

Subject: 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)

DOCUMENT APPROVED BY COMMITTEE 14

Committee 14 (European Union Policies),

having examined whether the proposal for a directive on the manufacture, presentation and sale of tobacco and related products (COM(2012)788 final) complies with the principle of subsidiarity;

supporting the aim of the proposed Directive, which is to ensure a higher level of health protection in relation to the risks associated with the consumption of tobacco, particularly among young people, by revising the Tobacco Products Directive 2001/37/EC and by taking account of scientific, international and market developments;

noting, however, that the provisions set out in the proposed Directive raise a number of concerns regarding compliance with the principle of subsidiarity;

particularly considering that:

a) assessment of the correctness of the legal basis for draft EU legislation is of fundamental importance for enabling national parliaments to assess compliance with the principle of subsidiarity as referred to in Protocol No 2 of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU). Therefore, national parliaments may adopt reasoned opinions pursuant to Article 6 of the Protocol mentioned above if they find that the legal basis identified is incorrect or inappropriate given the content and aims of the draft EU legislation;

b) the legal basis for the proposal for a Directive in question is Article 114 TFEU regarding the approximation of national provisions which have as their object the establishment and functioning of the internal market;

b)¹ the Court of Justice of the European Union (ECJ) has already ruled on the admissibility of citing this provision (formerly Article 95 of the Treaty establishing the European Community) in order to adopt harmonisation measures affecting the protection of human health. In particular, the Court has issued a number of judgments on tobacco advertising (cf. judgment of 10 December 2002, *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, Case C-491/01, ECR I-11453, paragraph 60; judgment of 12 July 2005, *Food Supplements*, Joined Cases C-154/04 and C-1 55/04, paragraph 28);

¹ Translator's note: the list sequence is incorrect in the original

c) specifically, the Court clarified that Article 114, when interpreted in conjunction with Article 168 TFEU, allows measures to be adopted that affect human health even though the primary effective aim of the legislative act is to eliminate obstacles to the free movement of goods or to remove appreciable distortions of competition. However, it is not possible to cite Article 114 as the legal basis if the act to be adopted has the protection of health as its primary and immediate objective and ‘has only the incidental effect of harmonising market conditions within the Community’;

d) the proposal for a Directive in question does not appear to meet all the conditions set out by the Court for citing Article 114, as it contains numerous provisions that do not have the effect of removing obstacles to the free movement of tobacco products or distortions of competition;

e) in particular, by encouraging Member States to intervene independently in certain areas (the measurement of emissions other than nicotine, tar and carbon monoxide; further tests for measuring ingredients; the requirements for banning products containing specific additives; the introduction of an authorisation system for new products; the introduction of stricter rules on packaging), the proposal makes it possible for significant differences to emerge between Member States, thereby limiting the free movement of goods;

f) the Commission justifies the provisions in the proposal concerning packet standardisation and the ban on the sale of whole product categories that are currently legal, such as slim cigarettes, menthol-flavoured cigarettes and packets of 10, by citing its desire to make tobacco products less attractive and its concern that certain types of packaging or product may mislead consumers by creating the impression that they are less harmful. The ban on these products is therefore not intended to reduce distortions in the single market or distortions of competition, but solely to improve protection; hence it is not consistent with the ECJ case-law;

hereby issues

A REASONED OPINION

pursuant to Article 6 of Protocol No 2 of the Treaty on European Union and the Treaty on the Functioning of the European Union.