

**BAT**

**Interpretation of Directive 2014/40/EU**

**Article 7(14) time extension and menthol cigarettes**

**1. INTRODUCTION**

- 1.1 We have been asked to provide advice regarding the application of the derogation contained in Article 7(14) of Directive 2014/40/EU (the "**Directive**") to menthol cigarettes. Specifically, we have been asked whether the exemption is only potentially applicable if the menthol is in the tobacco of a cigarette or whether the exemption is also in principle applicable to cigarettes with menthol in components other than tobacco (such as the paper, the filter or a capsule).
- 1.2 Section 2 of this note provides legal background and Section 3 considers the application of the extended time limit of 20 May 2020 in Article 7(14) of the Directive to menthol cigarettes. Conclusions are set out in Section 4.
- 1.3 Our main conclusions are that the extended time limit of Article 7(14) of the Directive is applicable to cigarettes with menthol in components as well as cigarettes with menthol in tobacco (to the extent that they have a characterising flavour). Further, when calculating the 3% sales volume requirement for application of the time extension, all menthol cigarettes should be considered collectively. The conclusions flow from the text of the Directive and the purpose of the derogation as well as the associated legislative history and related documents.

**2. LEGAL BACKGROUND**

- 2.1 Article 7(1) of the Directive requires Member States to prohibit the placing on the market of tobacco products with a characterising flavour.<sup>1</sup>
- 2.2 Article 2(4) of the Directive defines tobacco products as:  
*"products that can be consumed and consist, even partly, of tobacco, whether genetically modified or not"*
- 2.3 Characterising flavour is defined by Article 2(25) of the Directive as follows:  
*"'characterising flavour' means a clearly noticeable smell or taste other than one of tobacco, resulting from an additive or a combination of additives, including, but not limited to, fruit, spice, herbs, alcohol, candy, menthol or vanilla, which is noticeable before or during the consumption of the tobacco product."*
- 2.4 Article 7(7) of the Directive stipulates that Member States shall prohibit the placing on the market of tobacco products containing flavourings in any of their components such as

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<sup>1</sup> Article 7(1) clarifies, however, that "*Member States shall not prohibit the use of additives which are essential for the manufacture of tobacco products, for example sugar to replace sugar that is lost during the curing process, provided those additives do not result in a product with a characterising flavour and do not increase to a significant or measurable degree the addictiveness, toxicity or the CMR properties of the tobacco product.*"

filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity.<sup>2</sup>

- 2.5 Article 7(14) of the Directive exempts certain tobacco products with a characterising flavour from the provisions of Article 7. Specifically, it provides as follows:

*"In the case of tobacco products with a characterising flavour whose Union-wide sales volume represent 3% or more in a particular product category, the provisions of this Article shall apply from 20 May 2020."*

- 2.6 Recital (16) provides the following justification for the Article 7(14) exemption:

*"... products with characterising flavour with a higher sales volume should be phased out over an extended time period to allow consumers adequate time to switch to other products".*

- 2.7 Pursuant to Article 7(12) of the Directive, tobacco products other than cigarettes and roll-your-own tobacco are exempted from the prohibitions laid down in paragraphs 1 to 7 unless the Commission establishes in a report that there is a substantial change in circumstances. Article 7(15) of the Directive stipulates that Article 7 does not apply to tobacco for oral use.

### 3. **DISCUSSION**

- 3.1 It has been asked whether the application of the time extension in Article 7(14) of the Directive is only potentially applicable to cigarettes with menthol in the tobacco or whether it is also applicable to cigarettes with menthol in components, such as the paper or a capsule.

#### **Application of the time extension to products covered by Article 7(7)**

- 3.2 As a preliminary matter, it is noted that cigarettes with menthol in components that are covered by Article 7(7) cannot be excluded from the Article 7(14) time extension for that reason alone. This follows from the text of Article 7(14) which makes clear that it is an exemption for all obligations of Article 7.<sup>3</sup> Further, such a distinction could lead to unjustified discrimination.<sup>4</sup> It is not apparent that there would be any objective reason for distinguishing between a cigarette with menthol in the tobacco and, for example, a cigarette with menthol in the paper or a capsule. Such a distinction could also impact fundamental rights. It is well-established that EU legislation should be interpreted to avoid violations of the Treaty and general principles of EU law.<sup>5</sup>

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<sup>2</sup> Article 7(7) also states that filters, papers and capsules shall not contain tobacco or nicotine.

<sup>3</sup> This is to be contrasted with the wording of other derogatory provisions in the Directive. For example, Article 15(13) provides that "paragraphs 1 to 10" shall apply to cigarettes and roll-your own ("**RYO**") tobacco from 20 May 2019 and to tobacco products other than cigarettes and RYO tobacco from 20 May 2024. A further example is Article 16(3), which provides that "paragraph 1" shall apply to cigarettes and RYO tobacco from 20 May 2019 and to tobacco products other than cigarettes and RYO tobacco from 20 May 2024. In both cases the language is similar in the French and German versions..

<sup>4</sup> The principle of equal treatment, a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified.

<sup>5</sup> See, e.g., Case C-314/89 *Siegfried Rauh v Hauptzollamt Nürnberg-Fürth* [1991] ECR I-1647, para. 17; and Case C-98/91 *A. A. Herbrink v Minister van Landbouw* [1994] ECR I-00223, para. 9.

### **Tobacco products with a characterising flavour**

- 3.3 In order for the Article 7(14) time extension to apply to either cigarettes with menthol in the tobacco and/or cigarettes with menthol in components, the menthol cigarettes must in the first instance be "*tobacco products with a characterising flavour*" within the meaning of Article 7(14). In accordance with Article 2(4) of the Directive, both categories obviously fall within the definition of "*tobacco products*", as they are products that can be consumed and consist, even partly, of tobacco. Further, they are plainly products having a "*characterising flavour*" within the meaning of Article 2(25) of the Directive. Thus, the definition of "*characterising flavour*" expressly refers to menthol.

### **The 3% sales volume requirement**

- 3.4 Although both cigarettes with menthol in the tobacco and cigarettes with menthol in components are capable of qualifying as tobacco products with a characterising flavour, they will only qualify for the Article 7(14) derogation if their "*Union-wide sales volumes represent 3% or more in a particular product category*".
- 3.5 A key question is whether, for the purpose of assessing the 3% volume required for application of the Article 7(14) time extension, reference must be made to menthol cigarettes as a whole or whether the 3% volume criterion must be applied separately to (i) cigarettes with menthol in the tobacco; and (ii) cigarettes with menthol in components. In other words, the question is whether each type of menthol cigarette must represent 3% or more of EU-wide sales of cigarettes to qualify for the time extension or whether it is sufficient that menthol cigarettes as a whole represent 3% or more of EU-wide sales.
- 3.6 In our view, there is no justification for separate consideration of different types of menthol cigarettes for the purpose of the 3% volume requirement:

- 3.6.1 First, separate consideration of menthol cigarettes types with a characterising flavour is inconsistent with the text of the time extension. Article 7(14) refers to tobacco products with "a characterising flavour" (emphasis added) whose EU-wide sales volume represents 3% or more of "a particular product category" (emphasis added).

The particular product category in relation to menthol cigarettes is obviously cigarettes (as opposed to, for example, cigars or pipe tobacco). The relevant characterising flavour is menthol. Nothing in Article 7(14) indicates that there should be any further division among menthol cigarettes for the purpose of calculating the 3% volume requirement.

Moreover, distinguishing between cigarettes with menthol in the tobacco and cigarettes with menthol in components would not obviously be a straightforward assessment – for example, in relation to cigarettes which may contain menthol, giving rise to a characterising flavour, in both the tobacco and in a component. This factor therefore also supports a reading of Article 7(14) which considers all menthol cigarettes with a characterising flavour together for the purposes of the 3% volume requirement for application of the exemption.

- 3.6.2 Second, legislative history and related documents do not indicate that (i) cigarettes with menthol in the tobacco and (ii) cigarettes with menthol in components should be considered separately for the purpose of the application of the time extension. Thus, for example, in a press release dated 14 March 2014, the Council announced in respect of the Directive:

*"For those tobacco products with characterizing flavours whose EU wide sales in their product category represent more than 3% (e.g. mentholated cigarettes) the ban will apply only six years after the entry into force of the Directive."<sup>6</sup>*

The statement above clearly shows that the Article 7(14) derogation was conceived with menthol cigarettes in mind and it further indicates that the 3% volume requirement was meant to apply to menthol cigarettes with a characterising flavour generally rather than to specific sub-types of menthol cigarettes.

This latter conclusion is also reinforced by the discussion of menthol cigarettes in the Commission's Impact Assessment which supported adoption of the Directive and informed the formulation of the Article 7(14) derogation. The Impact Assessment described menthol cigarettes as accounting for 4% of the EU market without any distinction as to different types of menthol cigarettes.<sup>7</sup> Further, the source of the Commission's data also considered menthol cigarettes as one category for the purpose of calculating market shares with no indication that cigarettes with menthol in their components are excluded from the statistics.<sup>8</sup>

- 3.6.3 Third, reference to menthol cigarettes as a whole is consistent with the objective of the exemption which, according to recital (16), is to allow smokers adequate time to switch to other products. From this perspective, there is no reason to distinguish between cigarettes with menthol in the tobacco and, for example, cigarettes with menthol in the paper or in a capsule.
- 3.6.4 Fourth, the Opinion of Advocate General Kokott in case C-547/14 supports the notion that all menthol cigarettes should be considered as a single product group for the purpose of Article 7.14. When addressing the issue of whether Article 114 TFEU provides an appropriate legal basis for the Union-wide prohibition on menthol, the Advocate General disagrees with Poland's assertion that there are no divergences between national rules in respect of menthol cigarettes, noting that at the time of the adoption of the Directive there was a prohibition of certain menthol capsules "...in at least two Member States – Belgium and Germany – (...) with the result that it was not permitted in any case to place this specific variant of menthol cigarettes on the market..."<sup>9</sup> The central point of this aspect of the Advocate General's reasoning is that the Directive can regulate *all* menthol cigarettes as an internal market matter because two Member States regulate menthol *capsule* cigarettes. This inevitably implies that all menthol cigarettes are part of the same group of menthol cigarettes. Otherwise the Advocate General's reasoning would lead to the conclusion that the Directive can regulate menthol capsule cigarettes but not other types of menthol cigarettes.

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<sup>6</sup> Council press release, *Council adopts revised EU tobacco directive* (14 March 2014), doc 7763/14, page 1.

<sup>7</sup> See page 99 of the Impact Assessment: "[...] It is estimated, under option 2, that a limited part of the market would be affected by the change (including the menthol FMC counting for 4% of the market). [...] Menthol-flavoured FMC are more common than other FMC with characterising flavours. They account for 4% of all FMC sales over the past ten years ranging from 25% in Finland and 0,1% in Greece. [FN 363: Matrix 2012. Based on Euromonitor (volume) data for 24 Member States (no data available for Cyprus, Malta and Luxembourg)", available at [http://ec.europa.eu/health/tobacco/docs/com\\_2012\\_788\\_ia\\_en.pdf](http://ec.europa.eu/health/tobacco/docs/com_2012_788_ia_en.pdf).

<sup>8</sup> Matrix Insight Report, *Economic analysis of the EU market of tobacco, nicotine and related products* (20 September 2013), page 32, available at

[http://ec.europa.eu/health/tobacco/docs/tobacco\\_matrix\\_report\\_eu\\_market\\_en.pdf](http://ec.europa.eu/health/tobacco/docs/tobacco_matrix_report_eu_market_en.pdf).

<sup>9</sup> Opinion of Advocate General Kokott delivered on 23 December 2015, Case C-547/14, *Philip Morris Brands SARL and Others*, para. 70.

4. **CONCLUSION**

- 4.1 Article 7(14) of the Directive is applicable to cigarettes with menthol in components as well as cigarettes with menthol in tobacco to the extent that they have a characterising flavour. Further, when calculating the 3% sales volume requirement, all menthol cigarettes should be considered collectively.

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