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Subject: Notification 2023/215/B

Royal Decree of XXX on the manufacture and placing on the market of tobacco products and smoking herbal products

Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015

Madam,

Within the framework of the notification procedure laid down by Directive (EU) 2015/1535¹, the Belgian authorities notified to the Commission on 25 April 2023 the draft '*Royal Decree of XXX on the manufacture and placing on the market of tobacco products and smoking herbal products*' (hereinafter, 'the notified draft').

According to the notification message, the notified draft aims to redraft the existing national legislation on the manufacture and marketing of tobacco products and herbal products for smoking in order to transpose Commission Delegated Directive (EU) 2022/2100 of 29 June 2022 amending Directive 2014/40/EU of the European Parliament and of the Council as regards the withdrawal of certain exemptions for heated tobacco products², and in order to make the national legislation clearer and more readable.

Examination of the notified draft has prompted the Commission to deliver the following comments pursuant to Article 5 (2) of Directive (EU) 2015/1535.

¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

² OJ L 283, 3.11.2022, p. 4.

COMMENTS

(i) Heated Tobacco Products

The notified draft includes provisions on, inter alia, the transposition of Commission Delegated Directive (EU) 2022/2100 of 29 June 2022 amending Directive 2014/40/EU of the European Parliament and of the Council as regards the withdrawal of certain exemptions in respect of heated tobacco products.

Article 6(1) of the notified draft provides that *‘it shall be prohibited to place on the market tobacco products with a characterising flavour. Tobacco products other than cigarettes, roll-your-own tobacco and novel tobacco products are exempted from this prohibition’*.

Article 6(5)(1) of the notified draft further provides that it shall be prohibited to place on the market products containing flavourings in one of their components such as filters, paper, packaging and capsules, whereas the last sentence of Article 6(5) of the notified draft provides that herbal products for smoking and tobacco products other than cigarettes, roll-your-own tobacco and novel tobacco products shall be exempted from that prohibition.

The Commission notes that according to Article 7(1) of the Tobacco Products Directive³ “Member States shall prohibit the placing on the market of tobacco products with a characterising flavour”. However, these provisions must be read in conjunction with Article 7(12), which indicates that ‘Tobacco products other than cigarettes and roll-your-own tobacco shall be exempted from the prohibitions laid down in paragraphs 1 and 7. The Commission shall adopt delegated acts [...] to withdraw that exemption for a particular product category, if there is a substantial change of circumstances as established in a Commission report’.

In accordance with Article 1 of Delegated Directive (EU) 2022/2100, Article 7(12) of the Tobacco Product Directive is amended as follows:

’12. Tobacco products other than cigarettes, roll-your-own tobacco and heated tobacco products shall be exempted from the prohibitions laid down in paragraphs 1 and 7. The Commission shall adopt delegated acts in accordance with Article 27 to withdraw that exemption for a particular product category, if there is a substantial change of circumstances as established in a Commission report.’

The Commission highlights that in accordance with Delegated Directive (EU) 2022/2100, the prohibition to place on the market tobacco products with characterising flavour or containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity as laid down in Article 7(1) and 7(7) of the Tobacco Products Directive applies to heated tobacco products and not to all novel tobacco products. The Commission draws the attention of the Belgian authorities to the fact that the issue of the scope was addressed at the Meeting of the Group of Experts on Tobacco Policy on 9 February 2022, in the presence of the Belgian authorities.

³ 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 L 127, 29.4.2014, p. 1.

The Commission therefore highlights that Article 6(1) and 6(5)(1) in conjunction with Article 6(5) last sentence of the notified draft go beyond the requirements established under Article 1 of Delegated Directive (EU) 2022/2100, insofar as they extend the prohibition to place on the market not only to heated tobacco products but to all novel tobacco products with a characterising flavour or containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity, and are not compatible with that provision and disproportionate to their aim.

The Commission invites the Belgian authorities to align the scope of the national provisions to the one established under EU law.

The Commission finally notes that the present assessment on the notified draft is without prejudice to the examination of the national measure in the course of the compliance assessment of the transposition of Delegated Directive (EU) 2022/2100.

(ii) Use of EU-CEG system

Article 4 of the notified draft establishes a notification obligation for the placing on the market of products and appliances, with the exception of pipes and water pipes. Article 4(7) of the notified draft specifies that the notification shall be submitted in electronic form via the common electronic entry point for data transmission.

In the notification message accompanying the notified draft, the Belgian authorities state the following: *‘As regards the notification of devices, it should be clarified that in the EU-CEG system this is only possible for devices for novel tobacco products. Therefore the notification obligation currently only applies to these devices. However, with the extension of the definition, as soon as the system allows and subject to timely communication by the Department, we will apply this obligation to devices of all other products.’*

The Commission would like to remind the Belgian authorities that the information manufacturers and importers need to provide for tobacco products and e-cigarettes in the EU Common Entry Gate (hereinafter ‘EU-CEG’) is set out in Commission Implementing Decision (EU) 2015/2186 establishing a format for the submission and making available of information on tobacco products⁴ and Commission Implementing Decision (EU) 2015/2183 establishing a common format for the notification of electronic cigarettes and refill containers⁵.

While the Commission acknowledges the Belgian authorities’ efforts to extend the use of EU-CEG to other product categories which do not fall within the scope of the above decisions, The Commission would like to remind the Belgian authorities that the format of EU-CEG is not designed for devices other than electronic cigarettes and thus the currently available format might not allow for robust submission of notifications as defined in the notified draft. The Commission is not in the position to provide any specific support for such reporting as the products subject to the notified draft law are not covered by Decisions (EU) 2015/2186.

⁴ Commission Implementing Decision (EU) 2015/2186 of 25 November 2015 establishing a format for the submission and making available of information on tobacco products (notified under document C(2015) 8162), OJ L 312, 27.11.2015, p. 5.

⁵ Commission Implementing Decision (EU) 2015/2183 of 24 November 2015 establishing a common format for the notification of electronic cigarettes and refill containers (notified under document C(2015) 8087), OJ L 309, 26.11.2015, p. 15.

The Commission invites the Belgian authorities to take the above comments into account.

The Commission furthermore recalls that once the definitive text has been adopted, it must be communicated to the Commission in accordance with Article 5(3) of Directive (EU) 2015/1535.

Yours faithfully,

For the Commission

Thierry Breton
Member of the Commission