

Inside U.S. Trade

Business Groups Wary of Proposed Changes to EU Tobacco Directive

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U.S. business groups are worried by a proposal from the European Commission that would restrict the ways in which tobacco products can be sold in the European Union. The issue is also getting attention in Geneva, where countries like Malawi and the Dominican Republic have already alleged that the proposed changes violate World Trade Organization rules, and the topic of tobacco control could arise in the upcoming U.S.-EU trade negotiations (see related story).

U.S. business representatives this week said they are keeping tabs on the proposed revision to the Tobacco Products Directive (TPD) in Europe, which the commission released last December. Some groups -- as well as companies directly affected, including Philip Morris International -- are starting to weigh in against the proposal, although one business source said they do not expect much help from the Obama administration.

This source said the current administration has not been "helpful" on international tobacco issues in general, including the issue of "plain packaging" legislation in Australia, which U.S. business groups also opposed. That legislation sets strict requirements on the appearance of cigarette packs, and several WTO members are now alleging that the law violates WTO rules.

The new commission proposal has several elements. It would ban all cigarettes with a "characterizing flavor," including menthol cigarettes; require health warnings comprised of pictures and text to take up 75 percent of the front and back of cigarette packages; and require that cigarettes be sold in packs that contain at least 20 cigarettes and are "cuboid" in shape. The commission has proposed that it take effect in 2014.

In addition to Malawi and the Dominican Republic, WTO members like Nicaragua, Indonesia, the Philippines, Honduras, Mexico, Cuba and Zambia have all noted "concerns" about this policy, although Malawi and the Dominican Republic have perhaps gone the furthest. Last month, those two trading partners alleged that the proposal would violate various aspects of the WTO's Agreement on Technical Barriers to Trade (TBT).

The prospect that the EU could face WTO legal action over its revision is still far off. For one thing, the proposal is only a starting point for negotiations, and it could be amended as both the European Parliament and the Council of Ministers consider it. However, legal experts this week noted that one hurdle for any challenge that might be mounted by Malawi or the Dominican Republic is that the proposal appears non-discriminatory.

For instance, they noted that Indonesia's success in challenging U.S. law -- known as the Family Smoking Prevention and Tobacco Control Act -- under the auspices of the WTO

rested on the fact that the U.S. law banned cigarettes with a characterizing flavor, but then included a huge exemption from that ban for menthol cigarettes.

The U.S. lost that case under TBT Article 2.1, which stipulates that imports "shall be accorded treatment no less favorable" to "like" products of national origin. In the U.S. market, clove-flavored cigarettes primarily come from Indonesia, whereas menthol cigarettes are primarily produced domestically. Because it banned cloves but allowed menthol cigarettes, the Appellate Body found the law violated the non-discrimination rules in Article 2.1.

The EU proposed ban, by contrast, applies to all characterizing flavors, so it would be more difficult to challenge under the TBT Agreement, experts said. This is not to say that a challenge would be impossible, but, at least as far as the TBT Agreement is concerned, such a challenge would likely have to focus on Article 2.2 instead. The Appellate Body has never faulted a measure under Article 2.2.

When it comes to WTO rules, several experts noted that Article 2.2 is more controversial than Article 2.1 because even measures that are non-discriminatory can be found to violate its provisions. The Appellate Body "has seemed reluctant" to find a violation under this provision, according to Simon Lester, a legal expert at the Cato Institute. "This reluctance may be due to the potential of this provision for intrusion into domestic policy-making," he added.

Article 2.2 stipulates that WTO members must ensure that technical regulations do not create "unnecessary obstacles to international trade" and are not "more trade-restrictive than necessary to fulfill a legitimate objective." Some experts find this provision troubling because it is difficult to know when a measure is "more trade-restrictive than necessary," although others believe this article is useful and can help guard against disguised "protectionist" measure.

At the TBT Committee meeting, Malawi charged that the EU proposal would violate Article 2.2 because the EU "has provided no evidence to demonstrate that these ingredients bans will actually contribute to lower rates of smoking initiation by young people. Indeed, the initiation of smoking by young people is principally the result of social factors such as peer pressure rather than 'characterizing flavors,'" it argued, according to its statement.

Malawi also criticized the labeling requirements and the requirements that a cigarette package must have a "cuboid shape" and include at least 20 cigarettes, arguing that these requirements are also more trade-restrictive than necessary.

One observer noted that Malawi and the Dominican Republic likely have other allegations for why the EU proposal violates WTO rules outside of the TBT Agreement, but declined to raise them at the TBT Committee meeting because it would not be relevant for that committee.

Several observers said the apparent objective of EU's proposal to require that packs contain at least 20 cigarettes is that prices for a larger pack -- as opposed to single cigarettes -- would necessarily be higher, in theory making smoking less feasible for minors. Requiring cuboid packaging as opposed to the slimmer packs appears to be another attempt to make cigarette packaging less attractive, one anti-smoking advocate said.

