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POSITION PAPER REGARDING 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) 188 FINAL -

The undersigned associations welcome the European Commission's Draft Directive and the goal defined therein to ensure a high level of consumer and health protection. Brand-oriented industries in Europe regard the protection of health as a primary responsibility.

A crucial question is how best to achieve this common goal with the greatest positive effects for consumers and citizens while minimising the risk of unintended consequences.

The Draft Directive contains two aspects which the undersigned believe require improvement for the effect of the regulation to be as universally positive and comprehensive as possible.

These aspects are the provisions that relate to the size of the on-pack warnings and the specification of the design of the packaging. Art. 9 paragraph 1 (c) provides that health-related on-pack warnings on the front and rear of the pack must be a minimum size of 75% of the surface area. At the same time, the only admissible outer package shape is as specified in Art. 13 paragraph 1.

These provisions will prohibit the inclusion of packaging designs and three-dimensional elements which currently exist or may be developed in the future. Moreover, the potential to represent distinguishing name and figurative marks would be limited significantly to the extent that they would hardly be recognisable to the consumer at point of sale.

Consequently consumers will lose the protection provided by branded products.

- Brands enable consumers to identify readily products they can trust. They give consumers guidance and information, allowing them to make informed choices and to select their desired product from a large range of alternatives. It is not in the interests of health or consumer protection if the consumer buys the wrong product due to insufficient distinguishing features. This is true whatever the product category;
- The distinguishing features of brands also save retailers time when looking for the desired product and support accuracy of sale. If retailing the product is made more difficult, unreliable and/or

prolonged by products that are harder to distinguish, confidence and trust in the legitimate retailer (which enforces age controls) is likely to fall;

- Brands have the particularly important function of assuring quality to the consumer. This means that in the case of branded products, the consumer may come to rely on their quality, signalled by the brand. By making it harder to distinguish between products and brands, quality may become a less important factor in the buying decision (after all, products will all look essentially the same). Reducing the role of quality in this way is likely to act against the policy objective;
- Brands have a strong incentive to invest in innovation as this boosts their reputational asset. The policy as proposed may however stall investment in innovation as any new performance could not be communicated to consumers. Where distinction is absent, such high risk investments are futile;
- Brand producers are concerned not only with the quality of their products but the way in which they are produced (such as social or ecological conduct) as this matters to their consumers. Brands therefore empower consumers to influence producers in this way, by rewarding or penalising them according to their actions. These forces will be weakened if consumers are less able to tell reputable products apart from no-name products which have made no reputational investment;
- Related to this is the leading role brands play in environmental protection and sustainable production, including the adoption of new production methods, new product formulations and new corporate procedures. In this way brand owners meet their responsibility proactively to supply consumers in a way that reflects the demands of European civil society. The incentive to do so however is reduced if those products that make such investments are largely indistinguishable from those that do not;
- The reduced ability for products to differentiate themselves, inherent in the proposed policy, is likely to have other detrimental effects which must be taken into account for policy to be optimum. Competition in the marketplace is likely to undergo a significant change, shifting from competition on the basis of quality, innovation, reputation and price to price alone. This is because products will look essentially the same. Stronger price competition, as well as being a force for further reductions in investment in quality, innovation and reputation, may increase product usage, contrary to the policy goal. Were Member States to increase duty to compensate, the sector would become even more attractive to the counterfeiter.
- The nature of competition is likely to disadvantage new market entrants, potentially small and medium sized enterprises. This is because standardisation of packaging increases barriers to entry. Any new entrant with a new proposition for consumers would be unable to differentiate their offer from others and convey their unique values to the marketplace;
- A crucial consideration is to adopt a policy that does not fuel the already significant trade in counterfeit products. Currently, the wide range of differentiated packaging designs, the sophisticated printing machinery employed, the nature of the materials and the frequency with which packaging designs change all help to discourage counterfeiting. These obstacles to counterfeiting would be weaker or no longer exist were packaging largely standardised. Increased stan-

standardisation will reduce the costs of counterfeiting, making it more attractive, while a market in which all products look essentially similar may be one in which consumers find it harder to spot fakes. Counterfeit products tend to use the black market, avoiding regulated retailers, and therefore increase the access of underage people to tobacco. They also expose all consumers to risk from potentially unsafe products from unregulated sources. Such effects are contrary to the health goals of the policy.

These are important considerations relating to consumer behaviour and the working of the market that must be taken into account if the Directive is to balance the various forces at work and reach a solution which meets the policy objectives without stimulating effects that are likely to operate in the opposite direction.

The undersigned associations believe that it is important to take account of the positive effects of brands for consumers, innovation, competition, the economy and enterprises when defining any kind of regulatory intervention, irrespective of the product market concerned. This is as important in areas involving health as in other areas in order to avoid unintended consequences.

Therefore, the undersigned associations propose to amend the Draft Directive COM (2012) 188 final as shown below:

Proposal for Amendment 1

Art. 9 paragraph 1 (c)

Text proposed by the Commission

1 (c) cover 75 % of the external area of both the front and back surface of the unit packet and any outside packaging;

Amendment

1(c) cover 30% of the external area of the front and 40% of the back surface of the packet and outside packaging

Justification

The proposal of the undersigned associations will provide prominent visibility of the health warning and retain space for communication of the brand. The warning will also cover 50% of the lateral sides of the unit packets. Increasing the size of the warning further is unlikely to increase the impact of the warning sufficient to offset the potential damaging risks to consumers.

Proposal for Amendment 2

Art 13

Text proposed by the Commission

Amendment

1. A unit packet of cigarettes shall have a cuboid shape. A unit packet of roll-your-own tobacco shall have the form of a pouch, i.e. a rectangular pocket with a flap that covers the opening. The flap of the pouch shall cover at least 70% of the front of the packet. A unit packet of cigarettes shall include at least 20 cigarettes. A unit packet of roll-your-own tobacco shall contain tobacco weighing at least 40 g.

Deleted

2. A cigarette packet can be of carton or soft material and shall not contain an opening that can be re-closed or re-sealed after the opening is first opened, other than the fliptop lid. The flip-top lid of a cigarette packet shall be hinged only at the back of the packet.

Justification

The proposal of the undersigned associations will facilitate the differentiation and recognition of the product for the benefit of the consumers, innovation and competition while providing an obstacle to counterfeiting. Removing the potential for a consumer to recognize a product by the design of its packaging is likely to present adverse consequences for consumers.

SIGNED BY THE PARTICIPATING ASSOCIATIONS

British Brands Group, London

BGA, Budapest

Centromarca, Lisbon

CZECH ASSOCIATION FOR BRANDED PRODUCTS (CSZV), Prague

Markenverband e.V., Berlin

Österreichischer Verband der Markenartikelindustrie (MAV), Vienna

Slovak Association for Branded Goods (SZZV), Bratislava

Short description of the participating associations:

The **British Brands Group** provides the voice for brands in the UK, representing brand manufacturers that range in size and supply a variety of branded goods in a wide range of product categories. Its mission is to build in Britain the optimum climate for brands to deliver choice and value to consumers, through constant innovation and fair competition. The British Brands Group is a registered interest representative at the EU Commission (No. 91005492340-75).

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BGA Hungary is the prime forum of the FMCG businesses in Hungary, currently representing 60 international and local brand manufacturers covering 90% of the market. It is the authoritative and collective voice of the brands industry whenever it comes to brands and branding and how they contribute to economy and society. BGA Hungary seeks to maintain a continuous, open and constructive dialogue with policy makers, retailers, consumers, and media on various regulatory, commercial, and social issues.

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Centromarca - PORTUGUESE ASSOCIATION OF COMPANIES HOLDING BRANDED PRODUCTS - was founded in June 1994 and currently gathers 56 members who hold more than 800 brands and has an annual turnover in the domestic market of around € 6 billion. Its missions relies on the promotion and the defense of trademarks as a means of differentiation and a guarantee of quality and innovation for the consumer, a factor of competitiveness, progress and wealth creation for the economy and an indispensable tool for promoting progress for the society as a whole.

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CZECH ASSOCIATION FOR BRANDED PRODUCTS (CSZV) is an interest group of legal entities founded in 1993 for protection and support of the common interests of manufacturers, distributors and importers of branded products in areas affecting intellectual property, production, marketing, distribution and sale of branded products in the Czech Republic. Its members are primarily from the branded FMCG segment. The total market share of CSZV members in many categories is close to 100%.

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MARKENVERBAND is the leading organisation representing the brands industry in Germany. It represents the interests at national and European level of currently around 400 member companies of all sizes and from various industries. It advocates a positive consumer climate, competition on the merits, empowers consumers, the protection of intellectual property and sustainable economic development. MARKENVERBAND is a registered interest representative at the EU Commission (No. 2157421414-31).

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Österreichischer Verband der Markenartikelindustrie (MAV) is the organisation representing the brand industry in Austria. It represents the interests of its members at national and European level of currently around 100 member companies of all sizes and from various industries, mainly in the fast moving consumer goods area. It advocates fair competition of all trade partners, legal compliance with national and international trade mark and competition laws, the protection of intellectual property and sustainable economic development. Österreichischer Markenartikelverband is a registered Austrian association (ZVR 235298037), based in Vienna.

www.mav.at

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The **Slovak Association for Branded Goods (SZZV)** is an interest group of legal entities founded in 1996 for protection and support of the common interests of manufacturers, distributors and importers of branded products in areas affecting intellectual property, production, marketing, distribution and sale of branded products in the Slovak Republic. Its members are primarily from the branded FMCG segment. The total market share of SZZV members in many categories is between 90-100%.

www.szzv.sk

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