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*Committee on Legal Affairs  
The Chair*

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24.1.2014

Mr Matthias Grootte  
Chair  
Committee on the Environment, Public Health and Food Safety  
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Directive of the European Parliament and of the Council 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 (COM(2012)0788 – C7-0420/2012 – 2012/0366(COD))

Dear Mr Chair,

By letter of 18 December 2013 you asked the Committee on Legal Affairs, pursuant to Rule 37(2) of the Rules of Procedure, to consider the appropriateness of the legal basis of the draft act, including a proposed change of the single legal basis to a multiple legal basis.

### **I - Background**

The legal basis originally proposed by the Commission was Article 114(1) of the Treaty on the Functioning of the European Union (TFEU), which is the general legal basis in the Treaty concerning measures for the harmonisation of Member States' legislation in the internal market.<sup>1</sup> Plenary confirmed the mandate based on Article 114(1) TFEU on 8 October 2013.

In the context of negotiations for a compromise in first reading, the Commission suggested

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<sup>1</sup> See legal opinion SJ-0151/13 from the Legal Service of 22 March 2013. JURI also briefly touched upon the legal basis of the proposal in the short justification in its opinion to ENVI of 25 June 2013 in the context of this legislative procedure. JURI on 10 July 2013 also delivered an opinion under Rule 37a on the delegation of powers in the legislative proposal.

that Article 53(1) TFEU, on the right of establishment concerning the taking-up and pursuit of activities as self-employed persons, and Article 62 TFEU, on the freedom to provide services, should be added to the legal basis.

The agreed text includes a completely new Article 18a which did not appear in the Commission proposal and which sets out provisions on electronic cigarettes, notably a prohibition on advertising and sponsorship thereof. The relevant provisions correspond to provisions in the Tobacco Advertising Directive<sup>1</sup> and the Audiovisual Media Services Directive<sup>2</sup>, the legal basis of both of which include Articles 53 and 62 TFEU.

## **II - Relevant Treaty Articles**

The following Article of the TFEU was presented as the legal basis in the Commission's original proposal (emphasis added):

### ***Article 114*** (ex Article 95 TEC)

*1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

[...]

The following Articles of the TFEU were added to the legal basis as a result of the proposed compromise in first reading (emphasis added):

### ***Article 53*** (ex Article 47 TEC)

*1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.*

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<sup>1</sup> Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16).

<sup>2</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ L 95, 15.4.2010, p. 1).

[...]

**Article 62**  
(ex Article 55 TEC)

*The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter [which has the heading "Services"].*

**III - Case-law on legal basis**

It is settled case law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure"<sup>1</sup>. The choice of an incorrect legal basis may therefore justify the annulment of the act in question.

In this case, it therefore has to be established whether the proposal either:

1. pursues a twofold purpose or has a twofold component, and one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental; or
2. simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other.

According to the case law of the Court of Justice, in the first case the act must be based on a single legal basis, namely that required by the main or predominant purpose or component, and in the second case the act will have to be founded on the various corresponding legal bases.<sup>2</sup>

**IV. Aim and content of the proposed regulation**

The aim of the proposal, according to its Recital 1, is to reflect scientific, market and international developments in rules at Union level concerning tobacco products by repealing the Tobacco Products Directive<sup>3</sup> and replacing it by a new Directive. According to Recital 4, there are still substantial differences between the Member States' laws, regulations and administrative provisions in this area which impede the functioning of the internal market and due to these developments the discrepancies are expected to increase. This applies also to electronic cigarettes and refill containers, herbal products for smoking, ingredients and emissions, certain aspects of labelling and packaging and the cross-border distance sale of tobacco products.

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<sup>1</sup> Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission v. Parliament and Council* [2009] ECR I-7585.

<sup>2</sup> See the Case C-411/06, cited above, paras 46-47.

<sup>3</sup> 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).

The agreed text therefore includes provisions aiming at approximating the rules relating to the manufacture, presentation and sale of tobacco and related products.

The compromise text also includes the following new Recital 32h and Article 18a:

*(32h) Disparities existing between national legislations and practices on advertising and sponsorship impede the free movement of goods and the freedom to provide services and create an appreciable risk of distortions to competition. Without further action at Union level, the existing disparities are likely to increase in the coming years, considering also the growing market for electronic cigarettes and refill containers. Therefore, it is necessary to approximate the national rules on advertising and sponsoring, taking as a base a high level of health protection. Electronic cigarettes can develop into a gateway to nicotine addiction and ultimately traditional tobacco consumption, as they mimic and normalize the action of smoking. For this reason, it is appropriate to adopt a restrictive approach to advertising of electronic cigarettes and refill containers.*

**Article 18a**  
**Electronic cigarettes**

*1. The Member States shall ensure that electronic cigarettes and refill containers are only placed on the market if they comply with the relevant provisions of this Directive and with all other relevant Union legislation.*

*[...]*

*5. Member States shall ensure that:*

- a) commercial communications with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers are prohibited in information society services as defined in Article 1(2) of Directive 98/48/EC, in the press and other printed publications, with the exception of publications that are intended exclusively for professionals in the trade of the products and for publications which are printed and published in third countries, where those publications are not principally intended for the European Union market;*
- b) commercial communications with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers are prohibited in the radio;*
- c) any form of public or private contribution to radio programmes with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers is prohibited;*
- d) any form of public or private contribution to any event, activity or individual with the aim or direct or indirect effect of promoting electronic cigarettes and refill containers and involving or taking place in several Member States or otherwise having cross-border effects is prohibited;*

- e) *audiovisual commercial communications falling under Directive 2010/13/EU are prohibited for electronic cigarettes and refill containers;*
- f) *cross-border distance sales of electronic cigarettes and refill containers are regulated in accordance with Article 16.*

[...]

## **V - Determination of the appropriate legal basis**

It should first be noted that the legislative act which is to be repealed and replaced by the proposal was based on Article 114 TFEU. The Committee on Legal Affairs expressed doubts as to whether Article 114 TFEU constitutes the correct legal basis for the proposal in its opinion of 25 June 2013 on the proposal. The addition of Articles 53(1) and 62 TFEU and the changes agreed during the trilogue negotiations do however not address these concerns.

The question to be determined is therefore whether the addition of Articles 53(1) and 62 TFEU is proper in that the proposal would simultaneously pursue the objectives of ensuring the functioning of the internal market, the freedom of establishment and the freedom to provide services and therefore would include components which are indissociably linked, without one being secondary and indirect in relation to the other.

As pointed out by the Legal Service, while the regulation of advertising and sponsorship of tobacco and tobacco-related products might be considered as merely incidental to the main purpose of facilitating the functioning of the internal market for such products, provisions as regards tobacco products are already laid down in the Tobacco Advertising Directive and the Audiovisual Media Services Directive, which would suggest that for the internal market to properly function provisions on advertising and sponsorship are as needed as those harmonising the features and marketing conditions of these products. These two components are therefore indissociably linked, without one being secondary and indirect in relation to the other. This view is reinforced by the fact that the provisions on electronic cigarettes in the agreed text closely mirror the corresponding provisions of the two directives.

Therefore, since the legal basis for those two directives include Articles 53(1) and 62 TFEU, they should be added to Article 114(1) TFEU to form the legal basis for the agreed text.

## **VI - Conclusion and recommendation**

With regard to Article 114(1) TFEU the Committee on Legal Affairs refers to its opinion of 25 June 2013.

In light of the foregoing analysis Articles 53(1) and 62 TFEU should be added to the legal basis for the agreed text.

The Legal Affairs Committee considered the above question at its meeting of 21 January 2014. At this meeting, it accordingly decided, unanimously<sup>1</sup>, to recommend that the

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<sup>1</sup> The following were present for the final vote: Raffaele Baldassarre (Vic-Chair), Sebastian Valentin Bodu

appropriate legal basis for the proposal for a Directive of the European Parliament and of the Council 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 protective measures against pests of plants should be Articles 114(1), 53(1) and 62 TFEU.

Yours sincerely,

Klaus-Heiner Lehne

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(Vice-Chair), Françoise Castex (Vice-Chair), Christian Engström, Marielle Gallo, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Sajjad Karim, Klaus-Heiner Lehne Chair, Eva Lichtenberger, Antonio Masip Hidalgo, Alajos Mészáros, Angelika Niebler, Bernhard Rapkay, Evelyn Regner (Vice-Chair), Francesco Enrico Speroni, Rebecca Taylor, Alexandra Thein, Axel Voss, Cecilia Wikström, Tadeusz Zwiefka