

Agenzia delle Dogane e dei Monopoli

November 15, 2022

Dears,

Following our participation in the “open hearing on accessories containing characterizing flavors” held by ADM the 10th November 2022, please find hereafter our initial contribution and note we already reserve our rights to complete it.

Our understanding is that the ADM intends to give an **interpretation** (hereafter the “Interpretation”) of article 8 § 4 of the Legislative Decree n.6/2016 (hereafter the “LD”) which is the Italian adaptation of the directive TPD2 (hereafter “TPD2”).

Art. 8

Regolamentazione degli ingredienti

4. E' vietata l'immissione sul mercato dei prodotti del tabacco contenenti aromi in qualsiasi dei loro elementi quali i filtri, le cartine, le confezioni, le capsule o le caratteristiche tecniche che consentono di modificare l'odore o il gusto dei prodotti del tabacco interessati o la loro intensita' di fumo. I filtri, le cartine e le capsule non devono contenere tabacco o nicotina.

The Interpretation consists in extending the flavoring ban currently applicable to tobacco products “*prodotti del tabacco*” i.e. finished goods or goods consumable “as is” to single components i.e. accessories (hereafter “Accessories”), containing menthol, and sold independently of any tobacco product i.e. not usable solely.

The Interpretation is highly questionable for the following reasons :

I. Regarding the legal form

The ADM role is to implement the law not to create it. Hence, the ADM is not allowed to supersede the Italian Parliament and create or to be exact in the present case , to withdraw rights legally granted, to the detriment of accessories manufacturers and distributors.

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If the Italy intends to go beyond TPD2, as per transposed by the LD it shall follow the adequate process i.e. the TRIS procedure which implies to provide reasons and wait a couple of months in order to give other Member States the opportunity to assess the modification envisaged and express their potential concern, if any.

The publication of an official ADM document containing new rules on menthol accessories prohibition, including detailed instructions and deadlines for accessories sales to tobacconist and to final consumer, cannot intervene out of the blue and without proper justification. It's subject the prior compliance with the legislative process that led to the entry into force of the LD.

II. Regarding the substance

▪ Misinterpretation of the law

The LD does not contain any definition of the Accessories neither does TPD2. And it was on purpose as TPD2 focused on **tobacco products** and more specifically on cigarettes and roll-your-own which are, on purpose; the sole two categories subject to the characterizing flavor ban as it arises from the combined reading of article 7 § 1, 7 and 12.

Articolo 7

Regolamentazione degli ingredienti

1. Gli Stati membri vietano l'immissione sul mercato dei prodotti del tabacco con un aroma caratterizzante.

Gli Stati membri non vietano l'impiego degli additivi essenziali alla lavorazione dei prodotti del tabacco, ad esempio lo zucchero per sostituire quello perduto durante il processo di cura, purché tali additivi non diano luogo a un prodotto con un aroma caratterizzante e non accrescano in misura significativa e quantificabile la capacità di indurre dipendenza, la tossicità del prodotto del tabacco o le sue proprietà CMR.

Gli Stati membri notificano alla Commissione le misure adottate ai sensi del presente paragrafo.

7. Gli Stati membri vietano l'immissione sul mercato dei prodotti del tabacco contenenti aromi in qualsiasi dei loro elementi quali i filtri, le cartine, le confezioni, le capsule o le caratteristiche tecniche che consentono di modificare l'odore o il gusto dei prodotti del tabacco interessati o la loro intensità di fumo. I filtri, le cartine e le capsule non devono contenere tabacco o nicotina.

12. I prodotti del tabacco diversi dalle sigarette e dal tabacco da arrotolare sono esonerati dai divieti di cui ai paragrafi 1 e 7. La Commissione adotta atti delegati conformemente all'articolo 27 per revocare tale esenzione per una particolare categoria di prodotto qualora intervenga un mutamento sostanziale della situazione, attestato da una relazione della Commissione.

Extending the menthol ban to Accessories proceeds of a wrong interpretation both of the spirit and the letter of the law.

▪ Breach of legal certainty principle

The legislative process in Italy or the TRIS notification aim to grant any citizen or company a consistent delay to adapt to a new law. A lead time process for a manufacturer means to anticipate and a delay of weeks between raw material ordering, production and delivery to the market. Hence, apart urgency duly justified, it's not possible to withdraw a right without consistent notice period.

Furthermore, a litigant should be placed in a position of being aware of what is legal and what is not before acting or taking a decision. It's an essential pillar of the democracy!

- **Violation of the principle of equal treatment and fair competition**

The ADM position claiming that once the Legislator will adapt the EU rules related to flavors in Heat not Burn products (hereafter “HnB”), they will work on the implementation of the rules in IT territory and that for the time being, “they can only care about what the Italian rules norm” isn’t understandable.

For the time being there is no ruling of accessories, idem for HnB. So why a *status quo* should apply to HnB and not to accessories containing menthol?

Why HnB manufacturers and distributors should benefit years of “grace period” and be privileged to the detriment of Accessories manufacturers and distributors?

Such position would inevitably lead to a breach of equal treatment between HnB and Accessories, in addition to wipe current competition out to the benefit of one HnB player already in a dominant position, who would be given an extra competition advantage.

- **Violation of the free movement of goods**

As announced by the ADM, the extension of the menthol Accessories ban would constitute unjustified and disproportionate obstacle to free movement of goods, in contradiction to article 28 of the Treaty on the Functioning of the European Union.

In conclusion, our position is that the violation of the Italian and EU law, as resulting from the Interpretation, is fully unjustified. Such thematic can wait the upcoming review of the TPD2 and be handled in a proper legal way, as it seems to be intended by ADM regarding HnB.

Yours sincerely,



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General Manager