

Letter dated:
Munich, 29 May 2007

From:
Bavarian State Ministry for the Environment, Health and Consumer Protection

To:
European Commission (DG SANCO)

Subject: **Consultation on the European Commission's Green Paper Towards a Europe free from tobacco smoke: policy options at EU level, COM(2007) 27**

Dear Sir/Madam,

We would like to respond to the consultation as follows:

We consider it important, from the health policy viewpoint, to improve protection of the population against the dangers of passive smoking.

However, we are of the opinion that this is a matter for the Member States. Article 137(1)(a) of the EC Treaty, in conjunction with Article 137(2)(b), allows the Community to adopt minimum requirements in order to support and complement the activities of the Member States to improve, in particular, the working environment so as to protect workers' health and safety. This has been done through the existing EU labour protection provisions, e.g. Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace, which in our view are sufficient to ensure effective protection for non-smokers at work. Statutory smoking bans at workplaces, as put forward as a possibility by the Green Paper, would not constitute minimum requirements and therefore would not be covered by the powers granted under Article 137 ECT.

The EU is not responsible for legislation to protect non-smokers outside workplaces. Article 152 ECT clearly divides public health responsibilities between the European Community and the Member States. This division of responsibilities should not be undermined by amending Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances.

Nor does the principle of subsidiarity leave room for EU legislation. The purpose of the measures described in the Green Paper, namely to protect the population against the health dangers of passive smoking, can be sufficiently achieved at Member State level.

As stated by the European Commission in the Green Paper, many Member States already have or are planning some form of regulation banning smoking in enclosed public places, in some cases including bars/pubs/restaurants and workplaces.

In Germany, an act on protection against the dangers of passive smoking, which prohibits smoking in both houses of the German parliament, buildings occupied by federal authorities, public transport and railway stations, was adopted on 25 May 2007. Comprehensive smoking bans will apply in these places from 1 September 2007,

although it will remain possible to provide separate rooms for smoking. From the same date, in order to provide special protection for young people, the act will also raise the age from which young people are allowed to smoke in public and purchase tobacco products from 16 to 18.

The Bavarian government has drawn up a bill on health protection which will soon be presented to the Bavarian parliament for adoption. Accordingly, it is expected that smoking in public buildings, establishments for children and young people, healthcare establishments, cultural and leisure centres and hospitality venues will be prohibited from 1 January 2008. With the exception of establishments for children and young people, smoking will be allowed in separate, marked smoking rooms. The smoking ban will not apply to beer, wine and festival tents which are operated temporarily, and normally at changing locations.

Over the next few months the other German *Länder* too will start the process of introducing non-smoker protection legislation which will impose smoking bans in most enclosed public places. In conjunction with smoking bans under federal law, this will mean that Germany has comprehensive protection for non-smokers in public places.

Independently of the competence and subsidiarity aspects, we would like to reply to questions 1 and 2 in the Green Paper as follows:

Question 1: *Which of the two approaches suggested in Section IV would be more desirable in terms of its scope for smoke-free initiative: a total ban on smoking in all enclosed public spaces and workplaces or a ban with exemptions granted to selected categories of venues? Please indicate the reason(s) for your choice.*

Answer: We are not in favour of either approach. Instead, we would advocate a solution for the health protection of employees in workplaces covered by Directive 89/654/EEC according to which the employer must introduce the necessary measures so that non-smoking employees in workplaces are effectively protected against the health hazards of tobacco smoke. If necessary, the employer must introduce a general smoking ban or a smoking ban restricted to individual parts of the workplace. In workplaces open to the public, the employer should have to introduce such protective measures only to the extent that the type of operation and the nature of employment allow it (e.g. in smoking rooms in hospitality venues).

However, labour protection legislation cannot offer ideal solutions for all cases, and at Member State level provisions to protect against the dangers of passive smoking should preferably be adopted as part of general legislation on health protection.

Question 2: *Which of the policy options described in Section V would be the most desirable and appropriate for promoting smoke-free environments? What form of EU intervention do you consider necessary to achieve the smoke-free objectives?*

Answer: As explained, the lack of a legal basis in the EC Treaty and the principle of subsidiarity rule out legislation. The open method of coordination is rejected in that it goes beyond an exchange of experience between the Member States based on best practices and, for example, includes the adoption of EU objectives and instructions as

well as a reporting process. However, we would support Commission and Council recommendations as well as voluntary measures on the part of Member States. But we do not support the option of encouraging the European social partners, on the basis of Article 138 ECT, to negotiate an autonomous agreement on smoking at the workplace.

I remain at your disposal should you have any questions.

Yours faithfully,

Sabine Islebe
Senior Government Official

This paper represents the views of its author on the subject. These views have not been adopted or in any way approved by the Commission and should not be relied upon as a statement of the Commission's or Health & Consumer Protection DG's views. The European Commission does not guarantee the accuracy of the data included in this paper, nor does it accept responsibility for any use made thereof.