

**Contribution to the Green Paper**  
**“Towards a Europe free from tobacco smoke: policy options at EU level”**

by

**Prof. Dr. Karl-Olov Fagerström, o.Univ.Prof.Dr.med.Michael Kunze and**  
**Spyros A. Pappas, Attorney at Law**

1. At the occasion of the World-Non-Smoking-Day on May 31, 2007, WHO published new figures showing a death rate of 5 million people due to cigarette smoking per year. In light of this alarming condition and the given fact of the complexity of existing EU legislation and case law applied to tobacco products, we would like to welcome the European Commission’s Consultation Paper “Towards a Europe free from tobacco smoke” as an opportunity to embrace and encourage change in the policy at EU-level.

As experts in the medical, psychological and legal fields it is our utmost concern to stress the interdependence which exists between price increases and the decrease of cigarette consumption and in particular the price sensitiveness of young people.

We have submitted a statement to the European Commission’s Consultation Paper on the structure and rates of excise duty applied on cigarettes and other manufactured tobacco and we would like to forward this input also to the discussion process which will follow the Green Paper “Towards a Europa free from tobacco smoke”.

As such we refer to the consultation Paper on the structure and rates of excise duty applied on cigarettes and other manufactured tobacco and we fully support the propositions and conclusions contained in the following paper, according to which imposing minimum retail selling prices on tobacco products is the most effective means to encourage smoking prevention and to ultimately attain the EU’s current objectives, including those on health protection.

**I. Do minimum excise duties fulfil their expectations concerning their ability to effectively reduce tobacco consumption?**

2. In fact, it is legitimate at this point to ask ourselves whether minimum excise duties' measures of the EU meet the expectations and objectives of the EU framework put in place as from 1992 (Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes and Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes). We do not think that minimum excise duties are effective in fulfilling their mission (3-9) and would even go as far as to question the appropriateness of excise duties on tobacco as a State means for a number of reasons (10).

**a.** Price increases of tobacco products are the most effective single intervention to prevent smoking

3. In paragraphs 2.2, 2.3 and 2.4 of the Consultation Paper it is explained why the Internal Market's objective has not been attained by the imposition of minimum excise duties on smoking tobacco (**exceptions, derogations, transitional periods and private individuals enjoying greater freedom to purchase duty-paid goods for their own use**).

4. In paragraph 3 it is explained that **the wider objectives of the TEC have to be integrated in the objective of the Internal Market**. Among these objectives the paper explicitly refers to the task of the EC to improve and ensure high level of human health protection (Article 152 TEC) and recognizes that "smoking is still the biggest single form of avoidable death in the Community and one of the leading causes of morbidity and mortality in the EU". Moreover, while it explains that "Taxation forms part of an overall strategy of prevention and dissuasion which also includes other reduction demand measures such as non-price measures, protection from exposure to tobacco smoke, regulation of the contents, etc." at the same time it acknowledges that "**according to the**

**World Bank price increases of tobacco products are the most effective single intervention to prevent smoking.”**

5. More specifically the Paper substantiates that “A price increase of 10 % decreases consumption on average by about 4% in high income countries among adults. Importantly, the impact of higher prices is likely to be greatest on young people, who are more responsive to price rises than older people. In addition, price increases are an effective policy tool to prevent people from taking up smoking especially among youth, encourage smoking cessation, reduce the number of ex-smokers who resume the habit, and reduce in the long run the average cigarette consumption among continuing smokers.”

6. However, contrary to the foregoing the paper draws the conclusion: “Tax policies may reduce tobacco consumption either by increasing the overall level of taxation and consequently the retail selling prices, or by imposing minimum taxes or more specific duties in order to tackle cheaper categories of cigarettes.” **This is not consistent!**

**b. Effectiveness of excise duties on the consumption of smoking tobacco**

7. The above inconsistency is probably coupled with the incomplete understanding on the effectiveness of excise duties on the consumption of smoking tobacco. However, as it was recently argued **“In fact, this very assumption is nowadays being contested by expert centers, such as the Austrian Nicotine Institute, of which its experts have been dealing with smoking prevention for more than thirty years, as well as by recent studies. One of them published by KPMG in April 2006 in Austria concluded that increased taxation of tobacco products is not suitable to attain public health objectives on the grounds that such means do not avoid price dumping. As a matter of fact, recent developments – such as in 2006 in Spain - show a new behaviour on tobacco markets: In order to keep up market shares, the tobacco industry does not always pass on tax increases to consumers. In other words: Industry decides to rather minimize its profit than to raise cigarette prices according to tax levels. The**

**financial source for price support is the money formerly earmarked for advertising that has been shifted to other fields as well as profits from other brands or even other markets. Moreover - long-term studies on smoking practices prove the interdependence which exists between price increases and the decrease of cigarette consumption:**

- A recent study (Gallus S., “Price and cigarette consumption in Europe”, published 2006 on [www.tobaccocontrol.com](http://www.tobaccocontrol.com)) which has reviewed 86 different studies from 52 European countries on price and cigarette consumption comes to the following conclusion: a 10% increase in the real price of cigarettes decreases smoking consumption by 5-7%.” (S. Pappas in *Europolitics*, No 3292, 23.4.2007).
- In his position paper, Luk Joossens, a European tobacco control specialist, argues that the effect of tax increases on smoking prevalence is weakened by several factors which stem from the tobacco industry. He mentions in particular, the launch of discount and low priced cigarette brands and the process of inventive pricing (reduction of the amount of cigarettes per package). Moreover, in response to Luk Joossens’ position paper, the Austrian Nicotine Institute points out that recent studies on price policies upheld by tobacco companies prove that (1) the latter price policies determine the demand of tobacco products and (2) increased taxation of tobacco products is not enough effective to attain public health objectives as such means inevitably create “price wars”.

8. In reply to the consultation on the issue of “price wars” on tobacco markets, since the tobacco industry had to reduce advertising for cigarettes due to regulation, the money formerly earmarked for advertising has been shifted to price supporting measures. Thus to keep up and to gain market shares, new habits on tobacco markets have developed. In addition, depending on market strategies, tax increases are not always passed on to consumers by the tobacco industry. Such measures inevitably result in price dumping (“price war”).

9. The “price war” which took place in the Austrian tobacco market is a good example. In January 2006 a price war was triggered by a market entrant that was aiming at gaining

market shares by positioning an attractive international brand at a very low price level. The other market players imitated this strategy and within 3 months the discount sector went up from 10 to 45 brands. As a result the Austrian Ministry of Health introduced minimum retail prices on cigarettes in May 2006 for public health reasons.

10. Moreover, according to the Consultation Paper, “**Although excise duty is primarily an instrument for generating revenue at national level**, policy-making in this area has to take the wider objectives of the Treaty into account.” In view of this particular vocation of excise duties, the question arises as to how is it possible for Member States of the EU – the latter being set to raise “the standard of living and quality of life” (Article 2 TEC) and to contribute to “the attainment of a high level of health protection” (Article 3p TEC)- to generate revenues by imposing excise duties on products that are detrimental to public health such as smoking tobacco? This is an ethical question of paramount importance for the credibility and the coherence of the Community ideal; the present Community legislation, as well as the paper in consultation are from this point of view controversial and contrary to the objectives of the TEC and not legitimate Community wise.

11. According to the above, it is fair to say that the system so far has not met the expectations. Not only is it ineffective but it is also inappropriate for a Member State to profit from dangerous goods. As such, minimum excise duties cannot be the solution.

## **II. Minimum prices are the way forward**

12. The above leads us to believe that allowing Member states to impose minimum retail prices on tobacco products is the most effective way to attain the EC Treaty’s objectives in terms of public health. This method has a number of non-negligible advantages.

13. Firstly, the various studies as well as the Austrian “price war” example outlined above show that minimum prices are an effective means to reduce cigarette consumption and to prevent and combat “price war” phenomenon.

14. Secondly, the practice of allowing Member states to ‘play’ with excise duties whilst imposing minimum prices is a more flexible and transparent way of responding to health concerns. Accordingly, Member states would have to apply minimum prices on all tobacco products according to their degree of harmfulness while they would be free to determine the level at which excise duties should be set to encourage smuggling prevention and prevent illegal cigarette trade within a market.

15. Thirdly, minimum prices is a simple and subsequently a more transparent means; in fact, minimum prices have the power to avoid the confusion caused by ‘transitional periods’, i.e. periods during which Member states are authorised to derogate from EU legislation on cigarette taxation. For example, Directive 2003/117/EC of 5 December 2003 authorised the French Republic to prolong the application of lower rates of excise duty to tobacco products released for consumption in Corsica from 1st January to 31 December 2009. France put forward the argument that Corsica was in a ‘special position’ as an island within the EU and needed more time than France to implement the above Directives. Such peculiar exceptions to the general rules allow the basic principles in favour of the imposition of minimum excise duties to be circumvented, thereby questioning the purpose of the excise duty legislation.

16. As a matter of fact the 2006-period of price war on the Austrian tobacco market had an impact of minus 20% demand for smoking cessation services offered by the Austrian Nicotine Institute. The “nicotine pre abstinence syndrome” constitutes a psychological situation which may result in a cessation attempt which is obviously influenced by cigarette price policy. When the minimum price of cigarettes was introduced in May 2006 the number of clients went up again in figures which correspond to the survey on smoking practices carried out in Austria and spread over 28 years that shows that a 1% increase in tobacco prices decreases tobacco consumption by 0.5%.

At the same time sales of nicotine replacement products were equally affected: A downtrend during the 2006-period of price war on the Austrian tobacco market followed by an upswing after the introduction of minimum price of cigarettes in May 2006.

17. Finally, we cannot ignore the scientific evidence put before our eyes and we refer again to a survey – mentioned above - on smoking practices carried out in Austria and spread over 28 years (Kunze, M., Wörgötter, G.: Cigarette prices and cigarette consumption in Austria, 1955-1983, 1986) shows that a 1% increase in tobacco prices decreases tobacco consumption by 0.5%.

### **III. Minimum prices are the only method compatible with the EC Treaty's modern objectives:**

18. It is clear when taking a closer look at EU case law, that excise duties do not go to the heart of public health as foreseen by the Treaty. As such, it does seem adequate to suggest that the European Court of Justice would review its reasoning in future case law by taking into consideration new research results; and even more so if viewed in the context of EU policy against tobacco and the Treaty provisions which aim to protect consumers' health.

19. The Commission's Consultation Paper enumerates the binding community law that allows adoption and implementation of appropriate price measures on tobacco products "so as to discourage tobacco consumption" (Article 7 of Council Recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control (2003/54/EC)). Moreover, the EU has adhered to the World Health Organization's Framework Convention on Tobacco Control (FCTC) by way of Council Decision of 2 June 2004. Article 6 of the FCTC stipulates that "*The Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.*" "*...each Party should adopt or maintain, as appropriate, measures which may include: implementing tax policies and, where appropriate, price policies, on tobacco products so*

*as to contribute to the health objectives aimed at reducing tobacco consumption;...”.* Therefore, there is a compulsory legal obligation on the Community to introduce legislation encouraging the use of minimum retail prices on the sale of cigarettes so as to contribute to the EU’s health objectives aimed at reducing tobacco consumption.

**Conclusion:**

**20. In light of the above, it seems to us that the measure against smoking which is the most appropriate and compatible with the EC Treaty health protection and wider objectives is the introduction of minimum prices. In the case of dangerous goods such as cigarettes public health should prevail over the Internal Market.**

May 31, 2007

Prof. Dr. Karl-Olov Fagerström  
 Doctor of Psychology, Director, Smokers Information Centre in Helsingborg, Sweden,  
 Inventor of the Test on Nicotine Dependency

Michael Kunze, o.Univ.Prof.Dr.med.  
 Director, Institute of Social Medicine, Center of Public Health, Medical University  
 Vienna, Supreme Medical Advisory Board, Ministry of Health, Family and Youth  
 Austrian Delegation, EU Tobacco Regulatory Committee, Member, EU Tobacco Expert  
 Working Group, Past President, Austrian Cancer Fund

Spyros A. Pappas, Member of the Athens and Brussels Bars, Pappas & Associates,  
 Former Director General for Consumer Policy at the European Commission, Professor  
 and Director General of the European Institute of Public Administration (Maastricht),  
 Secretary General of the NCPA (Athens), Judge at the Supreme Court.



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.