



## SINGLE-USE PLASTICS DIRECTIVE

### EP AMENDMENTS – MARKING REQUIREMENTS

1. In this opinion we set out our views on the legality of the European Parliament amendments ("**EP amendments**") to the proposal for a single-use plastics directive ("**SUP Directive**"),<sup>1</sup> relating to marking requirements. These EP amendments concern Article 7 of the proposed SUP Directive and were adopted by the European Parliament in a first reading on 24 October 2018.<sup>2</sup>
2. The EP amendments *inter alia*
  - insert tobacco products with filters and filters marketed for use in combination with tobacco products in Annex D of the SUP Directive, thereby subjecting them to the provisions on marking requirements; and
  - require four types of information to be displayed on the packaging, instead of one (including a list of chemicals present in the product).

#### ***The applicable legal principles***

3. While the EU legislature has a broad discretion when deciding on proposals such as the one at issue, it must nevertheless respect fundamental principles of EU law such as *proportionality* and *non-discrimination / equal treatment*.
4. In order to comply with the *principle of proportionality*, a legislative measure must pursue a legitimate objective and: (i) be an "*appropriate*" means of achieving that objective (i.e. suitable or capable of meeting its objective; (ii) be "*necessary*" and the "*least onerous*" means of achieving that objective; and (iii) not impose a burden which outweighs the benefits of the measure.<sup>3</sup>
5. The *principle of non-discrimination / equal treatment* requires similar treatment of similar situations and different treatment of different situations – unless something else is justified in light of the subject matter of the measure in question (and taking into account the principles and objectives of the field to which that measure relates).<sup>4</sup>

#### ***The EP amendments on marking requirements are legally problematic***

6. It is essential to take into account that tobacco packaging is subject to extraordinarily strict rules under the Tobacco Products Directive ("**TPD**").<sup>5</sup> These regulate every aspect of the packaging – including its shape, that 65% of the front and back of the pack must be covered by a health warning as well as 50% of the lateral side, the precise location of the health warning on the pack, the colour and font of the health warning and the location of the tax stamp, among other things.

<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment, COM(2018) 340 final, 28 May 2018.

<sup>2</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0411+0+DOC+PDF+V0//EN>.

<sup>3</sup> See for example, Case C-331/88 *R v Minister of Agriculture, Fisheries and Food, ex parte FEDESA*, para 13.

<sup>4</sup> See for example, Case C-127/07 *Arcelor Atlantique and Lorraine and Others*, paras 25-56. Any such different treatment must also be proportionate to the aim pursued by that treatment – see para 47.

<sup>5</sup> Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014, 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 and repealing Directive 2001/37/EC, OJ[2014] L 360, 22.



7. The TPD rules were adopted following extensive legislative work and a detailed impact assessment and were specifically designed to achieve human health objectives while leaving producers a minimal opportunity to communicate with consumers. The fact that the EP amendments introduce additional marking requirements via the SUP Directive without consideration of these far-reaching existing rules inevitably causes legal difficulties, as set out below. It is also simply bad law-making.
8. Given the limited size of a cigarette pack and the limited pack space that is not regulated by the TPD, it will simply be impossible to place all the information required by the EP amendments on a cigarette pack via "*conspicuous, clearly legible and indelible marking*". Requiring something that is not possible is inherently disproportionate.
9. Even if it were possible to place all the required information on the pack, it is highly questionable whether the proposed marking requirements could ever be effective in the case of tobacco products, in light of the existing TPD requirements. The specific intention of the existing TPD rules is that consumers' attention becomes entirely focused on the required health warnings to the exclusion of anything else.
10. In this respect, there appears to be an inherent conflict between the objectives pursued by the two sets of rules, namely focusing attention on the health warnings on the one hand and focusing attention on the SUP markings on the other hand. Achieving one objective risks undermining the other. In fact, one only has to look at a TPD compliant cigarette pack to understand that adding another four items of information will result in absolute "information overload" which will result in confusion and consumers most likely ignoring most of the information on the pack.
11. The EP amendments are also likely to create a conflict with Article 24(1) TPD according to which Member States must allow all products on their market that comply with the TPD. However, through the proposal to impose SUP markings, Member States would be able to ban products pursuant to requirements outside the scope of TPD. This is of course one of the consequences of the Parliament not taking into account the TPD when formulating its amendments to the SUP Directive.
12. The strict regulation of tobacco packaging also places tobacco products in a completely different position than any other SUP product. Producers of other SUP products are essentially free to design packaging and advertise their products as they see fit. Producers of tobacco products, by contrast, cannot advertise and have only very limited pack space available to communicate basic product information to consumers such as brand and product type. Consequently, the impact of the SUP marking requirements on the commercial freedom of tobacco manufacturers is fundamentally different from the impact on other SUP manufacturers. Simply applying the same rules to tobacco products without taking into account their very different regulatory situation, as the Parliament proposes, clearly violates the principle of non-discrimination.
13. The Commission itself appears to have been aware of the different situation of tobacco products and the possibility of conflict with the TPD because it did not propose to apply the marking requirements to tobacco products. While the Commission proposal was based on an impact assessment, the EP amendments do not include a meaningful explanation for deviating from the Commission proposal on the point of marking requirements for tobacco products.<sup>6</sup>

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<sup>6</sup> Regarding the inclusion of tobacco products with filters in part D of the Annex (Amendment 86), the Report of the Parliamentary Committee on the Environment, Public Health and Food Safety of 11 November 2018 merely includes the following justification: "*Cigarette butts have a severe negative impact on the environment. For example, one cigarette butt can pollute between 500 and 1000 litres of water. By including tobacco products in this Annex, the consumers would be better informed on the environmental impact of cigarettes.*"



HERBERT  
SMITH  
FREEHILLS

14. In light of all the above, the EP amendments imposing marking requirements on tobacco packing are disproportionate and discriminatory. In addition, they conflict with other EU legislation, namely the TPD.

**Herbert Smith Freehills LLP**

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