Worldwide news and comment

NETHERLANDS: PLAIN PACKAGING DELAY FOLLOWS FAMILIAR PATTERN

In 2019, the Netherlands planned to introduce standard packaging from 1 July 2020. All cigarettes and roll-your-own tobacco products were to be packaged in an unattractive dark green-blue colour, and brand names were to be printed in uniform lettering only.

Notification of the legal amendment with which the Netherlands planned to introduce standard packaging for tobacco products was submitted to the European Commission on 1 October 2019. In accordance with EU law, the EU must be notified of any such measure, and other member states have a right to comment. If member states respond with a 'detailed opinion', then the standstill period is automatically extended by 3 months.

On 20 December 2019, Slovakia responded with a 'detailed opinion', thereby automatically extending the standstill period of the legislative process until 2 April 2020. On 13 March 2020, the Czech Republic also submitted a 'detailed opinion'. Romania also submitted a number of questions; however these have no effect on the standstill period.

As a result, the introduction of standard packaging has been delayed until 1 October 2020. This bears a striking resemblance to delays typically orchestrated by the tobacco industry. The TabakNee website, which monitors the tobacco lobby in the Netherlands, accessed the 'detailed opinions' and questions submitted by the Czech, Romanian and Slovakian governments. Despite Slovakia having no tobacco production of any significance, the arguments put forward by these three countries are the same highly misleading arguments that the tobacco industry regularly makes on the subject of standard packaging. Slovakia's response stated that "Standard packaging has not been proven to be an effective tool for limiting smoking" and "Although the Netherlands refers in the notification to the experience of other countries, it is easy to demonstrate that such claims are not supported by facts." Slovakia also provided a summary of research intended to prove that the introduction of standard packaging in Australia, France and the United Kingdom had no effect.

Slovakia's response referred to the 'Better Regulation Principles' of the Organisation for Economic Co-operation and Development (OECD), stating that existing legislation must first be evaluated before a country introduces new laws, and claimed that the draft Dutch legislation has not undertaken this. The response also stated that as a number of tobacco control measures had already been implemented in Holland and further legislation will be introduced, "It would be prudent to first evaluate the effectiveness of existing and approved future measures before introducing new measures." This is another argument frequently used by the tobacco industry.

Slovakia also contended that standard packaging is in breach of European regulations on proportionality and the free movement of goods. The United Kingdom, and EU member states including France, Ireland and Hungary, have already introduced standard packaging, and both the Netherlands and Slovenia are planning to do so. Slovakia argued that the implementation of this legislation is an infringement on the intellectual property rights of tobacco companies as they will be prevented from placing their logos and specific design elements on their products.

The Czech Republic's objections were less extensive and instead concentrated on the obstruction of the free movement of goods within the EU. The Czech Republic concluded that standard packaging is an infringement of intellectual property rights of cigarette manufacturers. Romania's arguments referred to intellectual property and attempted to amend the legislation. It proposed to increase the size of the required lettering of brand names because sellers would otherwise have difficulty in distinguishing brands.

All EU member states are signatories to the WHO's Framework Convention on Tobacco Control (WHO FCTC). All states are required to ensure that the development and implementation of tobacco control policies are not influenced by the tobacco industry. Despite this, the EU member states' objections which are influencing tobacco control in the Netherlands closely echo those of the tobacco industry, raising suspicions of infringement of the provisions of Article 5.3 of the FCTC. The Netherlands must immediately proceed with the introduction of standard packaging and prevent any further delays.

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BRAZIL: TOBACCO INDUSTRY INCREASES PRODUCTION DURING COVID-19 PANDEMIC

Brazil ratified the WHO Framework Convention on Tobacco Control (FCTC) in 2005, when there were around 200 000 families cultivating tobacco. Brazil is also the second largest global producer of tobacco leaves. To address FCTC requirements, the National Programme for Diversification in Tobacco-Growing Areas was established under the coordination of the Ministry of Agrarian Development. This programme focused on addressing WHO FCTC articles 17 and 18 to encourage the development of economically feasible alternatives to tobacco farming, and to protect the environment from tobacco cultivation and manufacture. The programme ended in 2016 when the Ministry of Agrarian Development ceased; however there are still an estimated 150 000 families involved in cultivating tobacco in Brazil.

In December 2019, tobacco farmers met with the tobacco industry to establish prices for the 2019/2020 tobacco crop in accordance with the Integration Law created by the former government in 2016. However this legislation was disregarded; farmers were not provided with guarantees or rights, and the amount paid for their harvest would rely only on the evaluation of the tobacco industry.

Since the COVID-19 pandemic was declared, countries around the world have adopted measures to prevent the spread of the virus. Representatives from China Tobacco were prevented from visiting Brazil to evaluate and grade tobacco, and other companies suspended the purchase of tobacco from tobacco growers. The tobacco industry also reduced activities related to cigarette production at the beginning.

Some Brazilian governmental jurisdictions have committed to safeguarding tobacco farmers, but the thousands of families who depend on this crop need viable alternatives to diversify their production and income. These farmers need technical assistance, comprehensive policy and access to opportunities to make diversification a reality.

In response to the COVID-19 pandemic, Brazilian authorities also introduced legislation to temporarily ban non-essential industrial activities. Brazil's second-largest cigarette manufacturer, Philip Morris Brazil (PMB), is located in Santa Cruz do Sul. The mayor of Santa Cruz do Sul, Telmo Kirst, signed a public calamity decree on 20 March 2020 to close all trades and industries that were

All articles written by Marita Hefler and John Baker unless otherwise attributed. Ideas and items for News Analysis should be sent to tcnewsanalysis@gmail.com

classified as non-essential. Only health organisations, food retailers, gas stations and banks were allowed to operate, and cigarette manufacturing was not included as an essential activity. Despite this, PMB increased cigarette production. According to news published in The Intercept Brasil, the company's Chief Operating Officer, Alejandro Okroglic, sent an email to all staff in mid-March 2020 stating that the production facility would remain open and that "Preserving the health of our public, without compromising the business, is one of our goals…". The email also included details about three new weekend shifts introduced to increase production. Preserving business rather than preserving the health of the public seems to be the most important goal, given that the two are irreconcilable.

Although legislation to ban non-essential industrial activities was in place, PMB announced in early April that it would resume purchasing tobacco from farmers to ensure "the financial preservation of producers in the region". PMB also stated that "it follows all the rules of the municipalities in which it operates".

Despite the entirely preventable morbidity and mortality caused by tobacco products in Brazil, PMB appears to be exempt from being classified as a non-essential industry. It is strongly recommended that government authorities act quickly to guarantee the legislation's compliance, strengthen the National Programme for Diversification in Tobacco-Growing Area and increase the opportunities to make diversification a reality for family farmers.

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Rachel Kitonyo Devotsu, one of the 2020 recipients of the WHO's World No Tobacco Day award.

KENYA: WORLD NO TOBACCO DAY AWARD HIGHLIGHTS ACHIEVEMENTS IN AFRICA

The WHO has recognised Rachel Kitonyo-Devotsu for her leadership in tobacco control with a World No Tobacco Day (WNTD) 2020 award. World No Tobacco Day (WNTD) is held on 31 May each year, and the awards are presented to individuals working in WHO's six regions for their accomplishments in tobacco control. Ms Kitonyo-Devotsu was previously recognised in 2009, when she received the Judy Wilkenfeld Award for International Tobacco Control Excellence from the Campaign for Tobacco-Free Kids.

Ms Kitonyo-Devotsu is an internationally respected lawyer and tobacco control advocate, and is the Regional Coordinator (Africa) for the McCabe Centre for Law & Cancer. The McCabe Centre is based in Australia, and has worked with more than 20 countries to develop and defend tobacco plain packaging laws. This award shines a spotlight on achievements in African countries, where - based in Nairobi, Kenya - Ms Kitonyo-Devotsu has advanced tobacco control laws and policies for more than 15 years. In 2004, she founded a grassroots lobby group called the Institute for Legislative Affairs (ILA) with like-minded lawyers and set to work on reviving tobacco control legislation that had stalled in previous years.

Ms Kitonyo-Devotsu has founded multiple tobacco control alliances in Kenya and across Africa. She helped draft and lobby for Kenya's *Tobacco Control Act 2007*. The odds were stacked against the passage of this landmark public health bill, with significant objections from the tobacco industry. However with the ILA's legal expertise to help draft the bill, and Ms Kitonyo-Devotsu leading a public awareness campaign, the Kenyan government tabled and passed one of Africa's most comprehensive tobacco control laws. For the past 6 years, Ms Kitonyo-Devotsu has trained more than 150 lawyers and policymakers from low- and middle-income countries on how to use law to prevent and control cancer and other chronic diseases through the McCabe Centre's International Legal Training Programme (ILTP).

Through the McCabe Centre's work as the FCTC Knowledge Hub on legal challenges, Ms Kitonyo-Devotsu provides technical support to ILTP alumni and to policymakers around the world. She supports lawyers and policymakers to advance tobacco control laws in their own countries. In 2019, one alumnus worked to successfully defend Kenyan tobacco control regulations in the Supreme Court, while another helped to defend a legal challenge brought by British American Tobacco to Uganda's *Tobacco Control Act* in that country's Constitutional Court. Rachel brings crucial African insight to the McCabe Centre's capacity-building work. In this work, she is also able to draw on lessons learnt from Australia's world-first plain packaging laws.

Africa's large young population presents its own unique challenges. Although overall smoking prevalence is declining, aggressive tobacco industry marketing means that young people continue to initiate smoking. Tackling youth smoking in Africa will require increased commitment to tobacco taxation, as tax rates on tobacco products are still relatively low. Though there is plenty of work to be done, Ms Kitonyo-Devotsu thinks the future of tobacco control in Africa is bright. "Smoking is addictive, but so too is tobacco control. It spurs me to continue with the fight."

Article 5.3 implementation guidelines of the WHO Framework Convention on Tobacco Control (FCTC) remind all parties to protect public health against the "commercial or other vested interests" of the tobacco industry. The guidelines recognise a "fundamental and irreconcilable" conflict of interest between tobacco industry ambitions and public health policy interests.

Compliance with and implementation of Article 5.3 have been, at best, partial, with many parties yet to take steps to fully protect against tobacco industry interference in the policymaking process. One of the well documented ways in which the tobacco industry insinuates itself into the public policymaking sphere is through Corporate Social Responsibility (CSR) (or

Sustainability) efforts. These voluntary efforts are widely recognised as just public relations and deemed to be yet another form of tobacco marketing. Many countries struggle to regulate CSR activities and the industry has taken full advantage of this legislative loophole.

It is predictable that during the COVID-19 pandemic the tobacco industry's "largesse" would rear its head once again. News reports, collated by public health stakeholders engaged in monitoring the tobacco industry during the pandemic, show a wide range of industry CSR activities. In addition to the donation of equipment to healthcare facilities, medical professionals, government officials, and charitable organisations, there have been reports of tobacco companies pursuing a vaccine and providing resources to support social distancing and handwashing. At the same time, the industry is lobbying against the exclusion of its products from the list of essential consumer goods available during the pandemic, as has happened in South Africa. In Sri Lanka and Kenya, health groups urged the government to follow the WHO in declaring tobacco as a non-essential product.

The extent to which the tobacco industry will use the pandemic to continue to market its electronic and heated tobacco products must be monitored. In February 2020 communications to investors from both BAT and PMI made it clear that expanding the market for combustible products and maintaining cigarette affordability would remain the priority post-pandemic. The industry's duplicity in supporting efforts to address a respiratory virus pandemic while promoting a product responsible for countless numbers of respiratory diseases and deaths has not gone unnoticed.

The industry continues to deploy moves from its classic playbook. While refusing these donations is difficult in most times, it would be impossible for many countries now when the pandemic is accompanied by devastating economic losses and there is a serious shortage of medical supplies. Nonetheless, once the pandemic calms, government functions that may have been suspended, including full implementation of the FCTC, will resume. Parties will need to assess if firewalls, as thin as they might have been, between tobacco industry and public health interests were breached, and to put in place urgent repairs. Parties will need to ensure that tobacco industry donations do not translate into marketing and access to the policymaking process.

Weakening of legislative and policy measures that support implementation of the treaty will also weaken post-pandemic recovery. Proven policy measures, including the creation of 100% smoke free environments, bans on all tobacco marketing, strict regulatory frameworks, and tobacco tax increases, must continue to be implemented and strengthened. Limiting interactions with the industry to those strictly necessary for regulation, ensuring transparency of any interaction, and refusing industry partnerships will need to be on top of the tobacco control agenda again. Parties need to ensure that gratitude for the lives saved now do not interfere with the saving of millions of lives that will be lost without full implementation of the treaty, including implementation of Article 5.3.

This article was first published on the Tobacco Control blog at https://blogs.bmj.com/tc/2020/05/10/article-5-3-of-the-who-framework-convention-on-tobacco-control-the-covid19-pandemic/.

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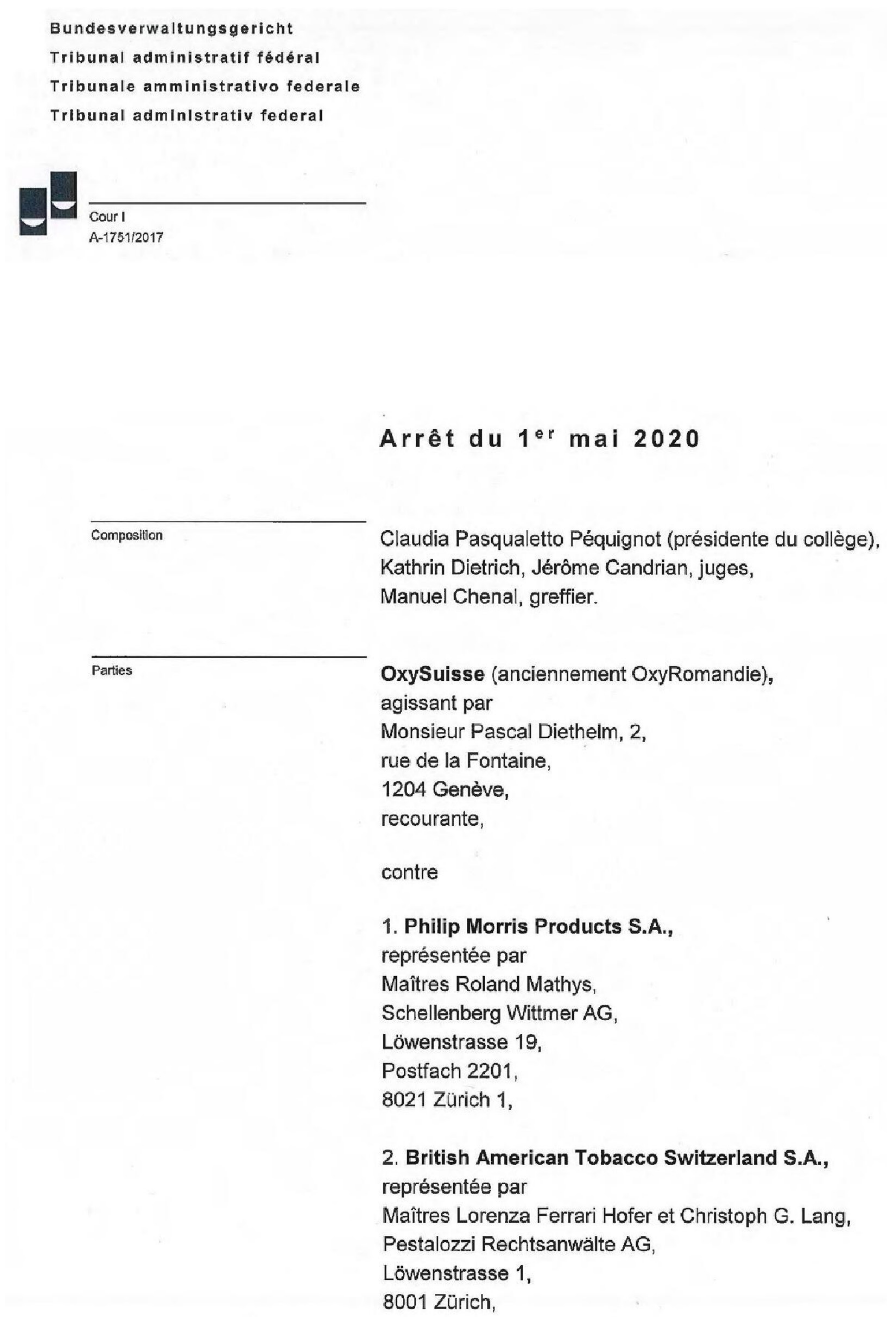

Bundesverwaltungsgericht
Tribunal administratif fédéral
Tribunale amministrativo federale
Tribunal administrativ federal

Cour I
A-1751/2017

Arrêt du 1er mai 2020

Composition: Claudia Pasqualetto Péquignot (présidente du collège), Kathrin Dietrich, Jérôme Candrian, juges, Manuel Chenal, greffier.

Parties: **OxySuisse** (anciennement OxyRomandie), agissant par Monsieur Pascal Diethelm, 2, rue de la Fontaine, 1204 Genève, recourante,

contre

1. **Philip Morris Products S.A.**, représentée par Maîtres Roland Mathys, Schellenberg Wittmer AG, Löwenstrasse 19, Postfach 2201, 8021 Zürich 1,

2. **British American Tobacco Switzerland S.A.**, représentée par Maîtres Lorenza Ferrari Hofer et Christoph G. Lang, Pestalozzi Rechtsanwälte AG, Löwenstrasse 1, 8001 Zürich,

First page of the judgment of the Federal Administrative Court. Image source: https://www.oxysuisse.ch/node/79.

SWITZERLAND: TOBACCO TAXES LAGGING BEHIND OTHER NATIONS

After a 3 year battle with British American Tobacco (BAT), Japan Tobacco International (JTI) and Philip Morris (PMI), the Swiss Federal Administrative Court has ruled that the Customs Directorate must provide information on the retail prices of various cigarette brands sold in Switzerland between 2014 and 2015 to OxySuisse, a Swiss Tobacco Control Organisation.

In the judgement handed down on May 1 2020, the Court strongly rejected the tobacco companies' arguments, stating the industry's position held "unfounded grievances…unexplained allegations…(and) borders on bad faith". OxySuisse believes that an agreement may have been in place between these three tobacco companies to manipulate the price of cigarettes in Switzerland, and will begin an investigation into this allegation.

The tobacco industry makes substantial profits in Switzerland. The gross profit of CHF3.65 (€3.42) per pack for the best-selling brand is the largest profit per pack in the EU. In comparison, the same brand is sold in France for €10.00, of which only €1.57 is gross profit. Despite these record profits, tobacco companies continue to raise their prices. OxySuisse observed that the average price of cigarettes increased by 6% in 2014, even without any government-mandated tax increases implemented during that period.

With the assistance of three law firms, the tobacco companies fought to block OxySuisse from accessing the requested data, invoking the protection of "trade secrets". PMI told the court that "it is highly likely that the disclosure of the required information will have the impact of damaging its reputation."

The absence of a tobacco tax policy in Switzerland is doubly disastrous in terms of public health, as the country renounces one of the most effective tobacco control measures. In terms of tax revenues, it results in a net tax loss of at least CHF 200 million per year, creating a haven for the tobacco industry without any plausible justification.

Switzerland must immediately adopt a tobacco tax policy that prioritises health protection and implements the WHO recommendation of a minimum tax of 70%. An opportunity for the government to increase tobacco taxes was previously blocked by parliament in 2013, as further increases might have a "deterring effect" on consumption.

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