



Brussels, 1.12.2016
C(2016) 7685 final

COMMISSION IMPLEMENTING DECISION

of 1.12.2016

**concerning national provisions notified by Austria prohibiting the placing on the market
of chewing tobacco**

(Only the German text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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/EC¹, and in particular Article 24(3) thereof,

Whereas:

I. FACTS

- (1) By letter dated 6 May 2016, received on 11 May 2016, Austria informed the Commission under Article 24(3) of Directive 2014/40/EU of a Federal Bill to amend the Federal Act on the manufacture and placing on the market of tobacco products, tobacco products advertising, and the protection of non-smokers ("Federal Tobacco Act"). The Federal Bill provides for the prohibition on the placing on the market of chewing tobacco.
- (2) By letter dated 8 June 2016, the Commission requested information concerning the grounds for the introduction of the measure at issue. Such information was provided by the Austrian authorities by letter dated 22 June 2016 and received on 22 June 2016. Additional information on the notified measure was supplied by the Austrian authorities by letter dated 29 September 2016.

1.1 Notification procedure under Article 24(3) of Directive 2014/40/EU

- (3) Pursuant to Article 24(3) of Directive 2014/40/EU a Member State may prohibit a certain category of tobacco or related products where the conditions laid down in that Article are fulfilled. In particular, any such prohibition is to be based on grounds relating to the specific situation in the Member State concerned and must be justified by the need to protect public health, taking into account the high level of protection of human health achieved through that Directive. Any Member State wishing to introduce such a prohibition is required to notify to the Commission the relevant national provisions and the grounds for their introduction.
- (4) Article 24(3) of Directive 2014/40/EU further provides that, within a period of six months of the date of receiving the notification, the Commission is to either approve or reject the draft national provisions in question after having verified whether or not they are justified, necessary and proportionate and whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States. As

¹ OJ L 127, 29.04.2014, p. 1.

the notification, within the meaning of Article 24(3) of Directive 2014/40/EU, was completed following the submission of additional information by the Austrian authorities on 22 June 2016, the six month time limit commences from that date.

1.2 Union legislation

- (5) Directive 2014/40/EU regulates the manufacture, presentation and sale of tobacco and related products placed on, or intended to be placed on the Union market.
- (6) Article 17 of Directive 2014/40/EU provides for the prohibition of the placing on the market of tobacco for oral use. This prohibition, does not include chewing or nasal tobacco products as defined in Article 2(6) and (7) of the Directive. The prohibition of oral tobacco had initially been established in 1992 following an amendment introduced by Council Directive 92/41/EEC² to Council Directive 89/622/EEC³. The prohibition was subsequently re-enacted in Directive 2001/37/EC of the European Parliament and of the Council⁴.
- (7) Article 151 of the Act of Accession of Austria, Finland and Sweden⁵ grants Sweden a derogation from the prohibition of placing oral tobacco on the market, making it the only Member State in which the placing on the market of tobacco for oral use is permitted.

1.3 National Provisions Notified

- (8) According to the notification, it is proposed to insert the following provision in the Federal Tobacco Act: "*The placing on the market of [...] chewing tobacco is prohibited.*"

II. ASSESSMENT

2.1 The position of Austria

- (9) By their notification, the Austrian authorities claim that the prohibition of the placing on the market of chewing tobacco is based on public health grounds.
- (10) The Austrian authorities recall that chewing tobacco poses serious risks to health due to the substances contained in those products (such as polycyclic aromatic hydrocarbons and certain types of nitrosamines). Referring to a number of scientific studies, including studies prepared by the International Agency for Research on Cancer (IARC) and recommendations of the World Health Organisation, the Austrian authorities list a wide range of health risks associated with the consumption of chewing tobacco, including addiction, damage or loss of teeth, gum disease, cancer (especially pancreatic carcinoma and cancer of the oral cavity), cardiovascular disease and precancerous oral lesion.

² Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ L 158, 11.6.1992, p. 30).

³ Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ L 359, 8.12.1989, p. 1).

⁴ Directive 2001/37/EC of the European Parliament and of the Council 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 (OJ L 194, 18.7.2001, p. 26).

⁵ OL C 241, 29.8.1994.

- (11) Austria submits that the grounds underlying the proposed measure relate to the specific situation in Austria.
- (12) In the first instance, the Austrian authorities make reference to an alarming rise in the consumption of chewing tobacco in Austria. Data received from the Federal Ministry of Finance discloses that between 2009 and 2015, sales of chewing tobacco has risen fifty fold, from 200 kg to 10,000 kg. In contrast to these trends, the consumption of other smokeless tobacco products (snuff) dropped significantly in the same period.
- (13) According to the Austrian authorities the rise in the consumption coincides with the entry into force in Austria of more stringent rules on smoke-free environments, aimed at protecting non-smokers. The Austrian authorities express concern that the anticipated extension of such measures is liable to lead to a further increase in the consumption of chewing tobacco in Austria.
- (14) More specifically, Austria explains that in 2008, the Tobacco Act was amended to extend a ban on smoking in public places to the food services industry (*BGBI. I No 120/2008*). In 2015, a further amendment to the Tobacco Act provided for the extension of the ban to the use of electronic cigarettes, herbal cigarettes and water pipes. The same revision of the Tobacco Act also extended the smoking ban to numerous other environments (such as open areas at schools, rooms where activities are carried out in the presence of children and young people and on public and private transport) (*BGBI. I No 101/2015*). The Austrian legislation provides for a gradual extension of the measures restricting smoking, some of which have taken effect in May 2016, others of which are to enter into force as of May 2018, as specified by Austrian authorities.
- (15) The Austrian authorities submit that the link observed between the imposition of smoking restrictions and the uptake of smokeless tobacco products is corroborated by international research in this area. Moreover, the Austrian authorities have identified targeted efforts on the part of some tobacco manufacturers to promote consumption of smokeless tobacco products as an alternative to traditional smoking where smoke-free environment legislation is in place.
- (16) In addition the Austrian authorities express concerns of a serious rise in the consumption of smokeless tobacco products by young people in Austria, as emerged from reports submitted by addiction prevention bodies. Reports received by Austrian school authorities and sports physicians have disclosed a particular increase in the consumption of smokeless tobacco products and illegal oral tobacco in schools with a specific sports profile, particularly in western Austria. This rise is attributed to an assumption amongst these students that smokeless products would enhance performance and would enable them to consume nicotine without affecting their pulmonary functions. Moreover Austria stresses that chewing tobacco is perceived by young sportsperson as a less harmful product.
- (17) The Austrian authorities also highlight the difficulties in ensuring the enforcement of the prohibition of oral tobacco with reference to products improperly presented as chewing tobacco. The Austrian authorities note that, since 2013, they have observed the appearance on the Austrian market, in particular online, of products often wrongfully presented as chewing tobacco, which, based on their characteristics and mode of use, should be considered as oral tobacco. The ways in which these "oral tobacco-like products" are presented, especially the varying dosage forms (loose, pressed, pre-portioned with or without bags, in rolls, bars, tins, in cubes, etc.), may

result in a circumvention of the ban of oral tobacco and, as a consequence, in the presence of illegal products on the Austrian market.

- (18) The Austrian authorities underline that initiatives adopted by Austria in the field of tobacco control arise in a context where Austria suffers from a particularly high level of young smokers. Austria refers to an OECD report according to which, in Austria, 29% of young females and 25% of young males, smoke. This makes Austria the worst ranked country in the OECD as regards young smokers. Moreover, the Austrian authorities refer to studies which suggest that since 2007, Austria is considered to have had the weakest regulation of tobacco consumption in the EU. Austria explains that the recent and current legislative packages represent a concerted attempt to implement a stronger national health policy aimed at reducing the consumption of tobacco products. The Austrian authorities consider that technical regulations reducing the harmfulness of these products, or stricter labelling requirements and conditions for sale to minors would not have the same preventive effect in terms of health protection as a ban on the placing on the market of chewing tobacco.

2.3 Evaluation

- (19) At the outset, it is recalled that in Case C-547/14 *Philip Morris brands and others*, the Court of Justice has held that Directive 2014/40/EU is not intended to interfere with the policies of the Member States concerning the lawfulness of tobacco products as such. The Court clarified that Article 24(3) of Directive 2014/40/EU concerns an aspect of tobacco regulation that is not covered by the harmonisation measures in the directive⁶. The Court ruled that Article 24(3) "seeks to delineate the scope of the directive by clarifying that tobacco and related products which comply with the requirements laid down by the directive may move freely on the internal market, provided that those products belong to a category of tobacco products or related products which is, as such, lawful in the Member State in which they are marketed"⁷.
- (20) In accordance with this case-law, the notified measure that provides for the prohibition on the placing on the market of chewing tobacco, concerns an aspect not harmonised by Directive 2014/40/EU.
- (21) Nevertheless, pursuant to Article 24(3) of Directive 2014/40/EU, the Commission is required to verify whether or not the proposed national measures are justified, necessary and proportionate to their aim and whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States.
- (22) In this regard, the Commission observes that it is apparent from the notification that the measure at issue is proposed to be adopted on public health grounds. In its notification, Austria details the health risks associated with the consumption of chewing tobacco. The Austrian authorities further underline that the proposed measure forms part of an overarching policy initiative that is intended to strengthen the tobacco control legislation and to ensure that there exists in Austria a high level of health protection in the field of tobacco control.
- (23) It is also apparent from the notification that the national provisions are based on grounds that relate to the specific situation of Austria. Information and data submitted

⁶ Judgement in *Philip Morris Brands and others*, C-547/14, ECLI:EU:C:2016:325, paragraph 90.

⁷ Judgement in *Philip Morris Brands and others*, C-547/14, ECLI:EU:C:2016:325, paragraph 91.

by the Austrian authorities in support of the notified measure disclose an acute increase in the consumption of chewing tobacco in that Member State, particularly in respect of young persons. Moreover, such an increase is observed to have coincided with the development and implementation in Austria of an increasingly strict national policy of creating smoke-free environments. In this regard, as Austria maintains, it cannot be excluded that the entry into force of additional measures extending the scope of smoke-free environments legislation could result in a further increase in the consumption of chewing tobacco in that Member State. Furthermore, information received from the Austrian authorities disclose the existence of a wide product range placed on the Austrian market and that Austria has been subject to attempts at circumventing the ban of oral tobacco, by presenting that product for sale as chewing tobacco.

- (24) In addition, the proposed measure prohibiting the placing on the market of chewing tobacco may be considered necessary as regards the objective pursued and could not have been attained by a less restrictive alternative measure. In this context, the Commission notes that as regards the objective to prevent the formation of addiction and dependence on smokeless tobacco products, it is recalled that nicotine is a particularly addictive toxic substance. Any measure that is less than a preventive measure, such as the proposed prohibition which operates at a stage before dependence on such products is established, would be less effective since it is manifestly much more difficult to diminish or cease addiction after dependence has been formed. The addictive nature of tobacco products underscores the need and entitlement of Member States to take timely preventive action, particularly in a context where, having regard to available consumption data, the risk for future widespread use and dependence is particularly acute.
- (25) The Commission considers that, on the basis of the considerations set out above and taking into account the high level of protection of human health that Directive 2014/40/EU is intended to achieve, the proposed prohibition on the placing on the market of chewing tobacco may be regarded as justified and proportionate.
- (26) Moreover on the basis of the information supplied by the Austrian authorities, the Commission considers that there is no reason to conclude that the prohibition of chewing tobacco would constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Given that the scope of the ban applies to domestic and imported products alike, there are no grounds to consider that the measure would be of particular benefit to national producers.

III. CONCLUSION

- (27) On the basis of the considerations set out above, having regard to the information and data submitted by the Austrian authorities and taking account of the objective of ensuring a high level of public health that Directive 2014/40/EU is intended to achieve, the national prohibition on the placing on the market of chewing tobacco may be regarded as complying with the requirements laid down in Article 24(3) of the Directive.
- (28) It is therefore appropriate for national measures prohibiting the placing on the market of chewing tobacco to be approved,

HAS ADOPTED THIS DECISION:

Article 1

The national provisions prohibiting the placing on the market of chewing tobacco notified by the Republic of Austria in accordance with Article 24(3) of Directive 2014/40/EU, are approved.

Article 2

This Decision is addressed to the Republic of Austria.

Done at Brussels, 1.12.2016

For the Commission
Vytenis ANDRIUKAITIS
Member of the Commission

