the proposal. In addition the new requirements for traceability and security features for cigarettes seem to be driven by consideration related to fight against fraud and tax evasion, and therefore would require to be based on a different legal basis than Article 114.

Second, and notwithstanding the question of the legal basis, there are a number of key issues where we have serious concerns about the proportionality (absence of analysis of the possibility to impose less restrictive measures) and subsidiarity issues raised by what we understand to be SANCO's preferred options.

This applies particularly to:

- The general ban on smokeless tobacco products;
- The treatment of nicotine-containing products;

- The provisions foreseen concerning sales arrangements (in particular but not only those related to tobacco vending machines and point of sales).

- Finally, linked to these points, in its second opinion of 12 July the Impact Assessment Board raised significant questions related to the identified preferred options which need careful consideration by DG SANCO. The IAB opinion noted in particular that the IA did "not adequately support internal market based EU legislative action in the non-harmonised areas, particularly for restrictions on tobacco promotion at the point of sale, and to prohibit chewing and nasal tobacco".

Given these substantial points and taking into account the political sensitivity of the matter, we do not believe it is appropriate to launch the inter-service consultation.

As a way forward, I would suggest you share a draft of the proposal and the revised draft Impact Assessment taking account of the comments of the Board with the Secretariat General and the Legal Service so that we can find appropriate solutions to the main outstanding issues before the formal inter-service consultation.



Catherine Day



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