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BALANCE OF COMPETENCES REVIEW
SUBMISSION BY BRITISH AMERICAN TOBACCO (HOLDINGS) LIMITED

The Single Market and Subsidiarity

While the business community has keenly embraced the notion of a Single Market, it has in many instances argued over the years that its completion does not necessarily require full harmonisation of the laws and regulations of EU Member States in all policy areas.

These concerns were widely debated during the European Council held in Birmingham on 16 October 1992 and led to adoption by the Council of "the Birmingham Declaration – A Community close to its Citizens" expressing notably the Council's determination to "respect the history, culture and traditions of individual nations, with a clearer understanding of what Member States should do and what needs to be done by the Community".

The Declaration reaffirms "that decisions must be taken as closely as possible to the citizen". The concept of "subsidiarity" was born and the Council states that making it work "should be a priority for all the Community institutions".

This paved the way for agreement in the 12 December 1992 Edinburgh Council on an overall approach to the application by the Council of the subsidiarity principle, notably resulting in the European Commission withdrawing some pending legislative proposals.

Following calls by the business community a.o. to give teeth to the Birmingham Declaration and the Edinburgh Council conclusions, these principles were eventually enshrined in a Protocol, which is now Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Lisbon Treaty.

Twenty years later, implementation of these worthy principles remains another matter. It was hoped that a clear description in the Lisbon Treaty of the respective competences of the EU and its Member States would enable the institutions to achieve a true balance of powers and limit EU action to what is really necessary. Sadly, this is not the case and the problem lies largely in an excessive and often unjustified reliance on an alleged Internal Market objective (Article 114 TFEU) to justify detailed regulation in areas where the EU has no competence to legislate.

Public Health: A Supporting Competence?

A case in point is the Public Health area, where the EU only has a complementary or supporting competence (Article 6 TFEU).

During the discussions that took place in the framework of the Convention on the Future of Europe in 2002-2003 and subsequently during the negotiations leading to adoption in June 2004 of the – now defunct – Constitutional Treaty, there were repeated, well documented attempts by the European Commission to extend the EU's competence to the Public Health area.

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The issue was hotly debated and was finally settled in what became Article III-179 of the proposed Constitution and ultimately the current Article 168 TFEU which reproduces the same wording.

Responding to concerns expressed at the time by the UK business community, the then Foreign Secretary Jack Straw, in a letter to the CBI's Director General dated 11 June 2004, wrote: "Article III-179.5 also makes clear that where European Laws or framework laws are established to combat major cross-border scourges and measures with the direct objective of the protection of public health regarding tobacco and alcohol abuse, they cannot provide for any harmonisation of the laws and regulations of the Member States. This means that Member States cannot be forced to harmonise their tobacco and alcohol regulations". This understanding would clearly apply to the wording ultimately adopted in Article 168 TFEU.

This however does not appear to be the case in practice.

The reality is that the relevant Directorate General of the European Commission increasingly relies on Article 114 TFEU (Internal Market) to justify sweeping harmonisation of Member States' laws rather than resorting – as it should – to recommendations.

Better regulation? Up to a point.

Over recent years, the European Commission has made great strides towards "better regulation", one important element of which is the obligation imposed on Commission Directorates General (DGs) to draft and submit a thorough impact assessment (IA) before presenting any legislative proposals.

The Commission Guidelines for conducting impact assessments clearly spell out the duty for the relevant DG to define the problem that needs to be tackled and to provide evidence of the nature and scale of this problem. In order to be able to legislate on the basis of Article 114 TFEU, the Directorate General for Health – which has no power to propose binding instruments in the Public Health area – should therefore demonstrate that there is a market failure.

The Guidelines make it equally clear that, where the EU does not have exclusive competence – which is the case of the Internal Market competence (Article 4 TFEU) – the Commission services responsible for a draft piece of legislation must justify any legislative initiative in the light of the principles of subsidiarity and proportionality. The draft proposal must in addition be scrutinised for compatibility with the EU Charter of Fundamental Rights.

In theory, these excellent rules should indeed lead to Better Regulation, especially as the Commission President, in the 2010 Communication on "Smart Regulation" vowed not to place on the agenda of the College of Commissioners proposals that have not duly received the Impact Assessment Board's (IAB) approval.

Sadly, while admittedly the IAB does a thorough job of scrutinising impact assessments, the reality is that these worthy principles are not necessarily respected, for a number of reasons, and notably the following:

- The evidence base for some proposals can be fairly weak, or even controversial, and the IAB will not necessarily be aware of the existence of scientific evidence – disregarded by

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the proponents of these measures – that would negate the value of the studies being produced to justify action. Neither is it the Board's role to conduct its own research.

- The alleged Internal Market problem may be ill-defined and/or badly quantified and, again, the IAB is not necessarily equipped to assess the thoroughness of the analyses presented in the IA.

- Most importantly, if the services concerned, after receiving a negative IAB opinion, present a revised IA and this second report is still heavily criticised by the Board, even for lack of a legal basis or doubts about the proportionality of the measures envisaged, nothing stops the responsible Commission services from disregarding this criticism and proceeding with the draft proposal towards adoption by the College. In other words, the Commission President's assurance that no initiative not approved by the IAB would be adopted by the College remains a dead letter.

A striking example: The revision of the Tobacco Products Directive

A case in point is the current revision of the Tobacco Products Directive (Directive 2001/37/EC of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products) hereinafter referred to as the TPD.

This is a remarkable example of a process generally known as "competence creep".

This section lists a number of measures contained in the proposed revised TPD [Document COM(2012)788 final, adopted by the European Commission on 19 December 2012]. All of these measures either have no valid legal base, or infringe the principles of subsidiarity or proportionality, or even affect fundamental human rights without a shred of evidence that this would in any way benefit human health. The list of issues below is far from exhaustive.

While the purported objective of the proposed Directive is to "improve the functioning of the internal market", its true focus is essentially to reduce the attractiveness of tobacco products in the belief that this will reduce smoking prevalence. This is a public health objective presented under the guise of internal market concerns, and further justified by the purported need to conform to non-binding instruments such as the guidelines for the implementation of the WHO's Framework Convention on Tobacco Control (FCTC).

However, since the European Court of Justice has ruled that the predominance of a public health objective does not preclude reliance on Article 114 TFEU providing there are genuine internal market concerns, there is a need to examine whether the proposed measures, which go much further than Directive 2001/37/EC, fulfil these conditions.

- Before examining the proposed measures individually, it is important to realise that *there is in reality no internal market in tobacco products*, for at least two fundamental reasons: (i) taxation and excise regimes continue to differ and (ii) health warning language requirements are those of the Member State of placing on the market, with the result that manufacturers conform to the legislation in force in each Member State not only in these two respects, but also in all others provided for by national laws. Tobacco products can thus only be marketed in the Member State for which they are intended and thus the internal market in tobacco products is a myth.

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- The proposed Directive seeks to regulate ingredients contained in tobacco products, notably by banning characterising flavours, such as menthol. Consumption of this category of products is prevalent in some Member States more than in others, a clear indication of national preferences, which should not be tampered with if the EU is to respect the diversity of its citizens' taste. Furthermore, there are at this stage no national regulations banning the marketing of mentholated cigarettes and it is therefore difficult to see how banning this entire category of product throughout the EU would improve the functioning of the internal market.

- The Commission also seeks to regulate in detail the ingredients present in tobacco products. It even seeks to give itself the power to regulate further in the future by means of implementing or delegated acts. No internal market need justifies such an interference in the market: national technical regulations related to tobacco products have thus far always been adequately dealt with under the Technical Barriers to Trade Directive and the Mutual Recognition Regulation – *which is only natural since there is no internal market for tobacco products.*

- The area of labelling raises similar issues. The Commission proposes to increase dramatically the size of health warnings to 75% of both main faces of the packs and to make pictorial health warnings mandatory on both sides. The objective of the proposed increase in size is to offer consumers comparable information in all Member States – when in reality it is widely acknowledged that awareness of the effects of tobacco on health is universal. There is therefore no genuine internal market need for increasing health warnings across the EU, and Member States are clearly better placed than the Commission to assess the level of their citizens' awareness and their need for information of equivalent size.

  It is worth noting that there already are disparities in the size of health warnings since these vary depending on the number of official languages in use in the various Member States.

  In addition, while the use of pictorial health warnings was optional under Directive 2001/37/EC, the Commission not only wants to make them mandatory, it also proposes to mandate them on both main faces of the packs. Again, there is no internal market justification for this: the use of pictorial warnings by the regulator in some Member States and not in others has not raised any barriers to trade in tobacco products and there is no legal basis for making them mandatory. Furthermore, even assuming there were an internal market need to make these so-called combined warnings mandatory, there is absolutely no internal market justification whatsoever for mandating them on both sides of the packs when there is thus far no such regulation in any of the Member States.

- The Commission also proposes to ban from the packaging of tobacco products any signs, including trademarks or colours which it deems to be misleading. Irrespective of possible infringement of intellectual property protection legislation, it is hard to see how such a proposal would genuinely improve the functioning of the internal market since there is no such restrictive regulation in any of the Member States.

- Similarly, cigarettes with a diameter of less than 7.5 mm would be deemed to be misleading, and banned. There is no such provision in any of the Member States and it

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is therefore difficult to comprehend how the disappearance of a whole category of products would benefit the internal market when these products have never raised issues related to the free movement of goods.

- Finally, the Commission also wants to standardise the appearance and content of unit packs. Cigarette packs should have a cuboid shape and the only type of opening allowed would be the fairly classic flip-top lid. There is no such regulation in any Member State and thus no need to harmonise their laws. In addition, such a measure would infringe design and patent rights and would make it more difficult for manufacturers to distinguish their products from those of their competitors Such anti-competitive provisions, which are not designed to deal with an existing problem in the market, would harm competition in the internal market and can hardly be said to improve its functioning.

- A final word to add that, despite the absence of a genuine legal basis for all these measures, the Commission reserves the right in most areas to regulate into further detail at a later stage under implementing or delegated powers.

The above analysis has been deliberately limited to internal market-related issues as an example of the way in which abusive recourse to Article 114 TFEU upsets the balance of competences in the EU. The Commission's proposal for a revised TPD infringes other provisions of national, EU and international law. These do not however come within the ambit of this paper which is limited to discussing the balance of competences between the EU and its Member States.

Conclusion

The above analysis will have shown how easily the balance of competences can be distorted by abusive use of Article 114 TFEU compounded by a lax interpretation of the subsidiarity principle.

The leaders who, in 1992, reaffirmed that "decisions must be taken as closely as possible to the citizen" and stated that making the subsidiarity principle work "should be a priority for all the Community institutions" would be bitterly disappointed to see that even the Protocol designed to give teeth to their statements has not resulted in a clear balance of power between the EU and the Member States.

The above striking example of the proposal to revise the TPD shows that we are no longer in the realm of "competence creep". The proposed measures actually constitute "power grab" since the Commission now intends to regulate in its smallest details a whole industrial sector while the Treaty expressly excludes harmonisation of the laws and regulations of the Member States when it comes to measures which have as their direct objective the protection of public health regarding tobacco.

This is far removed from the initial, very laudable desire to have a "clearer understanding of what Member States should do and what needs to be done by the Community". This is also in flagrant contradiction with the UK Foreign Secretary's belief that: "This means that Member States cannot be forced to harmonise their tobacco and alcohol regulations".