

Message 116

Communication from the Commission - TRIS/(2019) 03650
Directive (EU) 2015/1535
Translation of the message 115
Notification: 2019/0479/NL

Forwarding of a detailed opinion received by a Member State (Slovakia) (article 6, paragraph 2, second indent of Directive (EU) 2015/1535). This detailed opinion extends the standstill period until 02-04-2020.

Comunicado detallado - Podrobné vyjádření - Udførlig udtalelse - Ausführlichen Stellungnahme - Üksikasjalik arvamused - Επιμεριστωμένη γνώμη - Detailed opinion - Avis circonstancié - Parere circostanziato - Detalizēts atzinums - Detali nuomonė - Részletes vélemény - Opinioni dettaljata - Uitvoerig gemotiveerde mening - Opinia szczegółowa - Parecer circunstanciado - Podrobný úsudok - Podrobno mnenje - Yksityiskohtainen lausunto - Detaljerat yttrande - Подробно становище - Aviz detaliat - Aviz detaliat.

Amplia el plazo del estatu quo hasta 02-04-2020. - Prodlužuje lhůtu pro stávající stav až do 02-04-2020. - Fristen for status quo forlænges til 02-04-2020. - Die Laufzeit des Status quo wird verlängert bis 02-04-2020. - Praeguse olukorra tähtaega pikendatakse kuni 02-04-2020. - Παρατείνει την προθεσμία του status quo μέχρι την 02-04-2020. - Extends the time limit of the status quo until 02-04-2020. - Prolonge le délai de statu quo jusqu'au 02-04-2020. - Proroga il termine dello status quo fino al 02-04-2020. - Pagarina "status quo" laika periodu līdz 02-04-2020. - Pratešia status quo laiko limitą iki 02-04-2020. - Meghosszabbítja a korábbi állapot határidejét 02-04-2020-ig. - Jestendi t-terminu ta' l-istatus quo sa 02-04-2020. - De status-quo-periode wordt verlengd tot 02-04-2020. - Przedłużenie status quo do 02-04-2020. - Prolonga o prazo do statu quo ate 02-04-2020. - Časový limit momentálneho stavu sa predĺži až do 02-04-2020. - Podaljša rok nespremenjenega stanja do 02-04-2020. - Jatkaa status quo määräaika 02-04-2020 asti - Förlänger tiden för status quo fram till: 02-04-2020 - Удължаване на крайния срок на статуквото до 02-04-2020 - Prelungește termenul status quo-ului până la 02-04-2020.

Die Kommission hat diese ausführliche Stellungnahme am 20-12-2019 empfangen.
The Commission received this detailed opinion on the 20-12-2019.
La Commission a reçu cet avis circonstancié le 20-12-2019.

(MSG: 201903650.EN)

1. MSG 116 IND 2019 0479 NL EN 02-04-2020 20-12-2019 COM 6.2(2) 02-04-2020

2. Slovensko

3A. Úrad pre normalizáciu, metrológiu a skúšobníctvo SR
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4. 2019/0479/NL - X00M

5. Article 6(2), second indent of Directive (EU) 2015/1535

6. The Slovak Republic, as part of intra-Community commenting, wishes to submit its detailed opinion on the proposal.

1. Standard packaging has not been proven to be an effective tool for limiting smoking. Although the Netherlands refers in the notification to the experience of other countries, it is easy to demonstrate that such claims are not supported by facts. Australia was the first to introduce standard packaging in 2012, and there is therefore a sufficiently long period for an examination of the impact of this measure. A government survey

of 2016 (National Drug Strategy Household Survey) shows that the measure has failed. The gradual decline in the prevalence of smoking actually stopped after its introduction. The report states: 'While the smoking rate followed a long-term downward trend, for the first time in more than three decades, the daily smoking rate for the last three years (2013-2016) has not decreased significantly.' Consumers therefore continue to consume tobacco products regardless of the unattractive packaging.

France and the United Kingdom have introduced similar measures relatively recently, but data from the early years shows a similar failure of regulation. Official French data show that the supply of cigarettes to retailers remained virtually unchanged in 2017 (-0.7 %). The French minister for health quoted official data in November 2017, when she stated that standard packaging had not contributed to a reduction in tobacco sales in the country. At the same time, she admitted that the measure 'does not lead smokers to stop smoking'.

Similar knowledge also comes from the UK market, which has also started to face an increased onslaught of illegal products as standard packaging is easier to falsify.

The facts and evidence from Australia, the United Kingdom and France confirm that standard packaging is not the right measure to achieve the objectives declared by the Dutch Government.

2. Breach of Better Regulation principles

Better Regulation principles promoted by the Organisation for Economic Co-operation and Development (OECD) require that regulatory proposals meet certain standards:

- The regulator must review and evaluate existing legislation and its effectiveness before introducing new measures.

- The objectives of a proposed regulation must be legitimately and clearly defined.

- The nature and scope of the problem to be addressed by the regulation must be clearly defined.

- The proposal must be based on clear evidence.

- The impact study must be accurate and complete.

- The proposed regulation must have a solid legal basis.

- It must be possible to implement and enforce the proposed regulation effectively.

The Dutch proposal does not meet these standards. The proposed regulation's Explanatory Note itself states that tobacco products are already highly regulated in the Netherlands and the proposal does not mention any analyses that would indicate or confirm the ineffectiveness of the existing measures. In addition, a ban on displaying tobacco products at points of sale will come into force from 2020. A year later, a ban on advertising will be introduced for tobacco vendors, and in 2022 vending machines will be banned. It would be prudent to first evaluate the effectiveness of existing and approved future measures before introducing new measures.

The sending of the notification by the Dutch Ministry of Health can therefore be seen not as an effort to stimulate discussion and relevant comments, but only as a formal fulfilment of the obligation to submit the proposal for comment.

3. Conflict with EU law – proportionality

We also consider the proposal to be problematic in relation to the existing Directive 2014/40/EU 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. This, in Article 24(2), allows Member States to adopt stricter conditions in relation to standardised packaging. It emphasises, however, that 'Such measures shall be proportionate and may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.' Neither the proposal nor the Explanatory Note show that the measure is proportionate. Article 5 of the Treaty on the Functioning of the EU clearly expects that regulatory measures will not go beyond what is necessary to achieve the objectives. If there exist less bold interventions that achieve the same goal, they should be chosen. The tobacco industry has long and persistently come up with proposals that are less drastic and can have positive effects in achieving the goal they fully identify with: protecting young people and other vulnerable groups from the negative effects of smoking.

4. Conflict with EU law – free movement of goods

Standard packaging clearly falls within the prohibition of restrictions on the free movement of goods as defined in Article 34 of the Treaty on the Functioning of the European Union. By implementing the regulation in question, products legally produced in one EU Member State in accordance with its legislation could not be sold in the Netherlands, as the proposed regulation creates additional requirements for them. This creates an obstacle to the free movement of goods. From the point of view of EU law, this is a repeat of a case that has already occurred in the past, and the EU Court of Justice in *Cassis de Dijon* (judgment of the Court of Justice in Case 120/78 *Societe Rewe-Zentral AG v Bundesmonopolverwaltung Branntwein*) unequivocally confirmed this. According to the judgment, a Member State cannot prohibit the sale of a product that is lawfully sold in another Member State and that has not been the subject of EU-wide harmonisation. This has been repeatedly pointed out in the past by several Member States, which have sent detailed opinions on similar proposals in different EU countries (most recently, for example, when introducing standard packaging for tobacco products in Slovenia, when detailed opinions were received, including from Slovakia).

5. Infringement of intellectual property rights

Standard packaging prevents manufacturers from using their trademarks and specific design features protected by copyright. We believe that such measures restrict the intellectual property rights guaranteed by EU law, constitute an illegal expropriation of trademarks (conflict with Article 1 of Protocol 1 to the European Convention on Human Rights and Article 17 of the EU Charter of Fundamental Rights). Both European and Dutch national legislation allow for the expropriation of intellectual property in the public interest (if it passes the proportionality and necessity test), but this should be accompanied by fair compensation.

At the same time, the denial of the right to use trademarks restricts competition because it impairs consumer choice and does not allow companies to compete on the basis of brands.

6. Growth in crime, decrease in tax collection

Experience from countries that have introduced standardised packaging (especially Australia) has clearly shown that such measures have significant negative consequences. In Australia, there was no impact on consumer behaviour in terms of consumption reduction. However, what consumers are consuming has changed: imports of illegal cigarettes and free tobacco have increased significantly. The share of illegal tobacco in 2017 reached 15% of total consumption, which is a record to date. In 2012, when standardised packaging was introduced, this rate was 11.5%. Due to illegal tobacco, the Government there loses nearly AUD 2 billion a year in tax revenues. In 2018, this forced the Ministry of Finance to establish a special tobacco unit to combat organised smugglers. Similar trends have also emerged in Europe. The volume of counterfeit products on the French market tripled year-on-year in 2018. Similar data also come from surveys in the United Kingdom. The first counterfeit standardised packaging was seized in Britain almost immediately after the regulation was introduced. Single packs are easier to falsify, and the measure simplifies the situation for criminal groups. Rising crime has an impact not only on national tax revenues, but also negatively affects the entire supply chain up to the retail level. This shows that standardised packaging is a problem for all stakeholders except criminal gangs.

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