



## EUROPEAN COMMISSION

*Brussels, 23. 7. 2013  
C(2013) 4563 final*

*Mr Milan ŠTĚCH  
President of the Senát  
Valdštejnské náměstí 17/4  
CZ – 118 01 PRAHA 1*

*Dear President,*

*The European Commission would like to thank the Senát for its Opinion on the 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 final}.*

*The Commission would like to make the following remarks.*

*The Commission welcomes the Senát's support to the aim to discourage especially young people from taking up smoking tobacco.*

*The Senát considers that the proposal would not be covered by its legal basis of Article 114 TFEU and that measures against the use of tobacco products should primarily be taken at Member State level. The Commission would like to point out that the current Directive largely pursues the same aims as foreseen under the proposal for its revision. The legality of the current Directive has been confirmed by the European Court of Justice (ECJ) (see Case 491/01, BAT [2002] ECR I-11453, paras 177-185 on subsidiarity). Moreover, the Commission recalls that the legal base of the Proposal is Article 114 TFEU, the choice of which has also been confirmed by the ECJ with regard to the current Directive. This legal base is appropriate to update the existing level of harmonisation, to remove obstacles to the internal market due to divergent regulatory developments in the Member States, and to prevent circumvention of internal market rules. It thus either updates or extends regulations to ensure the functioning of the internal market, or provides rules that could not be effectively adopted at national level, such as on tracking and tracing and distance sales.*

*The Senát also considers that the prohibition of slim cigarettes and flavoured products would not contribute to improving the functioning of the single market. The Commission would like to stress that the proposal does not prohibit flavoured products. Instead, it prohibits products with a characterising flavour. The Commission recalls that Article 114 TFEU as legal base is appropriate for the aim to prohibit misleading elements with regard to the appearance of tobacco products. The Commission would like to remark that it has provided scientific evidence showing the misleading nature of slim cigarettes and the attractiveness of products with a characterising flavour especially for young people. Studies have found that slim cigarettes can mislead consumers by creating the impression that they are less harmful<sup>1</sup> and lead to weight loss. With respect to*

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<sup>1</sup> see 24<sup>th</sup> recital of the proposal

*characterising flavours, studies and market data have shown that flavours influence and can facilitate smoking initiation. Moreover, as Member States have started to adopt different measures to regulate flavours, the Commission proposes harmonisation to prevent distortions of the market. The Framework Convention for Tobacco Control's guidelines also recommends its Parties, including the EU and all its Member States including the Czech Republic, to take action in this area.*

*The Senát furthermore considers that the increased size of health warnings might impair intellectual property rights, might impact negatively on the quality of tobacco, and might lead to an increase in illicit trade. It also questions the usefulness of pictorial health warnings. The Commission would like to point out that it has provided scientific evidence showing the effectiveness of pictorial health warnings. Moreover, according to the Eurobarometer 2012, 76% of EU citizens are in favour of using pictorial warnings, and in 17 Member States pictorial health warnings attract the highest level of support among all possible tobacco control measures. In the Commission's view, the proposed rules on packaging would not increase the risk of illicit trade. During the public consultation, no evidence was presented to substantiate any such claims. In any event, the proposal foresees effective measures against illicit trade, such as a security feature and a tracking and tracing system. The Commission is therefore of the view that its proposal would reduce illicit trade. The Commission would also like to underline that requirements in the current Directive already restrict the use of trademarks, which was confirmed as legal by the Court of Justice. A prohibition of trademarks in certain circumstances can be justified provided that the measure is proportionate. Under the proposal, manufacturers of tobacco products would be able to continue to use their trademarks on the non-regulated surface of the package, which would correspond to approximately 30% of the total surface area. This would allow tobacco companies to distinguish their goods from those of other companies. Consumers would also be able to differentiate between different brands.*

*The Senát considers that the proposed delegation of powers in the proposal would not meet the requirements laid down by Article 290 TFEU. The Commission would like to point out that in order to make this Directive fully operational in view of technical, scientific and international developments in the tobacco manufacture, consumption and regulation, the power to adopt acts in accordance with Article 290 TFEU has been deemed necessary. The delegations of power in the proposal provide for clear and concise criteria, giving limited discretion to the Commission. The Commission would involve Member States in the preparation of these acts and would ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.*

*The Commission hopes that these clarifications address the comments and concerns raised in the Opinion submitted by the Senát and looks forward to continuing our constructive political dialogue in the future.*

*Yours faithfully,*

*Maroš Šefčovič  
Vice-President*