

Tobacco Products Directive - Vending Machines

In the scope of the Public Consultation on the Revision of the Tobacco Products Directive 2001/37/EG, apart from other regulatory issues, further restrictions or a uniform ban on Vending Machines under European law was put to discussion by the European Commission. In the Public Consultation Paper`s justification it is merely stated that Vending Machines are banned in many Member States.

Preliminary remarks:

Vending Machines are legitimate distribution points for tobacco products in many Member States of EU 27 which are not accessible - in connection with the use of effective technological age verification systems - to children and adolescents.

All measures to limit the access to tobacco products (such as the introduction of a minimum age or duty restrictions on the sale of tobacco products via Vending Machines) fall within the competence of the individual Member States. Recommendations on the sale of tobacco products via Vending Machines have already been sufficiently covered in the Council Recommendation 2003/54/EC¹ and their satisfactory implementation in the Member States has already been certified by the Commission itself².

It is, therefore, very surprising that with regard to the revision of the Tobacco Products Directive restricted access to Vending Machines or even a general EU-wide ban have been made subject of the Commission`s deliberations. It also means, conversely, that the Commission apparently directly relates this specific measure with the functioning of the internal market and/or the achievement of a high level of health protection.

Legal position:

In the relevant area of health, the EU is not allowed according to Article 168 TFEU to adopt measures that lead to a harmonisation of the Member States' legislation. The EU only possesses a "supportive" competence. Harmonisation of regulations across the Member States is expressly excluded.

¹ Council Recommendation 2003/54/EC of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco controls [Official Journal L 22 of 25.01.2003]

² "COMMISSION STAFF WORKING DOCUMENT SEC(2009) 1621 final"

As an EU-wide prohibition on the sale of tobacco products via Vending Machines would necessarily entail a harmonisation, the Union is not permitted to prohibit the sale of tobacco products via Vending Machines for reasons of health protection.

Moreover, a prohibition on the sale of tobacco products via Vending Machines cannot be based on the competence to harmonise the internal market according to Art.114 TFEU, because it has no domestic market-promoting effects and it also does not have any cross-border implications (the catchment area is limited to the immediate vicinity of the site of the machine).

Occasionally, it is considered, that the market for the trade with or the operation of Vending Machines would be limited by differing national rules on the validity of the installation of Vending Machines and therefore, there is an EU-competence to harmonize the rules governing the sale of tobacco products via Vending Machines. If one, however, wants to justify from this consideration an EU-wide ban on the physical product Vending Machine or a general prohibition on the sale of tobacco products via Vending Machines, overlooks the contradiction, that a comprehensive ban would – instead of improving – **fully eliminate** a potentially/assumed imperfect single market for trade in Vending Machines.

Conclusions:

1. An EU-wide prohibition on the sale of tobacco products via Vending Machines is inadmissible for lack of relevant competence of the EU.
2. An EU-wide prohibition on the sale of tobacco products via Vending Machines is also problematic concerning competition law, not to be reconciled with the constitutional principles in a number of Member States (for example in Germany) and disproportionate. A prohibition would have farreaching negative economic consequences for the tobacco wholesale as well as for the cigarette vending machine operated trade in Europe.
3. Even the WHO Framework Convention on Tobacco Control (FCTC) does neither oblige the Parties nor the European Union to prohibit the sale of tobacco products via Vending Machines.

We support reasonable regulation, particularly for the protection of youth and non-smokers. But to abolish effectively-restricted machines does neither serve youth protection nor health protection.

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