

# THE REVISED TOBACCO DIRECTIVE IN GERMANY AND NORTH RHINE- WESTPHALIA

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### Executive Summary

On May 20, 2016, the Member States of the European Union will have to transpose the 2014/40/EU revised tobacco directive. The dissertation in front of you provides an understanding of the revised tobacco directive and the transposition of the directive into North Rhine-Westphalian law. The historical, political and economic context in which the directive was decided and transposed will be analysed with a focus on the German and North Rhine-Westphalian context. The main research method for this dissertation was documentary analysis on a diverse range of sources, including European directives, German policy documents and debates.

Tobacco control from the European level is regulated through directives. In 2001, the European Parliament and Council agreed upon the 2001/37/EC tobacco products directive. The directive brought new packaging rules for tobacco products and regulated the levels of emissions allowed in cigarettes. Since 2001, the European Union signed the WHO Convention on Tobacco Control, or FCTC, agreeing that stronger tobacco control measures are needed in order to discourage the use of tobacco and protect citizens of the harms of tobacco. Besides the FCTC, the tobacco market changed since 2001, with electronic cigarettes cannibalising a big portion of the traditional cigarette market. New regulations needed to be agreed upon in order to adapt the 2001/37/EC directive to the tobacco market of today.

The German tobacco market remained the biggest on the European continent in 2015, with around 18 million cigarette smokers. In the past, an extensive lobbying campaign of the German tobacco industry resulted in tobacco control to remain limited in the Member State, even opposing European tobacco directives such as the 2003/33/EC directive. This, however, changed after Germany signed the FCTC and reformed its tobacco policy in order to give State governments more power in implementing tobacco control measures. After the reform, the German state of North Rhine-Westphalia introduced the *Nichtraucherchutzgesetz* in 2007, in which a smoking ban and an age restriction on tobacco products were decided. The state parliament had the right to comment on the proposal for the 2014/40/EU directive in the consultation phase of the Commission, but did not provide feedback on its own.

On December 16, 2015, Germany transposed the 2014/40/EU directive into national law from the federal level, as the directive will be enforced through the Federal Ministry of Food and Safety. German states will therefore automatically comply with the directive, as no state legislation is required for the transposition. The transposition of the directive will go conjointly with a ban on outdoor tobacco advertising and limited tobacco advertising in cinemas. Tobacco stakeholders operating in North

Rhine-Westphalia responded with arguments stating the importance of smoking for the economy and the freedom of consumer choice. Stakeholders in the e-cigarette and liquid industry, though disagreeing with the categorisation of e-cigarettes together with tobacco products, welcomed the regulation of e-cigarettes, as they can now comply with rules that are the same in all the Member States.

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I also place on record, my sense of gratitude to one and all, who directly or indirectly, have helped me during my thesis.

### List of Abbreviations

The following abbreviations are used in this dissertation:

**BMEL:** *Bundesministerium für Ernährung und Landwirtschaft*, the Federal Ministry of Food and Agriculture

**BfR:** *Bundesinstitut für Risikobewertung*, the Federal Institute for Risk Assessment

**BftG:** *Bündnis für Tabakfreien Genuss*, the Alliance for Tobacco-free Enjoyment

**CDU:** *Christlich-Demokratische Union*, Christian Democratic Union

**CSU:** *Christlich-Soziale Union*, Christian Social Union

**DZV:** *Deutscher Zigarettenverband*, German Cigarette Association

**ENDS:** Electronic nicotine delivery systems

**EU:** European Union

**EUZBLG:** *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*, Act on Cooperation between the Federal government and States on European Affairs

**FCTC:** Framework Convention on Tobacco Control

**FDP:** *Freie Demokratische Partei*, Free Democratic Party

**GmbH:** *Gesellschaft mit beschränkter Haftung*, company with limited liability

**JTI:** Japan Tobacco International

**NGO:** Non-governmental organisation

**NRGZ:** *Nichtraucherschutzgesetz*, Protection of Nonsmoker Act

**NRW:** North Rhine-Westphalia

**SPD:** *Soziale Partei Deutschland*, Social Party of Germany

**WHO:** World Health Organisation

**VdeH:** *Verband des E-Zigaretten-Handels*, Union of E-Cigarette Trade

## I. Introduction

On December 19, 2012, the European Commission presented a proposal for a revision of the 2001/37/EC Tobacco Products Directive in the form of the 2014/40/EU directive. In the proposal, radical tobacco control measures were introduced for the Member States of the European Union with the goal to decrease smoking under European citizens and make smoking less attractive for minors and non-smokers (“Revision of the Tobacco Products Directive”, 2015). The scope of the directive is noticeable, as the 28 European Member States will have to introduce national rules and regulations in order to comply with the directive before the deadline of May 29, 2016.

In this dissertation, the transposition of the 2014/40/EU Directive into German and, more specifically, the political response in the German state of North Rhine-Westphalian law will be researched. There is a big presence of the tobacco industry in Germany as the Destatis, the German Institute for Statistics, measured that in 2013 an average of 24.5 per cent of the German population smokes cigarettes (2015). In Germany, tobacco advertising is still allowed, taking the form in billboards, advertising in night clubs and cinemas. With all these factors in mind, the German tobacco market makes a relevant environment for this dissertation to research the implementation and implications of the 2014/40/EU directive. The choice for North Rhine-Westphalia is based on the approximately 17.6 million inhabitants, making it the most populous state of Germany (“Bevölkerung im Regierungsbezirk”, 2014). The research for this dissertation is furthermore conducted in North Rhine-Westphalia and in the city of Bielefeld, providing the accessibility to resources as needed for this dissertation. Important to note is the method of transposition of the 2014/40/EU directive, as the federal governments of the Member States are responsible for creating laws and regulations which comply with the new measures in the directive (as further elaborated in chapter 4, page 47). It is for this reason that this dissertation keeps in mind the German federal government, the political system and the decision-making procedure in Germany. A focus on North Rhine-Westphalia provides a specific look into the effects of European law in the daily lives of German inhabitants. As a case study, German e-cigarette and liquid stakeholders’ positions on the 2014/40/EU directive are analysed in order to understand the implications of the directive on the German e-cigarette market.

The content of this dissertation is divided into five chapters. In the first chapter, the historical background of directive 2001/37/EC is discussed, followed by the specific regulations as described in the revised 2014/40/EU directive. It is important to show the developments between the 2001 and the



2014 directive, as the tobacco market changed since the original directive and a new agreement between the World Health Assembly members led to the introduction of the revised directive. In the second chapter, the lobbying framework of the tobacco industry in Germany is introduced, thus explaining the stance of the German government on previous tobacco control legislation, both from a national and a European level. Part of chapter two is also dedicated to explain the current stance of the German politics on tobacco control, as it is considerably different compared to the 1900s. The national tobacco legislation of Germany is provided, followed by specific legislation as agreed upon in the North Rhine-Westphalian parliament. After East and West Germany unified and became the Federal Republic of Germany, a federalist system with a strong position for the German states were agreed upon in the association agreement between the two former countries (A. Gunlicks, 2003). Since German states hold a strong position in the legislative process, as displayed in chapter two on the North Rhine-Westphalian tobacco control measures, it is important to present the political system of Germany in chapter three. In order to understand the political context in which the European legislators and tobacco stakeholders have to operate, the political parties of North Rhine-Westphalia are introduced with a history of the different political concepts from which the parties originate. The opinions of the parties on the 2014/40/EU Directive are further elaborated and displayed by analysing the discussion initiated by the Pirate Party in the North Rhine-Westphalian parliament. At last, the opinion of the *Bundesrat*, the federal institution in which German states are represented, on the 2014/40/EU directive proposal for the European Commission is presented.

Chapter four focuses on the transposition phase of the 2014/40/EU directive, beginning with a discussion on the transposition procedure for the German federal government as discussed in the 2014/40/EU Directive. Before December 16, 2015, the Federal Ministry of Food and Safety or “BMEL” did not inform the federal parliament on the transposition procedure of the 2014/40/EU directive. Members of parliament began to question the BMEL in a minor interpellation, as the deadline of May 20, 2016 was almost reached. As presented in Chapter four, it was not long after the minor interpellation that the minister of BMEL, Christian Schmidt, presented the transposition plan to the parliament. The chapter ends with an analysis of the discussion that followed the announcement of the transposition of the directive and the transposition bill. The directive will be in full force on the German market as of May 20, 2016. The different deadlines of specific measures as taken in the directive can be found in chapter four as well. It is important to note that the directive, as it was transposed on the federal level, will automatically be implemented in the North Rhine-Westphalian tobacco market.

In the final chapter of this dissertation, the position of tobacco stakeholders on the 2014/40/EU directive will be analysed and compared to other stakeholders involved. The *Deutscher Zigarettenverband* (DZV), or German Association for Cigarettes will be introduced and its stance on the directive before the transposition in Germany will be given. The newly presented arguments after Christian Schmidt announced the transposition plan will be compared. One member company of the DZV, namely Japan Tobacco International (JTI) shared their point of view on the directive in 2014, particularly their prediction of an increase in illicit tobacco trade after the directive would be implemented. As JTI is headquartered in Cologne, North Rhine-Westphalia, the arguments of the company are analysed as well and compared to the arguments of the Smoke Free Partnership NGO. The NGO presented arguments against the claim that illicit trade would increase. Finally, the position of Pöschl Tabak on the tracking and tracing system will be described, after which an extensive research as conducted by KMPG will be compared to the argument that a tracking and tracing system costs too much effort to adjust the production of small and medium enterprises.

In the case study of chapter five, e-cigarette interest groups and representatives are analysed, as the 2014/40/EU directive is the first regulation of e-cigarettes and liquids in Europe. The research questions for the case study were as following: “What is the size of the German e-cigarette market? What is the position of German e-cigarette interest groups on the 2014/40/EU directive? Does the e-cigarette industry feel a necessity to regulate e-cigarettes and liquids?”. Through a structured interview with one e-cigarette vendor in Bielefeld, North Rhine-Westphalia, the position of a smaller enterprise will be presented.

The dissertation is organised in such a manner that the different steps of the transposition of the 2014/40/EU directive in North Rhine-Westphalia are laid down. Chapter three presents a political context in which the North Rhine-Westphalian and German government provided feedback to the Commission on their proposal of the 2014/40/EU directive, as the current tobacco control measures, such as those described in Chapter two, needed improvement and adjustment to the changing tobacco market. The stakeholder response to the directive, as laid down in Chapter five, offers the understanding of the different parties involved; not only from the political level, but from the business level as well. Chapter one lays down the measures as decided in the 2014/40/EU directive and Chapter four explains the transposition procedure in Germany. By reading this dissertation, an overview of a European directive affecting businesses and consumers in Germany is presented, making it an interesting study for students and scholars of European Studies.

## II. Methodology

This dissertation is divided into five chapters. The overall aim of the dissertation is to clarify the revised tobacco directive 2014/40/EU of the European Parliament and European Council and how it was received by politicians and tobacco stakeholders in Germany and in North Rhine-Westphalia. Furthermore the adaptation process of the European directive into German law is presented.

In the first chapter, an overview is given of the measures which can be found in the 2014/40/EU directive, as described in the first research question: “What are the measures found in the European Revised Tobacco Directive (2014/40/EU)?”. This was done in order to, first of all, clarify the context of the directive in which the tobacco control measures were decided and, second of all, to provide an overview of the specific measures to which tobacco stakeholders will have to comply with as of May 2016 (or as of a different date, as clarified in Chapter 1, page 22). The method of research focused on desk research, where most of the referring focused on the actual 2014/40/EU directive as found on the EUR-Lex website. EUR-Lex provides access to European Union law and was of great use during the writing of this dissertation. It is a trustworthy source, as the publication office of the European Union manages the resources available and offers documents in the 24 official languages of the European Union (“About EUR-Lex”, 2015). From EUR-Lex, directive 2001/37/EC was furthermore used in order to present the tobacco control measures that were made by the European legislators in the previous Tobacco Products Directive. Documentary analysis was used in order to clarify the context of the 2001/37/EC directive and to clarify why the 2001/37/EC directive is repealed in the revised 2014/40/EU directive. The chosen research method provided background information from sources across the web, including articles found in the different databases of the Hague University and results on Google Scholar. Advantages for documentary analysis are the accessibility to information and the ease in which documents can be found, for example by using specific search terms or periods in time. A disadvantage is the amount of time it costs to read the journals and documents; however, this was obvious as writing a dissertation requires great effort. At last, the Treaty of the European Union was consulted to define key terms used in the 2014/40/EU directive.

Chapter two focuses on the current state of tobacco control legislation in Germany and more specifically the German state of North Rhine-Westphalia, as reflected in the second research question: “What is the current state of tobacco legislation in Germany and North Rhine-Westphalia?”. As much of the German tobacco control is governed from the federal level, an introduction into the German tobacco legislation is given firstly. This dissertation focuses on the European tobacco directive and

therefore begins with an analysis of the tobacco control situation as measured by Joossen and Raw, financed by the European Network for Smoking Prevention and the Association of European Cancer Leagues. The two reports presented a scale of 30 European countries and measured how the tobacco control legislation developed firstly from 2005 to 2007 and secondly in the year of 2013. These two timeframes were chosen for this dissertation as it displays the context in which the 2014/40/EU Directive was decided. The 2014/40/EU directive presents tobacco control measures for all the Member States of the European countries, which requires a closer look into the situation from Member State to Member State; more specifically for this dissertation, the situation in Germany. An advantage of analysing the report by Joossen and Raw is the availability of data and the methodology of Joossen and Raw, as it offers the data necessary for this dissertation through the intensive research as conducted. An issue involving research ethics might be raised as the research is sponsored by two organisations that are not working in favour of tobacco, as the integrity and objectivity of the researchers may come to question (Saunders et al. 2012). However, as the revised tobacco directive is a tobacco control measure, it matched the report written by Joossen and Raw. The tobacco labelling measures, as decided in the 2003/641/EC decision of the European Commission, has been displayed and clarified, based on European Commission publications on the topic of Public Health. Directive 2003/33/EC on Tobacco Advertising is considered in chapter two as the European Commission started an infringement procedure against Germany due to the fact that Germany did not adapt the directive into national law. The procedure is shortly clarified for those readers of this dissertation who are not familiar with the procedure. At last, chapter two focuses on the specific legislation for North Rhine-Westphalia and furthermore presents a stakeholder response and their view on the protection of non-smokers policy. This response was made possible due to e-mail correspondence with the DZV. The correspondence with the DZV can be found in chapter *i* of the appendix Objective news websites were used in order to present the most up-to-date information available for the recently introduced tobacco directive. It is important to use objective news sources, as tobacco can be a sensitive topic about which companies, government officials and members of society may have a strong opinion.

Chapter three presents the federal political system of Germany and the political system of North Rhine-Westphalia in order to describe the political context in which North Rhine-Westphalian politicians and tobacco stakeholders operate. It became clear while conducting the research for this dissertation to adapt several research questions on the legislative situation of the directive and use it in Chapter three, which is why the research question for Chapter three is as following: “What are the different stances of politicians and organisations on the Tobacco Directive in Germany and North Rhine-Westphalia?”. The reason Germany is included in this research question is based on the federal transposition of the

2014/40/EU directive. The federal government is obliged to transpose the directive and create a bill which complies with the revised directive. In order to understand the German political system, German federalism is introduced by a documentary analysis of Gunlicks, which presents a historical overview and the current state of federalism in Germany. The role of the federal government versus the state governments is considered as parts of the German Basic Law (constitution) are analysed and are included in the appendix chapter *iv* of this dissertation. The chapter continues with the introduction of the North Rhine-Westphalian government and individual political parties, including an introduction into social-democratic, Christian-democratic, Green left, Federal and the Pirate Party's political ideologies. The analysis of their political background is based on documental analysis of a diverse range of academic resources, all found through the databases of the Hague University. The majority of this part of chapter three is based on desk research on the individual parties. In order to understand the political parties and their historical background and furthermore their stance on the revised tobacco directive,

e-mail correspondence was used to gain knowledge about their stance. A noticeable disadvantage of this method is the lack of response from the political parties; an advantage is the gain in information and access to the political decision-making process. Results on the presented questions on the directive were successfully gathered from the Pirate Party of North Rhine-Westphalia and the answers are therefore applied in chapter three, whereas the results of the other parties are based on desk research. The contribution of the Pirate Party furthermore helped to describe the decision-making process which was relevant for the North Rhine-Westphalian parliament, as it helped understand their contribution to the national *Bundesrat* for the revised tobacco directive. The final part of chapter three describes the *Bundesrat* consultation for the European Commission on Directive 2014/40/EU. It is based on desk research through official published legislative documents by the German government. An advantage is the accuracy of the documents and the trustworthiness of the official sources, a disadvantage is the use of the German language in the official documents, as much of the sentence structure was found to be hard to translate. It was not a problem for this dissertation as the German language source "Duden" was consulted throughout the writing of this dissertation, which is a credible online dictionary, providing clear definitions of German words.

For Chapter four, sub-question three is answered and adapted to the decision-making process of the transposition of directive 2014/40/EU, as it is implemented from the federal level. The question answered is as following: "How is the German government transposing the revised EU directive into German law?". The first required source was the 2014/40/EU tobacco directive as it explains the transposition procedure. It became clear that the governments of the Member States are responsible

for the transposition, which is why the political party of *Bündnis 90/die Grünen* asked the German federal government on November 12, 2015, questions in regards to the transposition of the directive into German law. Their document of questions and the answers of the BMEL that followed are used in Chapter four. The documentation of the meeting held on December 16, 2015, in the federal parliament where Christian Schmidt presented the transposition bill, is extensively used in the chapter. Through correspondence with Jörg Sauskat, speaker of health policy for the federal *Bündnis 90/die Grünen* party, access was provided to the minutes of meeting of the transposition of the directive, as this document was not made available to the public at the time of writing this chapter. The documentary analysis on the transposition bill was made possible through the online portal of the BMEL. News websites were used in order to display the present situation of the revised tobacco directive. Only reliable sources, such as *der Spiegel*, were used in order to get an objective position on the topic of tobacco.

For Chapter five, the arguments of the tobacco industry on the 2014/40/EU directive are analysed and compared to arguments from other parties involved. The e-mail communications with the DZV is used to display the issues tobacco stakeholders have with the transposition of the law. A case study is conducted in the form of an analysis of the position of e-cigarette stakeholders in Germany. A structured interview was conducted with an e-cigarette stakeholder operating in Bielefeld, North Rhine-Westphalia, and the results are explained in the case study. According to Saunders et al. the advantages of conducting structured interviews are the possibility to get answers in which interviewees have the opportunity to elaborate on their answers. Personal contact is important, as it builds trust between the interviewer and the interviewee. A disadvantage of conducting structured interviews is the time it requires to conduct the interviews. A longer survey would require more time between the interviewer and the interviewee and the time it takes to process all data would involve many resources (Saunders, 2012). It is for this reason that in this dissertation, the structured interview used ten set questions with two options to elaborate on the answers. In order to comply with the ethical principles of conducting research, the interviewee was asked to sign an agreement in which was agreed upon understanding the goal of the survey (finding out how e-cigarette stakeholders are informed about the coming changes in the directive) and the voluntary nature of participation and the right to withdraw from the structured interview (Saunders et al. 2012). As the original plan for this dissertation planned an extensive questionnaire across different tobacco vendors in Bielefeld, the structured interview was set up to be conducted with different stakeholders. However, as will be mentioned in the case study, most tobacco vendors asked to participate in the structured interview were unable to answer the questions as they had no idea about the directive and were uncertain about

their capacity to participate. This led to the decision to only include the “Dampf In” vendor and analyse other e-cigarette stakeholders. Even though this does not represent the complete e-cigarette industry, it does provide an opinion of a smaller stakeholder.

To conclude, this dissertation used different research methods in order to answer the research questions. Through documentary analysis, secondary documentary data was analysed and reflected in the different chapters. The objectivity of the researchers was always kept in mind, as tobacco can be a sensitive topic for policy makers and the tobacco industry. The databases of the Hague University of Applied Sciences were of great help during the writing of this dissertation. Objective news sources were used, as the 2014/40/EU directive is currently being implemented and requires news sources to present the most recent information in regards to the directive.

### **III. Chapter 1: Measures of Directive 2014/40/EU**

The revised European Tobacco Directive in its full title is called: “Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 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 and repealing Directive 2001/37/EC” Directive 2014/40/EU, p.1). This directive concerns all of the 28 Member States of the European Union and has been adopted by both the European Parliament and the Council. It entered into force twenty days after the publication of the directive in the Official Journal of the European Union and was addressed to all the Member States. The deadline for bringing the laws, regulations and administrative provisions is May 20, 2016. In the following chapter, the context in which the directive needed to be revised will be given, followed by the implementation measures as laid down in the Directive 2014/40/EU.

#### **Revision of the 2001/37/EC Directive**

Directive 2001/37/EC created legislation concerning the “approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products” (“Official Journal of the European Communities”, 2001, p. 1). According to S. Mandal et al. the first discussions on further tobacco control measures from a supranational European level started in 1996. The first proposal for a new Tobacco Products Directive was presented in November 1999, which proposed stronger legislation on cigarette ingredients, product labelling and larger warning labels. Terms such as “light” and “mild” were to be banned as well, as they were misleading consumers on the dangers of the tobacco products. The tobacco industry responded with strong lobbying campaigns and by 1999, a comprehensive response framework was created by the tobacco companies in order to create specific argumentations in different context, such as legal, economic and scientific argumentation, similar to the German industry framework discussed in chapter four, page 25. The goal in mind was to create a debate around the proposed tobacco directive (2009, p. 6). Even though tobacco companies tried to lobby against the tobacco products directive, the legislative measure was adopted by the Council and the Parliament (S. Mandal et al., 2009, p. 17). The co-decision procedure was involved in the decision-making process for the directive and the following steps were taken before the directive was passed:



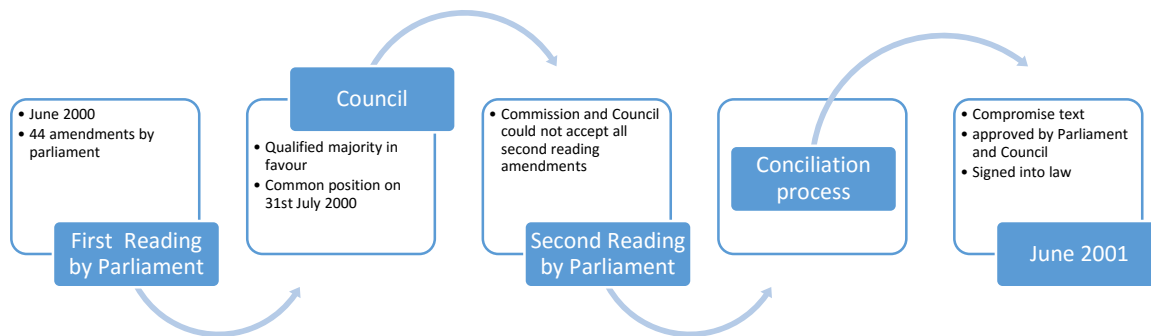


Figure 1 The co-decision process for the Tobacco Products Directive of 2001 (S. Mandal et al. 2009, p. 17)

However, since 2001, the tobacco market changed and new (including scientific) developments, particularly the WHO Framework Convention on Tobacco Control (hereafter FCTC), meant a revised directive needed to be created. On 21 May 2003, the World Health Assembly adopted the FCTC which contained non-binding measures in order to protect people of the dangers of tobacco and help governments to introduce stronger tobacco legislation in order to decrease smoking globally. The European Union is part of the Assembly and agreed upon the treaty, creating a necessity to revise the 2001 tobacco products directive in order to transpose the FCTC agreement (“WHO FCTC”, 2015, par. 2 – 4).

New developments on the tobacco market were also a reason behind the necessity to revise the directive. According to the Tobacco Atlas, electronic cigarettes, known as e-cigarettes were brought to the global market by Chinese entrepreneurs in 2004. Since then, the e-cigarette industry skyrocketed in popularity (“The Varying State of E-cigarettes Worldwide”, 2015, par. 1). In Europe, a substantial number of EU adults have ever used e-cigarettes, based on a research conduct by the BMJ Publishing Group Limited (2014). As e-cigarette measures were not taken into account in the 2001 Tobacco Directive and because the e-cigarette and liquid market is growing in Europe, new European measures were needed to be implemented and are therefore included in the 2014/40/EU Directive. Another reason behind revising the 2001 Directive was the obstacles to the internal European tobacco market. There were still “substantial differences between the Member States’ laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco and related products”

(Official Journal of the European Union, 2014, p. 2). This led to an obstacle of the smooth functioning of the internal tobacco market and therefore required the repeal of the original directive. At last there are certain measures taken in the 2001/37/EC Directive which remain in place and are further developed in the new directive. An example of this are the maximum limits for tar, nicotine and carbon monoxide per cigarette. The limits were decided in the 2001 directive and are still relevant in the revised directive.

On 19 December, 2012, the European Commission stated that, after having consulted with stakeholders and conducted a public consultation with around 85.000 responses, they agreed upon a proposal for the revision of the tobacco directive. An impact assessment was carried out in which the Commission evaluated the economic, social and health effects of the new policies in consideration in the revised directive ("Tobacco products", 2012). After the Commission presented the proposal, the revised directive passed through the ordinary legislative procedure. Based on Peeters et al. the revised directive underwent heavy lobbying and a great effort to delay or amend the proposed directive by tobacco companies. Even though the revised directive was partly delayed and several measures were taken out (one of which is plain packaging), the revised directive still was enacted by the Parliament and the Council (2015).

### **Laws for the ingredients and emissions of tobacco products**

The revised tobacco directive requires tobacco companies to follow the rules as laid down in the 2001/37/EC directive for the ingredients and emissions of cigarettes. Emissions are defined as any substance which is released upon smoking a tobacco product. It can be both a substance found in the released smoke as well as the substances that are inhaled by the consumer. Cigarettes in the European Union shall not have a greater amount of the following ingredients (2014, p. 13):

- **Tar:** 10 mg of tar per cigarette

The Directive defines tar as the evaporated substances that are released. According to Philip Morris International, tar releases particles which include different smoke constituents, without containing nicotine (2015, par. 4).

- **Nicotine:** 1 mg of nicotine per cigarette

Nicotine is the component in a cigarette which is released upon burning tobacco leaves (which are cut down and manufactured to be included in a cigarette). The Medical News Today reported that nicotine gives a particular reaction to humans upon consumption. It increases the heartrate, raises alertness and creates an addiction to the substance (2014, par. 3 – 5).

- **Carbon monoxide:** 10 mg of carbon monoxide per cigarette

According to J. Foulds, carbon monoxide is “a type of clear, odourless gas that is released upon burning any carbon-based substance”. It is different than regular oxygen as it is faster absorbed in the bloodstream of humans (2015, par. 1).

Tobacco companies, including manufacturers and importers of tobacco products, are required to inform the Member States about the ingredients found in manufactured tobacco products, as well as the emission levels. Information must be gathered and submitted to the Member States by November 20, 2016. The directive mentioned that the gathered data by the tobacco companies must be stored electronically and accessible by the Commission and other Member States. Furthermore, Member States have the right to charge a fee for “receiving, storing, handling, analysing and publishing the information” submitted by the companies (Directive 2014/40/EU, p. 14 – 15, 2014).

In the 2001/37/EU directive, the European Commission needed to draft a list of authorized additives; however, such a list has not been drafted (Luch & Henkler, 2015, p. 1). Additives can be described as any kind of ingredient which is added to enhance the flavour of cigarettes. Examples can be caffeine, mint and menthol flavours, chocolate, etcetera. According to Luch and Henkler, the reason behind creating a common list of authorised additives were to reduce the possible health risks that would be adjoined with inhaling such an additive. Furthermore, it was needed in order to prevent the expansion of innovative tobacco products which could be able to attract a new generation of smokers (2015, p. 1). Even though the list, as of 2015, was not yet created, the revised tobacco directive now implements new regulations in order to decrease the attractiveness of additives in cigarettes. The directive specifically bans the following: “Member States shall prohibit the placing on the market of tobacco products with a characterising flavour” (Art. 7 par 1). One of these characterising flavours is menthol which will be banned as of 2020 (“Poland to challenge EU”, 2014). The thought behind banning additives is based on the decisions in the FCTC. In articles 9 and 10 of the FCTC, it is stated that it is recommended to prohibit or put restrictions on ingredients of cigarettes that have the likeliness to enhance the attractiveness of the tobacco product (Luch & Henkler, 2015, p. 2).

### **Labelling and packaging of tobacco products**

The 2001/37/EC directive prevented Member States from increasing the size of health warnings or replacing misleading warnings on tar, nicotine and carbon monoxide emission levels, which is why one measure taken in the directive is the implementation of new and streamlined health warnings for

cigarette packages (Official Journal of the European Union, 2014, p.1). The possibility to introduce pictorial warnings on cigarette packages was left in the hands of the Member States; however, as the impact assessment carried out by the Commission showed, the introduction of bigger and mandatory pictorial warnings would be in line with the FCTC agreement and would facilitate cross-border trade of cigarettes (“Executive summary of the impact assessment”, 2012, p. 5). It is for this reason that by March 2016, new text and picture warnings need to be introduced by the European Member States. As measured by the Eurobarometer in 2009, picture warnings are perceived to be more effective than textual warnings (“Survey on Tobacco”, 2009, p. 26). The 2001 Tobacco Directive introduced two general warnings in the different languages of the European Union, namely “smoking kills” and “smoking seriously harms you and others around you” and 14 additional warnings which were to be placed on the front side and the back side of cigarette packages (“Health Warnings”, 2015, par. 1).

The reasoning behind the revision of the labelling and packaging rules for tobacco products are first of all the different packaging laws as based on a Member States’ policy, which could create a barrier to trade (Directive 2014/40/EU, p. 4). It is furthermore noted that in the different Member States, both old and new tobacco consumers are informed in a different way about the dangers of using tobacco products. The labelling provisions were adapted to new scientific research and results. Based on the Commissions’ research, it has been deemed misleading when cigarette packages show the emission levels, as packages with lower emission levels would seem less harmful than higher emission levels in different cigarette brands. In 2001, the U.S. Department of Health and Human Services measured that “light cigarettes”, defined as cigarettes with lower emission levels, are perceived by consumers as less dangerous for ones’ health. In their report, they researched and concluded that since the introduction of cigarettes with lower emission levels in the 1950s, the number of lung cancer deaths did not decrease in the United States (Burns et al. 2001). “Lung cancer death rates have continued to rise among women, and the modest decline in lung cancer death rates observed among men is generally consistent with the temporal trends of reduced initiation and increased cessation among males” (Tolley et al, 1991). The revised tobacco directive specifically mentions the ban on the use of the following words on tobacco packages: ‘low-tar’, ‘light’, ‘ultra-light’, ‘mild’, ‘natural’, ‘organic’, ‘without additives’, ‘without flavours’, ‘slim’. These words have the potential of misleading consumers as they suggest that the cigarettes are less harmful, as confirmed in the research by the U.S. Department of Health and Human Services (Directive 2014/40/EU, p. 5).

The specific rules for the tobacco packaging are as following:

- Misleading elements are not allowed on cigarette packaging (as established in the 2001/37/EC directive).
- “Neither the unit packets of tobacco products nor their outside packaging should include printed vouchers, discount offers, reference to free distribution, two-for-one or other similar offers that could suggest economic advantages to consumers” (Art. 28 Directive 2014/40/EU, p. 5).
- Health warnings must cover 65 per cent of the front and back of cigarette and roll-your-own tobacco packages, as can be seen on figure two.



Figure 2 The newly introduced health warnings for tobacco packages. ("Tobacco Products", 2015).

The revised directive gives Member States the opportunity to introduce plain packaging legislation, meaning covering a complete cigarette package with warnings and without a cigarette brand, as written down in article 24 (Directive 2014/40/EU). The Commission presented the plain packaging provision in its first proposal; however, due to heavy lobbying by the tobacco industry on the highest level of the European Commission, the provision was removed and the decision to implement plain packaging now lays in the hands of the Member States (Peeters et al. 2015).

### Oral tobacco (snus) and smokeless tobacco measures

Swedish Match, a Swedish snus company reported that “tobacco products for oral use, except those intended to be smoked or chewed, have been banned in the EU since 1992” (2015, par. 1). Snus is a type of moist tobacco which is placed under the upper lip by the user. Unlike chewing tobacco, it does not require to be spit out. The first ban on snus was introduced by the 92/41/EEC tobacco products directive, as legislators feared snus would become a gateway product to cigarette smoking. The directive writes the following: “Member States shall prohibit the placing on the market of tobacco for oral use as defined in Article 2 (4)” (Official Journal L 158, 1992, p. 30 – p. 33). Snus tobacco has therefore been banned in the EU since 1992; however, upon the accession of Sweden in the European Union in 1995, a permanent exemption from the ban of selling snus has been agreed upon for Sweden, which is laid down in article 151 of the Act of Accession of Austria, Finland and Sweden. In the revised tobacco directive, article 32 keeps in place the prohibition of the sale of tobacco for oral use must be maintained, with the exception of Sweden.

According to the impact assessment carried out by the Commission, stakeholders responded differently on the proposal to keep the ban on snus in place in the revised tobacco directive. Economic stakeholders producing snus felt the ban of oral tobacco is no longer justified, as snus is less harmful than traditional cigarettes and other smokeless tobacco products. They felt snus could help smokers in quitting smoking cigarettes. Member States and health NGOs on the other hand felt the current ban should stay in place or should be extended to other smokeless tobacco products, as smokeless tobacco does cause harm in terms of health and the possible risk of dual use of smokeless tobacco and traditional cigarettes (Impact Assessment, 2012, p. 24).

Smokeless tobacco such as chewing tobacco are still allowed to be sold in the European Union, but new measures in the revised tobacco directive do change certain rules for the products. First of all, all smokeless tobacco products have to carry health warnings on the main surface of the packaging. Furthermore, any smokeless tobacco containing characterising flavours can no longer be sold as of May 16, 2020.

### **Cross-border distance sales of tobacco products**

Member States now have the right to prohibit cross-border distance sales of tobacco products to consumers. The directive defines cross-border distance sales as the sale of a tobacco product to a consumer in another Member State. The reason behind the option for Member States to ban cross-border distance sales lays in article 33 of the directive, which stated that consumers could have access to tobacco products that are not in compliance with the rules laid down in the directive, therefore creating a risk of undermining the tobacco control legislation. Based on the principle of sincere cooperation<sup>1</sup>, as explained in Article 4(3) of the Treaty on European Union, “Member States should cooperate with each other in order to facilitate the implementation of this Directive, particularly as the measures take into account the cross-border distance sales of tobacco products” (Directive 2014/40/EU, p. 6 Art. 33). Based on the impact analysis carried out by the Commission, the previous tobacco directive did not cover cross-border distance sales. In order to decrease illicit trade and regulate the purchase of cigarettes from an online source, the revised directive covers cross-border distance sales. The risk for legal business to compete with cross-border sales, risk of consumers not paying taxes and the possibility to sell cigarettes to minors were also taken into account when deciding to offer the possibility to legislate cross-border distance sales (2012). If a Member State decides not

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<sup>1</sup> **Sincere cooperation** as defined by the (Consolidated) Treaty on European Union obliges Member States to, in “full mutual respect”, help each other on implementing legislation based from Directives (Article 4(3) TEU, 2007).

to ban cross border distance sales, it is required for cross-border distant retailers in the Member State to implement a digital age-verification system so that their products are not sold to minors.

### **The obligation to submit a notification of novel tobacco products**

Article 34 of the 2014/40/EU directive states that “tobacco products have the potential to cause mortality, morbidity and disability”. It is for this reason that regulation is required and developments in regards to new tobacco products must be monitored from a national level. Tobacco manufacturers must therefore inform Member States when new tobacco products are presented on the market. Furthermore, new products must comply with the measures as taken in the revised directive. A ‘novel tobacco product’ is defined by the directive as a tobacco product which does not classify as an existing tobacco product and which is placed on the market after May 19, 2014. The report which manufacturers must submit to a Member State includes the following components, as written down in article 19 of the directive: available research on consumer behaviour, in particular young people and current smokers, the attractiveness and addictiveness of the new products, the ingredients and emissions, a risk/benefit analysis of the product, the effect of the new product on smoking consumption and consumer perception (Art. 34 Directive 2014/40/EU, 2014).

### **Placing on market and labelling of certain products (e-cigarettes and herbal cigarettes)**

In 2004, the Chinese RUYAN Group patented “e-cigarettes”, marking the start of a booming market on a global scale. An e-cigarette, short for electronic cigarette, is a type of electronic nicotine-delivery system which, according to K. Cyrus et al. consists of three parts: a liquid nicotine cartridge, an electronic heating system and a plastic tube (Annals of Internal Medicine, 2010, p. 607). A substantial amount of European adults have used an e-cigarette, more specifically “20.3 per cent of current smokers, 4.7 per cent of ex-smokers and 1.2 per cent of never cigarette smokers in the EU reported having ever used an e-cigarette”, which is equal to 29.3 million adults (C.I. Vardavas et al. 2012). Since the product entered the market, an increase in online e-cigarette and liquid vendors and an increase in popularity on social media occurred.

As the e-cigarette market is growing in Europe and tobacco companies are increasingly looking for new markets to operate, the European Commission included e-cigarette policy in the revised directive. The directive laid down specific rules that need to be applied to e-cigarettes and related products in article 20 (3). More specifically, the following rules apply to e-cigarette products and must be enforced by Member States:

- Nicotine-containing liquid placed on the market must not exceed a volume of 10 ml in disposable electronic cigarettes
- Cartridges or tanks may not exceed 2 ml
- Nicotine-containing liquid should not contain more than 20 mg/ml of nicotine
- Nicotine-containing liquid should not contain the following additives:
  - Vitamins, caffeine or taurine, additives that give emissions colour

E-cigarettes are furthermore banned for marketing through communications on the radio, the sponsoring of any event and audio-visual commercials, as laid down in paragraph 5.c till 5.e of article 20 (Directive 2014/40/EU).

#### **Deadlines of directive**

For specific measures, different rules for the transposition apply. Until May 20, 2017, tobacco products which comply with the 2001/37/EC directive are allowed to be circulated on the market. Tobacco products manufactured after May 20, 2016 must comply with the 2014/40/EU directive. E-cigarettes and refill containers do not have to comply with the directive until November 20, 2016, after which the products brought to the market must follow the regulations in the directive. Herbal products for smoking have to comply with the directive by May 20, 2016 (Directive 2014/40/EU, 2014).



## Conclusion

In 2001, the European Commission presented the Tobacco Products Directive 2001/37/EC, bringing new tobacco control measures to the Member States of the European Union. Measures were introduced in order to implement universal health warnings, the possibility for Member States to introduce pictorial warnings and the banning of “light” and “mild” on cigarette packages. Since the 2001 directive, the European tobacco market changed and new scientific and product developments were reasons the European Commission presented their 2014/40/EU directive; a revision of the original directive, creating new measures to decrease smoking under European citizens and discourage the use of smoking. Another reason behind the revision of the original directive is the FCTC agreement which the European Union signed in May, 2003. In the FCTC, members of the World Health Assembly agreed upon stronger legislation to discourage the use of tobacco.

The 2014/40/EU Directive presents Member States with the following measures:

- The repeal of Directive 2001/37/EC, as existing legislation in the previous tobacco products directive is either not relevant or adopted in the new directive.
- Cigarettes with characterising flavours such as menthol are banned as of 2020.
- The amount of tar, nicotine and carbon monoxide may not be more than the following levels: *Tar (10 mg of tar per cigarette), nicotine (1 mg of nicotine per cigarette), carbon monoxide (10 mg of carbon monoxide per cigarette)*
- New, bigger pictorial health warnings to be placed on tobacco packaging. Member States are furthermore given the chance to implement plain packaging measures, which means a complete blank package design.
- Snus, as already banned in the 2001/37/EC directive, remains banned with the exception of Sweden.
- Member States have the opportunity to ban cross-border distance sales of tobacco, for example purchasing cigarettes through an online vendor.
- Tobacco companies have to inform Member States about new tobacco products they present to the market. Member States have to inform the Commission.
- E-cigarettes and liquid for electronical cigarette devices have to comply with new, specific rules as described on page 20 and 21 of this dissertation.



#### **IV. Chapter 2: State of Tobacco Legislation in Germany and North Rhine-Westphalia**

**In this chapter, Germany's stance on tobacco control will be highlighted, firstly explaining the situation of the 1900s, followed by the current position of the federal government on tobacco control policy. An overview will be given of the German tobacco market and the current tobacco legislation in Germany, followed by the specific tobacco control measures as implemented in North Rhine-Westphalia.**

##### **Germany's stance on tobacco control**

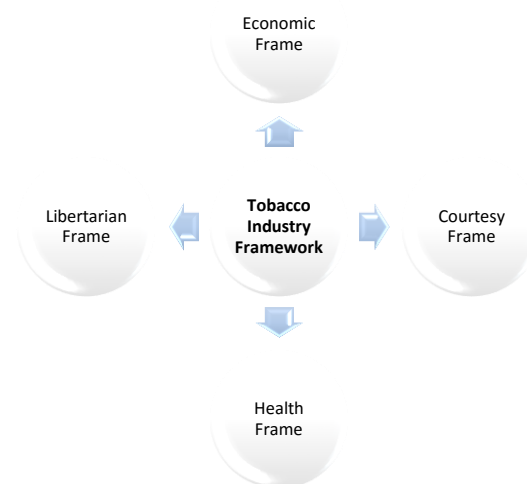
"Germany is noted within Europe for its weak tobacco control policies and its opposition to European Union tobacco control legislation" wrote Grüning et al. in their report "Puffing Away? Explaining the Politics of Tobacco Control in Germany" (2008, p. 1). The report presented several examples where Germany did not comply with European tobacco control measures. One of these examples was the 1998/43/EC directive with a comprehensive ban on tobacco advertising. Four tobacco companies and the government of Germany brought the directive to the European Court of Justice, as they questioned the principle of subsidiarity. The court agreed, therefore annulling the 1998/43/EC directive in 2001. The directive that followed, namely directive 2003/33/EC, did pass; however, Germany again brought the directive to the Court (see "tobacco advertising", page 30).

The question why Germany had such a weak stance on tobacco control can be found in two common answers as explained by political science scholars. First of all, German political parties and agencies received a high level of lobbying from tobacco company, thus enabling tobacco companies to take part in the policy-making process. Second of all, there is a historical context which needs to be addressed. During the second World War, the Nazi regime enforced a strict anti-smoking policy. This strict approach withheld German politicians, media channels and the German society as a whole to agree with or implement stricter tobacco control measures. Grüning et al. furthermore clarified the weak stance of Germany on tobacco control. The political landscape of Germany plays a part in the tobacco control stance. The lack of public health research that occurred after the second World War is clarified as one of the reasons there is limited tobacco control. Additionally, health and lifestyle is seen as a private matter in Germany, meaning a low interference of government is appreciated by the German society. Where previous research shown an increase in tobacco control in federalist states (such as Canada or the United States), Germany did not follow the set examples. This was due to the fact that before 2006, the federal government had the exclusive right to regulate tobacco. A reform of German

federalism took place in 2006, shifting power from the federal to the state level, giving more power for regulation which ultimately led to the *Nichtraucherschutzgesetz* in North Rhine-Westphalia, which is further explained in chapter 2.II (Grüning et al. 2008).

### Tobacco Industry Framework

As indicated before, the strong lobbying of tobacco companies influenced decision-making in Germany, especially during the 1900s. Pro-tobacco groups created a framework in which they summarised their interests and used arguments to influence the public's way of thinking. As Grüning et al. suggested that the tobacco industry's framework held a strong influence in the German society and political landscape, a deeper understanding is explained as



following and visualised in figure two. The tobacco industry focused on four frames within their framework: the economic frame, the libertarian frame, the courtesy frame and the health frame (Grüning et al. 2008, p. 150).

*Figure 3 The Tobacco Industry Framework, as explained by Grüning et al. (2006, p. 151 - 154)*

**Economic Frame:** The tobacco industry strongly suggested the importance of tobacco consumption for the German economy. The assumption that tobacco plays an important part in the German economy comes from the state of the German economy and the fact that Germany is the biggest cigarette manufacturer and has the largest cigarette consumer market; thus, a decline in smoking would mean a decline in the strength of the German economy. The tobacco industry additionally paid attention to the tobacco tax revenues and the jobs created by big tobacco. Grüning et al. showed that the contribution of the tobacco industry for the German economy is actually limited; although the influence by the economic frame was noticeable as the German government remained reluctant in implementing tobacco control policies (2008, p. 151-152).

**Libertarian Frame:** An important argument from the tobacco industry derived from the freedom of choice. Cigarettes are legal consumer goods; thus, it should remain the choice of the consumer to buy tobacco products (Grüning et al. 2008, p. 153). This is why the tobacco control followed the libertarian frame, as libertarianism includes individualism, the individual right as a moral being to make choices and the free market principle (Boaz, 1999). Tough tobacco control was presented by the tobacco industry as an oppression to libertarianism, furthermore referring to the Nazi history of Germany. The

problem, clarified by Grüning et al. is that tobacco consumers, in particular under-aged smokers, do not have the realisation that tobacco products may cause harm due to the lack of education in tobacco prevention. Even though the tobacco industry realised this, they still remained in their position that consumers should have the individual freedom to smoke (2008, p. 153).

**Courtesy Frame:** Social acceptability of smoking was heavily marketed by the tobacco industry, as one of the key points of their framework stated that there should be a mutual understanding and a tolerance between smokers and non-smokers (Grüning et al. 2008, p. 153). As found in the tobacco industry document “The Industry in Action“, the tobacco industry launched a media campaign in which the objective was to encourage the social acceptability of smoking. Based on their observations, state intervention in smoking would not receive public support and through a survey they found smokers and non-smokers would rather work out disagreements between themselves (1987).

**Health Frame:** The tobacco industry presented several arguments against scientific research into the effects of smoking. Their observations were based on the amount of research which was accepted by the society at different points in time. The first argument was that the research results were false or influenced. The second argument was based on the possibility of interpretation of the evidence presented by scientific research and the missing link between smoking and the health risks. The third argument partly accepted the causes of smoking, but compared the causes with environmental and health risks in general. As the argumentation of the health frame changed based on the point in time in which it was applied, it was important for the tobacco industry to manage the health frame correctly, which, as Grüning et al. pointed out, did have an impact in the scientific developments of tobacco control and tobacco evidence in Germany (2008, p. 154).

### **Tobacco control in 21<sup>st</sup> century**

As compared to the 1900s, Germany changed its attitude towards smoking and tobacco control and is shying away from their pro-tobacco-industry stance (K. Duke, 2006). As of 2007, new measures were taken and tobacco control was increased. One of the reasons for this change was the ratification of the FCTC by the federal government, followed by the German states improving their tobacco legislation. Taxes on tobacco products were furthermore increased. The German government does still allow some forms of tobacco advertising, which, compared to other European countries, is uncommon (Joossens and Raw, 2007). The reason behind some forms of advertising still being allowed is based on the fact that, as further clarified in the next part of this thesis, the Tobacco Advertising Directive of 2005 did not include advertising on billboards and using merchandising. It is for this reason that the German

government still allowed tobacco advertising through these channels (K. Duke, 2006). However, as of 2020, outside advertising will be banned and limited in cinemas (more on this topic can be found on page 31-32). In 2013, Joossen and Raw published their new Tobacco Control Scale 2013, in which Germany was placed on the 33<sup>rd</sup> place, as Germany did not introduce any new tobacco control legislation since 2010 (2014).

The level of transparency of the German government in its talks with the tobacco industry has increased since the 1900s. On December 10, 2015, the BMEL Secretary of State replied on questions asked by *Bündnis 90/Die Grünen* in regards to the transposition of the 2014/40/EU Directive and other tobacco-related topics. Several questions were in regards to the transparency of tobacco lobbying, for example whether any of the BMEL staff received money from the tobacco industry between 2010 and 2015, which is not the case. The tobacco industry has to comply with the same transparency regulations as other industries. This includes reporting on discussions the tobacco industry has with political parties or sponsoring of governmental institutions. In order to offer full transparency in negotiations or discussions with the tobacco industry, the BMEL furthermore publishes the correspondence it has with the tobacco industry online (M. Flachsbarth, 2015).

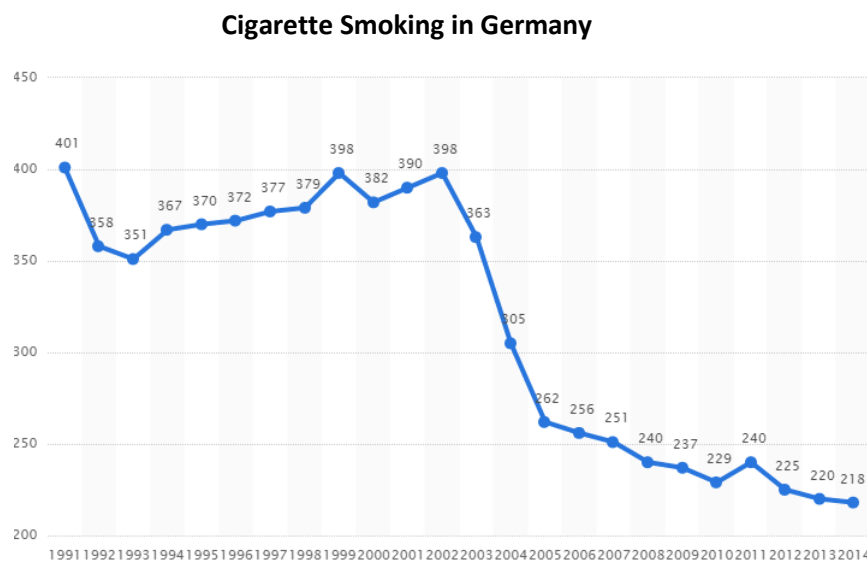


Figure 4 Average amount of Cigarettes consumed by German citizens from 1991 to 2014. The Y-axis presents the amount of cigarettes in millions ("Durchschnittlicher Verbrauch von (versteuerten) Zigaretten", 2015).

In 2014, there were approximately 20 million cigarette smokers in Germany ("Raucher bringen deutschem Staat", 2014, par. 6). Based on the economic analysis of the EU market of tobacco, nicotine and related products conducted by the Executive Agency for Health and Consumers, it became clear

that in 2010, the value of the sales of cigarettes on the German market was equal to €19.5 billion, making the German market the biggest European tobacco market in terms of value (2009, p. 24). Statista, a German statistical website which gathers data from over 18.000 sources presented in figure four, which gives an overview of the average amount of cigarettes smoked daily by German inhabitants from 1991 to 2014. A decrease is noticeable throughout the years.

### **Tobacco Legislation in Germany**

In the following part of chapter two, an overview of the federal tobacco control measures is given. The rules and regulations were decided from the federal level and are therefore applicable in all the German states.

### **Tobacco labelling in Germany**

Directive 2001/37/EC obliged Member States to ensure that each tobacco product, except for tobacco for oral use and other smokeless tobacco products, should contain a general warning and an additional warning as explained in Annex I of the directive and as displayed below in table one (2001). In Decision 2003/641/EC of the European Commission, picture warnings and new standardized health warnings were introduced for cigarette packages in the European Union in order to give Member States the option of implementing picture warnings. This was again defined in May 2005, when the Commission published a decision which states that “Member States can decide whether health warnings in the form of colour photographs or other illustrations are required in combination with the additional warnings” (26/4/2005, par. 2).

Germany did not implement the colour photographs, but did implement the following health warnings (“Health Warnings”, 2005):

<b>German:</b>	<b>English translation:</b>
Rauchen tötet	Smoking kills
Rauchen kann tödlich sein	Smoking may be deadly
Rauchen fügt Ihnen und den Menschen in Ihrer Umgebung erheblichen Schaden zu	Smoking harms you and people around you
Raucher sterben früher	Smokers die younger
Rauchen führt zur Verstopfung der Arterien und verursacht Herzinfarkte und Schlaganfälle	Smoking clogs the arteries and causes heart attacks and strokes
Rauchen verursacht tödlichen Lungenkrebs	Smoking causes fatal lung cancer
Rauchen macht sehr schnell abhängig: Fangen Sie gar nicht erst an!	Smoking is highly addictive, don't start

Wer das Rauchen aufgibt, verringert das Risiko tödlicher Herz- und Lungenerkrankungen	Stopping smoking reduces the risk of fatal heart and lung diseases
Rauchen kann zu einem langsamen und schmerzhaften Tod führen	Smoking can cause a slow and painful death
Rauchen lässt ihre Haut altern	Smoking causes ageing of the skin
Rauchen kann die Spermatozoen schädigen und schränkt die Fruchtbarkeit ein	Smoking can damage the sperm and decrease fertility
Rauchen kann zu Durchblutungsstörungen führen und verursacht Impotenz	Smoking may reduce the blood flow and cause impotence
Rauchen enthält Benzol, Nitrosamine, Formaldehyd und Blausäure	Smoking contains benzene, nitrosamines, formaldehyde and hydrogen cyanide
Rauchen in der Schwangerschaft schadet Ihrem Kind	Smoking when pregnant harms your baby
Schützen Sie Kinder: Lassen Sie sie nicht Ihrem Tabakrauch einatmen	Protect children: don't make them breathe your smoke
Ihr Arzt oder Apotheker kann Ihnen dabei helfen, das Rauchen aufzugeben	Your doctor or your pharmacist can help you stop smoking
Hier finden Sie Hilfe, wenn Sie das Rauchen aufgeben möchten	Get help to stop smoking

*Table 1 Health Warnings in German and English, as taken from the Pictorial Health Warnings of the DG of Public Health ("Health Warnings", 2005)*

### Cigarette machines

Hanewinkel and Isensee reported that in 2004 there were around 726,000 cigarette vending machines in Germany, equal to one machine for every 113 inhabitants. In their research, they measured that 51.92 per cent of adolescent (14 to 17 years old) smokers purchased cigarettes from cigarette machines, whereas 38 per cent of young adult (18 to 25 years) smokers and 28.06 per cent of adult (older than 25) smokers purchased their cigarettes from the machines. As a majority of adolescent smokers purchased their cigarettes through cigarette machines, new legislation was necessary to be introduced in order to prevent purchasing cigarettes by adolescents (2006). The number of tobacco vending machines has decreased, as the BDTA, the German organisation for tobacco trade, writes that there are currently 340,000 cigarette machines in Germany. In 2014, 11 per cent of tobacco purchases were by the use of a cigarette machine (BDTA, 2015). Since the implementation of the 2007 Act on the Protection against the dangers of passive smoking (in German: "Gesetz zum Schutz vor den Gefahren des Passivrauchens"), children younger than 18 are no longer allowed to purchase tobacco products. Due to the implementation of this bill the cigarette machines had to be adjusted. As of the first of January 2009, all cigarette machines have been adapted to include an ID scanner before a cigarette purchase can be made (BDTA, 2015). This was decided in the "Jugendschutzgesetz" (JuSchG) or protection for youth Act (Flachsbarth, 2015, p. 4).



On November 12, 2015, the *Bündnis 90/Die Grünen* political party asked the federal government in a minor interpellation if the government wanted to ban cigarette machines. As written above, the JuSchG of 2008 requires cigarette machines to carry an ID scanner. It also decided that cigarette machines are allowed on places where children or youth are denied entry. The BDTA furthermore makes certain cigarette machines are not placed near schools and youth centers. As these extensive regulations make sure children or youth are unable to purchase tobacco products from cigarette machines, the federal government responded that at that point in time it is unnecessary to ban cigarette machines in Germany (M. Flachsbarth, 2015).

### Taxation on tobacco products

In Germany, there is a high revenue for the public treasury due to the taxation on cigarettes. The WHO reported that the tax ranges on tobacco were in the medium range in 2004. Through different calculations, the World Bank expected a 2.6 per cent increase in government revenues when the German government increases tobacco taxation with 10 per cent (2004). Originally, there were plans by the German legislators to increase the taxes in 2003; however, due to an extensive lobbying campaign by the tobacco industry the planned taxes were decreased to a lower level ("Taxation of tobacco products", 2004, p. 17). On December 11, 2015, Maria Flachsbarth, of the BMEL answered a question by the parliament in regards to a possible increase in tobacco taxation for 2016. In December, 2015, the federal government did not plan an increase in tobacco taxation, as the taxes have already been increased in January 1, 2015 (M. Flachsbarth, 2015, p. 4).

An overview of the amount of fixed tax and the flexible tax based on the retail price of the cigarettes in recent years can be found the following table ("Höhe der Tabaksteuer", 2015):

Time period:	Taxation:
Until 30 April, 2011	- 8.27 cents per unit of tobacco - 24.66 per cent of retail selling price
From May 1, 2011 to December 31, 2011	- 9.08 cents per unit of tobacco - 21.94 per cent of retail selling price
From January 1, 2012 to December 31, 2012	- 9.26 cents per unit of tobacco - 21.87 per cent of retail selling price
From January 1, 2013 to December 31, 2013	- 9.44 cents per unit of tobacco - 21.80 per cent of retail selling price
From January 1, 2014 to December 31, 2014	- 9.63 cents per unit of tobacco - 21.74 per cent of retail selling price
From January 1, 2015 to February 14, 2016	- 19.636 cents per unit of tobacco

Table 2 Amount of fixed and flexible tax on cigarettes in Germany, as presented by the Ministry of Finance ("Höhe der Tabaksteuer", 2015)

## **Tobacco advertising in Germany**

### **History**

In 2003, the European Parliament and the Council agreed upon Directive 2003/33/EC on Tobacco Advertising, or in its full name: "Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products" (Official Journal L 152, par. 1). The transposition of this directive into national law was not without complications. EURACTIV reported that in 2003, the German government asked the European Court of Justice if the EU lawmakers were not exceeding their political power. Furthermore, Germany felt that the legal basis chosen for the Tobacco Advertising directive was incorrect (2015, par. 4). For these reasons, the German government did not transpose the EU directive into national law and continued to advertise tobacco on channels prohibited by the new directive.

It was Markos Kyprianou, the former European Commissioner for Health and Consumer Protection, who in 2005 stated that the tobacco advertising directive had to be implemented on July 31, 2005 in all the Member States ("Tobacco advertising ban", 2005, par. 1). However, by October 2005, Germany still did not transpose the directive into national law, which is why the Commission referred Germany to the European Court of Justice in the third step of the infringement procedure, as laid down in figure five. According to Ditsch and Zuber, the Commission starts the infringement procedure with a letter of formal notice, either on its own initiative or based on a complaint. The letter of formal notice requests information of the Member State so that the Commission can investigate the case. It is described as the informal phase, as information is not publicised. If the Commission does not receive a response or if the arguments are not adequate for the delay in the transposition of the directive, the Commission moves to a reasoned opinion or phase two. The second phase goes alongside a press release in which the public is informed about the infringement. In case the Member State does not comply with the reasoned opinion, the Commission may bring the Member State to the European Court of Justice. The court decides whether the Member State is in fact under the infringement procedure and whether the Member State should follow the reasoned opinion of the Commission. Penalties may be given if a Member State fails to comply with the judgement under Art. 260 TFEU (2010).

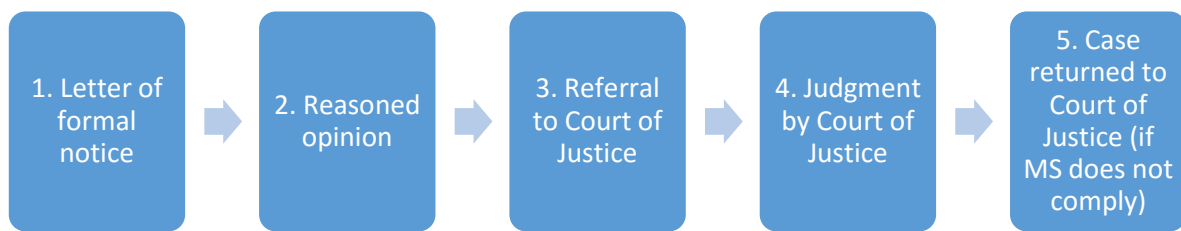


Figure 5 Steps in the Infringement Procedure in which the Commission goes against a Member State ("Infringement Procedure", 2015).

The infringement procedure against Germany reached the third stage in which the Commission referred Germany to the Court of Justice for not complying with the Tobacco Advertising Directive. By June 14, 2006, the Advocate General of the European Court of Justice recommended the Court to “dismiss the action brought before it by Germany” as the Tobacco Advertising Directive had a correct legal basis (“Germany bows to pressure”, 2006, par. 8). What followed was a response from the German Consumer Protection Minister Horst Seehofer, who on the same day announced that the German government will agree upon the implementation of the tobacco advertising directive (“Germany bows to pressure”, 2006, par. 8).

### **Tobacco Advertising Ban as of May 2016**

Christian Schmidt, minister of the BMEL, announced on December 16, 2015, that outdoor advertising of tobacco products will be banned and cinema advertising will be restricted in Germany as of May 20, 2016. The decision was included in the transposition bill of the 2014/40/EU directive. *Der Tagesspiegel* reported that outdoor advertising of tobacco products will be banned as of 2020. The advertising of cigarettes in cinemas will be banned, with the exception of advertising before movies that are not targeted for youth. Tobacco advertising in kiosks and at other tobacco vendors will still be permitted under the new law (Woratschka, 2015).

### **Position of federal government on E-cigarettes**

The federal government sees e-cigarette smoking as being connected to health risks. It is for this reason that on November 4, 2015, the German government agreed upon a new bill that protects children and youth from the dangers of consuming electronical cigarettes and e-shishas. The bill made sure that consumers under 18 years of age are not allowed to purchase e-cigarettes or e-shishas, both online and offline. In the response of M. Flachsbarth to the minor interpellation of November 12, 2015, it became clear that the government bases its position on e-cigarettes on the outcome of the following three reports (2015, p. 4-5):

**1. WHO “Electronic Nicotine Delivery Systems” (2014)**

On July 21, 2014, the WHO presented their report on the health impacts of electronic nicotine delivery systems (ENDS), more commonly referred to as e-cigarettes. This report was written for and presented at the fifth edition of the Conference of the Parties. The health risks that are associated with nicotine intake are dependent on different factors, due to the different amounts of nicotine that are inhaled when smoking an e-cigarette. Some types of ENDS contain a bigger amount of nicotine, whereas others are without nicotine. In general, the report states that nicotine “can have adverse effects during pregnancy and may contribute to cardiovascular disease” (“ENDS”, 2014, p. 3). The vapour exhaled by an e-cigarette user contains nicotine and toxicants, which can cause irritation or affect peoples’ health. Long-term health problems of smoking e-cigarettes are unknown at this point of time or inconclusive and the WHO states it could cost years before such evidence could be found (“ENDS”, 2014).

**2. German Center for Cancer Research (DKFZ) “Health Hazards of e-cigarettes for Children and Youth” (2015)**

In the position paper on e-cigarettes of the German Center for Cancer Research, or DKFZ in German, evidence was gathered which explained why e-cigarettes either with or without nicotine could cause harm to children and youth. The paper identified the toxicants which are released upon exhalation of an e-cigarette, including nicotine, propylene glycol and glycerol (Schnaller et al. 2015). These toxicants can act as a carcinogen, which are substances and exposures which could lead to cancer, as defined by the American Cancer Society (2015). E-cigarette smoking creates aerosol which are, as defined by the University of Florida and Washington University, tiny particles which come free after evaporation (n.d.). According to the DKFZ, the aerosol from e-cigarette smoking contains formaldehyde and acetaldehyde, which can both act as a carcinogen. Both the aerosol from e-cigarettes without nicotine as with nicotine have the same amount of carcinogens. (Schnaller et al. 2015).

**3. Federal Institute for Risk Assessment (BfR) “Health Risks E-Shishas without nicotine”**

The Federal Institute for Risk Assessment (BfR in German) measured the health risks for smoking e-shishas, a type of e-cigarettes, in their report “Nikotinfreie E-Shishas bergen gesundheitliche Risiken” The conclusions of the report were similar as those of the DKFZ and like the WHO, The long-term effects of e-cigarette smoking still require years of research (2015).

### Tobacco Legislation in North Rhine-Westphalia

#### Bill to protect non-smokers for harm of cigarettes

*“Nichtraucherschutzgesetz NRW, 20. December 2007”*

In 2007, the government of North Rhine-Westphalia agreed upon a bill of which the primary goal was to protect non-smokers. The bill became active as of January 1, 2008. The bill introduced a smoking ban inside the following locations:

Category:	Places:
Government areas	<ul style="list-style-type: none"> <li>- Concerning local government offices and other government organs</li> <li>- Any office of a public official</li> </ul>
Health and social instances	<ul style="list-style-type: none"> <li>- Hospitals</li> <li>- Prevention and rehabilitation facilities</li> <li>- Health institutions and centres</li> <li>- Prisons</li> </ul>
Educational instances	<ul style="list-style-type: none"> <li>- Schools and playgrounds</li> <li>- Child and Youth services</li> <li>- Adult education</li> <li>- Universities and universities of applied sciences, Art and music schools</li> </ul>
Sport areas	<ul style="list-style-type: none"> <li>- Closed sporting facilities, such as a fitness gym</li> </ul>
Culture and leisure locations	<ul style="list-style-type: none"> <li>- Theatres, museums, cinema's, concert halls, game halls</li> </ul>
Airports	<ul style="list-style-type: none"> <li>- Public accessible areas of airports</li> </ul>
Restaurants	<ul style="list-style-type: none"> <li>- All restaurants and bars</li> </ul>
Shopping malls and shops	<ul style="list-style-type: none"> <li>- Public accessible areas</li> </ul>

*Table 3 Measures in the Protection for Non-Smokers Bill ("Nichtraucherschutzgesetz", 2007)*

Smoking rooms are still permitted in nursing homes and prisons; however a barrier must be created between the room and the rest of the buildings. It is also necessary to include “no smoking” signs and children under 18 are not allowed to enter the smoking facilities (“Nichtraucherschutzgesetz”, 2007).

#### Stakeholder response on the 2007 NRGZ

Based on communications with the DZV, the impact of the NRGZ was limited for the tobacco industry. “The impact of the non-smoking protection act did not have any consequences on the German Cigarette Association and barely any effects on the member companies of the Association” says M. Heddenhausen of the German Cigarette Association (2015). The Association did not have a particular position on the implementation of the non-smoking protection act. The DZV supports the regulation

of smoking in public places, as it supports smokers and non-smokers alike. In places where people are not voluntarily, such as in a hospital or at work, they support a smoking ban as well. The DZV does feel that in places where people choose to enter, smoking rooms should be implemented in the form of clearly defined areas where millions of adult smokers have the possibility to smoke. This includes restaurants, bars and pubs (M. Heddenhausen, 2015).

### **NRGZ of 2013: Smoking in restaurants, bars and clubs banned**

On November 29, 2012, the *Landtag* of North Rhine-Westphalia agreed upon the “*Gesetz zur Änderung des Nichtraucherschutzgesetzes NRW*”. In this new legislation, smoking in restaurants, bars and clubs became prohibited as of May 1, 2013. The law was further specified to ban smoking in restaurants, bars and clubs to improve the protection of non-smokers in North Rhine-Westphalia (“*Nichtraucherschutz*”, 2015). Two years after the ban was implemented, the *Rheinische Post* reported on the opinions of North Rhine-Westphalian inhabitants on the revised NRGZ. In their survey, 55.1 per cent of respondents felt positive about the new NRGZ, whereas 44.9 per cent disagreed with the new rules. The report notes that many people are already used to the new NRGZ and that the countermovement against the NRGZ is slowly disappearing, as it does not seem likely the law would change at this time (“*Zwei Jahre Nichtrauchergesetz*”, 2015).

### **E-cigarette regulations**

The *Oberverwaltungsgericht* in Munster, the highest court of North Rhine-Westphalia, decided in November of 2014 that the smoking of e-cigarettes is permitted in restaurants and bars. With this decision, the Court decided that the NRGZ of 2013 did not include e-cigarette smoking and should allow the so called “vaping” inside restaurants, bars and clubs (“*Urteil in Nordrhein-Westfalen*”, 2014). The case was brought to the court of Cologne by a local business owner who wanted to allow the customers of his restaurant to smoke e-cigarettes. The Cologne judicial allowed the business owner to let his customers smoke e-cigarettes inside his restaurant; however, due to the nature of the legal matter, it being revolved around a law which addressed for complete state of North Rhine-Westphalia, the Cologne Court decided to ask a judgement of the Higher Court in Munster (“*Kölner Gericht erlaubt E-Zigaretten*”, 2014).

The regulation of e-cigarettes can cause not only legal problems as described above, but sociological problems as well. K. Voigt argues that even though there is a possibility that e-cigarettes could lead to the renormalisation of smoking; meaning the return of making smoking socially acceptable as it was in the 1900s, legislators should still be careful with putting too many restrictions on e-cigarettes. “The

dramatic change in social attitudes of just a few decades is seen by many as an important success for tobacco control (..)”, says K. Voigt (2015, p. 1968). As the smoking of e-cigarettes grows in popularity, the WHO is concerned with an increase in attractiveness of smoking and suggest that the smoking of e-cigarettes should be banned in places where traditional cigarettes are also banned, as this would not renormalize smoking. Another argument for the regulation of e-cigarettes is the marketing potential which could connect the smoking of e-cigarettes to the traditional smoking. K. Voigt argued that regulation against the marketing of e-cigarettes should focus on companies, as they market their products as attractive. Too much marketing restriction could raise a problem, as there is a possibility of e-cigarettes being a tool for smoking recession. If scientific research will prove that e-cigarettes help with the quitting of tobacco, smokers should allowed to be informed about the alternative product (2015).

### Conclusion

Chapter two firstly discussed the historical background of Germany's stance on tobacco control and was followed by the current tobacco control measures as implemented before the adoption of the 2014/40/EU directive. The weak presence of tobacco control in Germany, as suggested by Grüning et al. is due to the intensive lobbying campaign by the tobacco industry. Through a framework, the tobacco industry created arguments against possible tobacco control measures in four areas: from an economic, courtesy, health and libertarian point of view. Even though extensive lobbying persisted throughout the 1900s, the once weaker stance on tobacco control of Germany changed after 2001.

Since 2007, new tobacco control measures were introduced such as the North Rhine-Westphalian *Nichtraucherschutzgesetz*, a bill protecting non-smokers from the harms of tobacco. As the tobacco market is changing, with e-cigarettes taking over a big part of the traditional tobacco consumers, new rules and regulations need to be introduced in order to adapt to the new tobacco market. An example of this North Rhine-Westphalia was the decision by the highest court stating that e-cigarettes are allowed to be consumed in bars. As the 2014/40/EU directive requires Member States to change existing laws and/or create new regulations, the consequences of the directive for Germany and North Rhine-Westphalia are discussed in chapter four.



## **V. Chapter 3: The German political system and party positions on Directive 2014/40/EU**

In this chapter, an introduction to the German political system will be given, followed by an introduction to the political parties of North Rhine-Westphalia and a deeper look into the political movements that are represented in the parties. This chapter helps to understand the political context in which the 2014/40/EU directive will be transposed into German and NRW law. A description of the debate that occurred on January 23, 2013 will be given in which the NRW political parties shared their position on the proposal for the revised tobacco directive. Finally, the consultation of the German *Bundesrat* to the European Commission is given.

### **The German Political System**

Federalism in Germany underwent changes after the collapse of the Berlin Wall in 1989 as explained by A. Gunlicks. In July 1990, a report on the cornerstones of federalism was published by Helmut Kohl, the prime minister of the previous West German government. In the report, he noted his concerns on the increased centralisation that occurred in Germany, directly meaning less power in the hands of the German states. With this report, proposals were created for changes in the German constitution. The report included a plan with the ultimate goal of German unification on November 28, 1989. In the plan, Kohl proposed the creation of a federation, as Germany had a long history of federalism and federalism was successful in West Germany from 1949 to 1989. Federalism was furthermore written down in the constitution of West Germany, namely in article 79, making it a required step for the former communistic East to transition into federalism. As the two German governments, East and West, signed the Unification Treaty on 31 August 1990, a new Federal Republic was created (1994, p. 81-98).

The current state of the federalist political system of Germany is explained as following by A. Gunlicks. The division of legislative powers between the federal and the decentralised state governments is written in the German constitution, known as the Basic Law. In Article 70, the Constitution gives states the right of passing legislation. The states mainly focus on legislation concerning culture including schools, public safety, aspects of civil service and health care (2003, p. 56). It must be noted that the federal government has greater legislative power as compared to the decentralised state powers. Article 71 of the Basic Law denies state governments the power in exclusive federal jurisdiction, excluding those jurisdictions granted by federal law (Gunlicks, 2003, p. 56). In article 73 of the Basic Law, the legislative powers are described to be exclusively in the hands of the federal government. This article can be found in the Appendices of this thesis in chapter *iv*. Concurrent power, meaning

power both shared by the federal and the state government, is described in articles 72 and 74 of the Basic Law. In Article 72 it is explained as following: “On matters within the concurrent legislative power, the states shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law” (“Basic Law for the Federal Republic of Germany”, 2012). This means the states have the legislative power as long as the federation did not already pass a law in the area of concern. There are furthermore measures which fall under concurrent legislative powers, which can be found in Article 72 and 74 of the Basic Law. They have been included in the appendix chapter *iv* as well.

### The North Rhine-Westphalian Government

The NRW government consists of five political parties, namely the SPD, the CDU, *Bündnis 90/die Grünen*, the FDP and *die Piratenpartei*. Every five years, elections are held in order to select at least 181 members for the NRW state parliament (*Landtag* in German). The election system, known as the personalised proportional representation system, works as following: a German citizen who reached the age of majority and lived at least 16 days in North Rhine-Westphalia is allowed to cast two votes. One vote will be cast on a candidate of a political party, while the other vote will be cast on a political party. The candidate with the most votes is elected in the constituency, which is equal to a total of 128 members of parliament. The other members of parliament are elected through the second vote, which determines the size of a political party in the *Landtag*. This will calculate the number of seats the parties will receive in the *Landtag*. The seats will then be filled with members on the reserve lists of the political parties (“How is Parliament elected?”, 2015, par. 3).

In the 2012 *Landtag* elections, the results were as displayed in table four, with the SPD and *Bündnis 90/die Grünen* becoming the two governing parties of North Rhine Westphalia.

Election Results of the Landtag Elections 2012	
SPD <i>Sozialdemokratische Partei Deutschlands</i>	39.1 per cent of the votes, equal to 99 seats in the Landtag
CDU <i>Christlich Demokratische Union Deutschlands</i>	26.6 per cent of the votes, equal to 67 seats in the Landtag
Bündnis 90/Die Grünen	11.3 per cent of the votes, equal to 29 seats in the Landtag
FDP <i>Freie Demokratische Partei</i>	8.6 per cent of the votes, equal to 22 seats in the Landtag
Piratenpartei Deutschland	7.8 per cent of the votes, equal to 20 seats in the Landtag

Table 4 Results of the State Elections of 2012 (“Landtagswahl 2012”, 2012)

### Political parties of NRW

#### SPD

The governing political party of North Rhine-Westphalia is the SPD, an abbreviation for “*die Sozialdemokratische Partei Deutschlands*”, meaning the Social Democratic Party of Germany. Social democracy does not have one clear definition, as Sandbrook et al. explained that a social democratic route has different characteristics identified by scholars. However, social democratic thinking began in the early 1900s and was grounded as a political movement after the second World War, due to the problematic global economic situation (2007, p. 12-13). The first social-democratic experiment took place in Sweden in the 1930s and 40s, where the first social democratic features were noticeable, as Sandbrook et al. identified the following features: “a class compromise involving labour and capital, a welfare state predicated on universal entitlements, and full employment policies” (2007, p. 13). It were the Swedes who created the first social programs which were based on the entitlement for every citizen to equal access to services and a basic living standard (Sandbrook et al. 2007, p. 13). The standard model of social democracy is explained by Thomson as having the following characteristics: the state plays a heavy role in the economy, equality should be pursued and the interests of workers should be protected (2000). In the 1970s and 80s, when social democrats were present in different governments throughout Europe, there were occurrences which showed that the original model of social democrats did not work completely. First of all, the basis on which social democratic politics rests, namely Keynesian policies, was unable to counter modern economic problems such as inflation and stagnation. Second of all, in order to maintain the social programs, deficits were created by governments in which social democrats were governing parties, thus creating an unstable economy with even higher taxes. In order to keep the social democratic movement, political parties throughout Europe adapted their strategic and policy shifts in order to adapt to the changing environment. The original approach to replace capitalism with socialism was repealed, as this would have been damaging for the free market. Through measures such as decreasing subsidies and privatising state companies, the social democratic approach became more market-friendly. Instead of focusing on equality through a redistribution of income for the poor, the focus would be laid on the equality of opportunity, meaning having the equal opportunity to become successful in a society (Sandbrook et al. 2007).

The federal party of SDP has the following priorities: minimum wage, better pensions, affordable housing, restarting energy transition, more support for families, peace politics and many others. These priorities are in line with the social democratic features as described above. In European politics, they

stand for a more scientific, dynamic, socially just and democratic Europe (“Motor der Regierung”, 2015). In North Rhine-Westphalia, together with *die Grünen*, the following themes are of great importance to the party: help for refugees, education for everyone, strong municipalities means a stronger state, fair jobs, digital economy, help for the elderly and many others (“Was uns bewegt: Themen”, 2015).

## CDU

The CDU, an abbreviation for “*die Christlich Demokratische Union Deutschlands*”, meaning the Christian Democratic Union of Germany, is currently the main political party of the federal government and has 67 seats in the North Rhine-Westphalian *Landtag*. Christian democratic parties are active in a number of European governments, including the federal government of Germany. According to Kalyvas and van Kersbergen, the origins of Christian democracy lay in the Catholic confessional parties which started to emerge in the late 1800s and early 1900s and gained in popularity after World War II. In the report, key concepts are identified as being a part of Christian democracy, namely human rights based on a Christian commitment, liberal democratic values, integration, compromise, accommodation and pluralism (Kalyvas and van Kersbergen, 2010, p. 185-186). In the late 1980s, the Christian democratic movement in Germany had a declining rate in popularity especially on the state level. This was due to several factors, including secularisation and the transformation of traditional values in West Germany. However, in 1990 Chancellor Kohl of the CDU/CSU won the national election, gaining 43.8 per cent of the vote. Due to the unification of East and West Germany, the CDU offered East Germans a rapid assimilation into West Germany, by which they gained new (previous) East German voters and won the elections. This changed in the late 1990s, when the Christian democrats dropped 5.8 per cent in votes as voters were unhappy with the CDU/CSU through the 1990s. In 2002, the party regained 38.5 per cent of the votes and in 2005 they received 35.2 per cent of the votes (Kalyvas and van Kersbergen, 2010). As both the CDU and the SPD gained less votes partly due to the

Values	Faith	Ethics	Religion
<ul style="list-style-type: none"> <li>• legal awareness, responsibility, helpfulness, tolerance and the fulfillment of duties</li> </ul>	<ul style="list-style-type: none"> <li>• Faith is seen as private by nature.</li> </ul>	<ul style="list-style-type: none"> <li>• Ethics has a value-neutral meaning.</li> </ul>	<ul style="list-style-type: none"> <li>• Religion is seen as a coming together of a community, where a reconnection takes place with transcendent-divine form of existence.</li> </ul>

increase in different political parties, they came together in a coalition on the federal level in 2007 (Kalyvas and van Kersbergen, 2010).

In North Rhine-Westphalia, the SPD is in a coalition with *Bündnis 90/die Grünen*

party. The CDU describes themselves as the party for the people. The party puts freedom, justice and solidarity as their main pillars, with a Christian view of humanity. The Christian aspect of the party is divided into four central key points: values, faith, ethics and religion, each having the elements as displayed in figure six. For North Rhine-Westphalia, the CDU emphasises family as being the cornerstone of society. Their program consists of promoting equality for men and women, care for the

Figure 6 The elements of the four Christian values of the CDU in NRW  
 ("Grundsatzprogrammprozess der CDU NRW", 2014, p. 54-55)

elderly, a strong energy policy,  
 protection for the environment and  
 security policy

("Grundsatzprogrammprozess der CDU NRW", 2014).

### Bündnis 90/Die Grünen

In 1979, representatives from different movements (the environmental, peace and women's movements) came together and established *die Grünen* party in Bonn. *Die Grünen* translates as the green party, putting an emphasis on the environmental aspects of society. In 1990, after the unification of Germany, *die Grünen* entered the *Landtag* of North Rhine-Westphalia, after receiving 5.05 per cent of the votes, equal to 12 members of parliament ("Grüne Historie", 2015). In 1993, *die Grünen* joined together with *Bündnis 90*, a previous non-Communist political party in East Germany. As of that day, the party is officially called *Bündnis 90/Die Grünen*.

The Green party movement was not limited to the one that was established in Germany, as not only Green parties but also non-governmental institutions focusing on ecological policies were grounded in the 1970s. Cordier explains that an important issue that arose with the foundations of the Green party is the danger of, as a party, focussing on only one issue, namely ecological policy. It was not only important for possible voters to focus on different areas, but also for potential alliance parties. Due to the need to create a party program not only limited on ecology, political conflicts occurred; the biggest issue being the party members not agreeing on the same level on several topics, or seeing topics other than ecology as the same importance. Three main issues causing division between members of *die Grünen*: first of all, the question whether the party should seek out to work with other parties, or remain alone. Second of all, the issue of following the leftist orientation, as members were uncertain to see themselves as a social democratic party or a socialist party. Last of all, the policy style of the party, whether to be radical or cooperative. Within the party of *die Grünen*, there were two factions, that of the *Linkes Forum* (radicals) and the *Realisten* (moderates). Their opposition was mainly concerned with topics such as economic policy. The issue of the two-way division was cleared in 1990, as the radicals left the party to create their own. Cooperating with other parties is no longer an issue

as well, as *die Grünen* base their willing to cooperate on the electoral results. They have furthermore developed from being a single-issue party to having a broad program. In conclusion, Cordier sees *die Grünen* as a left party, leaning towards the social democrats while having clear differences on different policy areas (1996).

As of the 2012 elections, the SPD and *Bündnis 90/die Grünen* are in a coalition together in the North Rhine-Westphalian *Landtag*. Their political agenda focuses on making investments in education, taking care of the environment, equality on the job market, the development of the NRW industrial economy and energy and climate protection (*"Verantwortung für ein starkes NRW"*, 2012).

## FDP

The current main liberal party of Germany is called the *Freie Demokratische Partei* or the Free Democratic Party and is present in the NRW parliament. In 1948, the FDP was founded in West Germany after different liberal groups came together after World War II (Kirchner, 1988). The federal movement in Germany began with failed tries to become part of the political arena in 1848 and under the Weimar Republic, the Economist reports. The FDP since then has been a coalition partner of the government in many times, bringing the liberal values, putting the individual freedom above all, into German's society. After the unification of East and West, the party increased in popularity due to Hans-Dietrich Genscher, a liberal politician who was popular under former East German voters, as he was born in the east. Since then, limited support was to be found for the FDP. Then, in the 2009 federal elections, the party scored 14.6 per cent of the votes. Germans felt the governing parties of 2005 to 2009 did not have enough liberal aspects; thus the FDP gained a victory. However, the victory was of a short term, as the FDP shifted from advocating for more freedom in all aspects of life towards becoming a single-issue party, where the focus was laid on tax cuts. The Germans were unsatisfied with the FDP, even holding the perception that the FDP is the party for the rich. It is for this reason that in the 2013 federal election, the FDP scored 4.8 per cent of the votes. This meant the party did not enter the Bundestag, as the German electoral system holds a 5 per cent threshold for parties in order to enter the federal parliament (*"Dead or just resting?"*, 2013).

Even though the party is not in parliament on a federal level, the FDP did manage to get 8.6 per cent of the votes in North Rhine-Westphalia, meaning they have 22 seats in the *Landtag*. The party's main focus points are the prevention of unemployment, the availability of education for troubled youth, less bureaucracy, getting NRW to become the number one state in innovation by pursuing innovative policies and support for start-ups (*"Unsere Standpunkte im Überblick"*, 2015).

### **Piratenpartei Deutschland**

The *Piratenpartei* (Pirate Party) is a relatively new political party in Europe. The origins of the Pirate Party can be found in Sweden, where the *Piratpartiet* for the first time took part in the general election of 2009. Even though they gained only 0.68 per cent of the vote, meaning they could not enter the Swedish parliament, the party set its first record after only existing for 9 months and already gaining an increasing follower base (Miegel and Olsson, 2011). The rise in support for the Pirate movement in Sweden can be backtracked to the Pirate Bay, a file sharing website originated from Sweden. Since its existence, the website gained popularity due to young people's increased online file sharing. Young people felt conflicted with the politicians in power, as they were unable to keep up with the technological developments such as file sharing. The *Piratpartiet* focuses on classical political values such as democracy, equality, justice, freedom of speech and the right to inform (Miegel and Olsson, 2011, p. 214). The success for the Pirate movement was not limited to Sweden, as in the 2009 federal elections of Germany the new *Piratenpartei* entered the voting ticket for a seat in the federal parliament. Even though the party did not meet the 5 per cent threshold to be elected into parliament, they still gained a massive following and the most online attention out of all the existing German political parties (Jungherr, 2013). According to Jungherr, this was due to the rise of importance of internet regulation into German politics. The party dominated the online sphere, even though it remained a minor player in the political arena (2013).

In 2012, the *Piratenpartei* entered the NRW Parliament for the first time with 20 seats. Their main concerns remain with internet policy, as they are in favour of implementing a Ministry of Internet for North Rhine-Westphalia. They are furthermore committed to net neutrality, basic education for all, data protection and a social market economy. The pirates are the only party who share their opinion on

e-cigarettes, stating that e-cigarettes should be a legal and not too heavily regulated product, taking a liberal approach to legislation surrounding e-cigarettes ("Wahlprogramm", 2012). As an important part of the success of e-cigarettes is the online attention the product received, albeit through social media attention or the rise in online shops, it is logical for the *Piratenpartei* to address the issue.

### **Position of Parties on Directive 2014/40/EU**

The European Commission presented the proposal for the revised tobacco directive on December 19, 2012 with the name "COM(2012) 788 final". The proposal was sent to the Member States' parliaments, where they were given eight weeks to respond on the proposal. The *Bundesrat* of Germany, the

institution in which the sixteen States are represented, received the document on 7 January 2013. Through correspondence with T. Odebrecht, speaker for European Policy of *die Piraten* in NRW, it became clear that State parliaments such as the NRW *Landtag* have the right to take part in the discussions on European legislation, not only through their representatives in the Bundesrat but also in the *Landtag* of NRW. This is based on the Act on Cooperation between the Federal government and States on European Affairs (EUZBLG), more specifically on paragraph three and five of the act. As explained in paragraph three of the EUZBLG, German States' parliaments have the right to comment on proposed European legislation if the interests of the states are affected. According to paragraph five of the EUZBLG, at least two-third of the Bundestag must be in favour of a proposal in the interest of the German states ("EUZBLG", 1993, Par. 3 and 5).

### **Discussion of NRW *Landtag* on tobacco directive proposal**

On January 22, 2013, the NRW *Piratenpartei* presented a proposal for the Bundesrat, in which they commented on the proposed measures in the new tobacco directive. The party started by stating that they acknowledge the overall goal of the European Commission, being the reduction of tobacco-related deaths in Europe and the protection of non-smokers. They did have criticism on several measures by the Commission, starting with the proposed ban on tobacco products with characteristic flavours, as they do not recognize how the proposed ban is in connection with protecting non-smokers. The measure was seen as not being based on scientific evidence and not complying with the principle of subsidiarity, therefore missing the justification of the interference of the Commission on the consumer market. The second measure the *Piraten* did not agree with is the including of e-cigarettes measures, as they do not recognize the categorisation of e-cigarettes into the same product category as tobacco products. The reasoning behind this is the fact that e-cigarettes do not contain tobacco and, when compared with traditional tobacco products, do not pose the same health hazards, even though they do recognize the scientifically proven dangers with the consumption of nicotine. The *Piraten* see e-cigarettes as an alternative for traditional tobacco products, offering smokers who wish to quit traditional tobacco a chance of receiving nicotine on a safer, but similar method (T. Odebrecht, 2015).

The opinion of the *Piraten* as stated above were presented in a proposal for the *Bundesrat*. The *Landtag* of NRW held a debate on the proposal on January 25, 2013 in which several parties responded on the *Piraten* proposal. Nicolaus Kern of the *Piraten* presented the proposal with an introduction, in which he stated that since the 2001/37/EC Directive, the tobacco market has changed and he is therefore in support of the plan for a revision of the tobacco directive. However, the *Piraten* presented their stance on the measures of the revised proposal, creating a proposal of their own to present to



the *Bundesrat* ("Ausschuss für Europa und Eine Welt", 2013, p. 17 ). Angelica Schwall-Düren for the SPD responded with an opening statement in which she recognised the changed tobacco market, especially new tobacco products being brought to the market (e-cigarettes). Before the proposal of the *Piraten*, the NRW parliament was asked to share if they feel the proposed directive would violate the principle of subsidiarity, meaning whether the Commission has the right to intervene in the specific policy area and whether the measure is unable to be coped with on a national level ("The principle of subsidiarity", 2015). The NRW *Landtag* did not feel the directive would violate the principle of subsidiarity, because the main objective behind the revised directive is health protection. The SPD felt that the tobacco directive should be revised on the European level, as it is a European legal framework in the form of a directive. The response on the proposal of the *Piraten* was seen by her as unnecessary, as the subsidiarity principle is not violated and it would not be necessary to give comments on the specific measures as presented by the Commission ("Ausschuss für Europa und Eine Welt", 2013, p. 17-19). The Green party was positive on the tobacco directive, agreeing with the inclusion of e-cigarette measures and stating that the principle of subsidiarity is not breached with the revised directive, as agreed upon before ("Ausschuss für Europa und Eine Welt", 2013, p. 21). The *Piraten* responded by stating that there already is a high level of existing European legislation which promotes the protection of non-smokers. Therefore they feel Member States should be entitled to, on their own, implement new legislation for the protection of non-smokers. The FDP did not share their opinion on the *Piraten* proposal and upheld from voting whether the proposal should be passed on to the *Bundesrat*. The proposal was voted against by the SPD, CDU and *Bündnis 90/die Grünen*. Only the *Piratenpartei* was in favour ("Ausschuss für Europa und Eine Welt", 2013, p. 22-23).

### **Bundesrat opinion for Commission**

On March 22, 2013, the *Bundesrat* shared their opinion with the Commission on the proposal for the revised tobacco directive. The *Bundesrat* supports the reasoning of the Commission on the proposal, as it wants to harmonise the European legislation on tobacco products and protect non-smokers. The measure to increase the health warnings on tobacco products is fully supported, although the *Bundesrat* does not support the implementation of plain packaging, keeping in mind the economic consequences. In the final version of the revised directive, the Commission did not force Member States to introduce plain packaging, but left it in the hands of the heads of government to introduce plain packaging. The German government, as will be discussed in Chapter four, did not choose to introduce plain packaging. On specific measures of the proposal, the *Bundesrat* asked for clearer

definitions of terms such as “characteristic flavours” and “the level of emissions” allowed in cigarettes (“Vorschlag für eine Richtlinie”, 2013).

### Conclusion

The Federal Republic of Germany is, as of 1990, the coming together of the former states of East and West Germany. A new government was formed with the school of federalism as the foundation on which the new republic was created. In a federalist political system, states are given a strong role in the decision-making process. In Germany, this was especially important after the reunification, as the role of German states was in a decline and most political power was in the hands of the federal governments of East and West Germany. The governing institutions of Germany consist of the federal government called the *Bundesregierung*, the *Bundesrat* in which the German states are represented and the national *Landtage*, the State governments.

The state of North Rhine-Westphalia is governed by a coalition between the social democratic SPD and the green party *Bündnis 90/die Grünen*. In the opposition, the Christian democratic CDU, the liberal FDP and the *Piratenpartei* can be found. Even though social and Christian democracy has a long past in German political history, both the *Piratenpartei* and *Bündnis 90/die Grünen* are relative new parties, as the *Piratenpartei* entered the NRW parliament in 2012 for the first time with 20 seats. It was the *Piratenpartei* that addressed NRW parliament on January 22, 2013 on the 2014/40/EU directive. The European Commission presented the draft of the revised tobacco directive to the Member States on December 19, 2012. The *Piraten* wanted to provide feedback on the directive to the *Bundesrat*, as they disagreed with the e-cigarette measures and they questioned the principle of subsidiarity. The feedback, in the form of a bill to the *Bundesrat*, did not receive enough support from the other parties, as most felt it was too late and the principle of subsidiarity was not in question.

## VI. Chapter 4: Transposition of 2014/40/EU Directive in Germany

In the following chapter, the transposition procedure of the 2014/40/EU Directive in Germany will be discussed. The transposition procedure as laid down in the directive is given, followed by the transposition procedure in Germany. The chapter ends with an analysis of the discussion between the BMEL and the *Bundestag* in regards to the transposition of the directive and a documentary analysis of the bill which will bring the 2014/40/EU directive into German national law.

### Transposition procedure

The European Member States need to undergo certain steps in order to transpose the 2014/40/EU directive into national law. In Article 26 of the directive it is written that Member States are obligated to designate the competent authorities which will be responsible for the implementation and the enforcement of obligations from the 2014/40/EU directive. At the latest, this should be done three months before May 20, 2016. Paragraph one of article 29 states that Member States have until May 20, 2016 to bring into force the laws, regulations and administrative provisions as described in the directive. It is necessary for Member States to report to the Commission on the implementation of the directive and in paragraph two of article 29, the requirements for the transposition bill of the directive is explained as following (Directive 2014/40/EU, 2014):

- A reference to the directive is necessary in the official publication of national law.
- A statement is required on the existing laws and regulations when they are repealed by the 2014/40/EU directive.

### Transposition in Germany

As confirmed in the correspondence with the German *Zigarettenverband*, the transposition of the directive into German law had, as of December 1, 2015, not yet started (M. Heddenhausen, 2015). On November 12, 2015, the *Bündnis 90/Die Grünen* asked the federal government several question concerned with the transposition of the directive. In their opening statement, the party confirms that the federal government did not submit any new legislation based on the tobacco directive. It was furthermore unclear when the federal government would present a bill to the parliament, why the federal government waited so long and whether lobbying played a role in the slow transposition process (Göring-Eckhardt & Hofreiter, 2015).

On December 10, Maria Flachsbarth, German Secretary of State of BMEL, answered the questions in a letter to the *Bundestag*. She stated that the German government was still discussing the transposition of the 2014/40/EU Directive. They were therefore unable to answer specific questions on how certain measures would be regulated, such as question eight which asked whether the government will introduce plain packaging. However, the government strived to reach the deadline of May 20, 2016 and will present a bill to the parliament as soon as possible. Contact had already been sought with different tobacco stakeholders, public health institutions, consumer organisations and scientific institutions. Whether lobbying played a part and why the government waited so long is not answered specifically, as Flachsbarth opened her letter with the statement that the government is not obligated to share their decision-making process before a bill is presented to parliament. In Germany, the controlling aspect of the parliament over the federal government is limited to the engagement by the parliament after a bill is presented to the parliament. The right of controlling<sup>2</sup> the actions of the federal government by the parliament is excluding the engagement of the parliament during ongoing negotiations and the preparation stages of the decision-making process of the federal government. For this reason, several questions as asked by *Bündnis 90/Die Grünen* did not receive a specific answer, for example why the federal government did not yet present a bill to the *Bundestag* (M. Flachsbarth, 2015).

#### **Draft on December 16, 2015**

Six days later, the minister of BMEL, Christian Schmidt, presented the bill for the transposition of the 2014/40/EU directive to the *Bundestag*. In his opening statement, he referred to the bill as a contribution to the harmonisation of the European internal market. He noted that around 110,000 Germans die every year due to tobacco-related diseases and therefore felt that consumer protection will increase after the directive has been transposed into German law. In the opening statement of the minister, special attention was given to the following measures of the transposition bill (Deutscher Bundestag, 2015):

- Cigarettes and roll-your-own tobacco products which contain a characteristic flavour or which have the capacity to change the smell, taste or smoke intensity of cigarettes, will be banned. This measure complies with article seven of Directive 2014/40/EU. A list of cigarette brands that will be banned as of May 2020 can be found in appendix chapter v.

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<sup>2</sup> "Controlling" in this context means overseeing the decisions of the federal government, keeping the checks and balances between the federal government and the *Bundestag* parliament into the political arena.

- Cigarettes, roll-your-own tobacco and water pipe tobacco packaging will have to contain a pictorial and text health warning, covering 65 per cent of the packaging, as complying with article eight of the directive.
- For the first time, herbal cigarettes and e-cigarettes and refill containers will be regulated and included in the draft.
- The draft obliges tobacco companies to include a unique identifier on tobacco packages, as based on art. 15 of the directive. The identifier must carry several information available such as the data and place of manufacturing, the product description, etc. The law furthermore must ensure the units of tobacco products carry a security feature as based on art. 16. These measures are introduced to fight against the illicit trade of tobacco products.

After the opening statement of Christian Schmidt, members of parliament were allowed to ask questions in regards to the draft of the BMEL. Rainer Spiering of the SPD asked what the transposition period would be for the tobacco industry in order to prepare for the coming packaging changes and whether the deadline of May 20, 2016, was not too narrow. The minister replied by stating that the directive allows Member States to introduce a bill which complies the directive before May 21, 2016. For the German tobacco industry, six months are given to prepare for the changes in the directive which is, in his words, quite ambitious. The minister advised the Commissioner for Health and Food Safety to, in the future, allow for a longer transposition period. Franz-Josef Holzenkamp of the CDU asked whether it would be possible to extend the period of transposition, as he felt it would be quite hard to comply with the directive on time. The minister responded by stating that it was impossible to change the deadline of May 20, 2016, as the Commission would have to create a new directive with a new deadline. However, in order to give room for tobacco companies to adjust their production, the minister sent out the health warnings and measurements which needed to be placed on tobacco packaging six weeks before the meeting of December 16, 2015 ("145. Sitzung", 2015, p. 4-6).

Jörn Wunderlich of *die Linke* asked how small and medium producers of niche tobacco products, such as producers of cigars, would have to comply with directive. In the directive, Member States are given the option to, besides traditional cigarette and roll-your-own tobacco packaging, not oblige producers of other tobacco products to put a pictorial health warning on the packaging. Germany will exclude pictorial health warnings on the packaging of cigars, cigarillos and snuff tobacco, as these products are, according to the minister, not seen as a gateway to smoking but as luxury items. In a follow up question by Ingrid Pahlmann of the CDU, the minister confirmed that cigarettes, roll-your-own tobacco and

water pipe tobacco will carry the pictorial and text health warnings. The final question in the debate with the minister came from Kathrin Vogler of *die Linke*. She began her question with stating that the smoking of e-cigarettes as compared to traditional cigarettes is far less dangerous in terms of health consequences. She feels a firmer regulation of e-cigarettes would make it harder for tobacco smokers to switch to the e-cigarette, therefore asking the minister whether it would not be more logical to decrease the regulation of e-cigarettes. The minister responded by stating that, even though long-term effects of e-cigarette smoking are not known, it seems to become more evident that there are hazardous effects to ones' health upon the consumption of e-cigarettes. E-cigarettes can no longer only be seen as a measure to quit smoking, it is increasingly becoming a gateway drug towards smoking and nicotine addiction. The minister once again stated that the liquids also have the potential of causing harm, such as a nicotine overdose, and it is therefore necessary to regulate e-cigarettes and liquid ("145. Sitzung", 2015, p. 6-8).

### **Transposition bill**

Soon after the debate, the BMEL published the bill on its portal. As of May 20, 2016, the directive will be transposed into German law, as decided by the ministry in their *Gesetzentwurf*. The bill has the following content ("Gesetzentwurf der Bundesregierung", 2015):

- Chapter 1: definitions of terms and identification of key actors

In the first chapter, similar to the 2014/40/EU directive, key terms (as based on article two of the directive) and the key actors are defined in the first paragraph. Economic stakeholders affected by the bill are identified as the key actors to which the directive applies. This includes manufacturers, importers and vendors.

- Chapter 2: Regulations for tobacco products

- §4 limits the amount of tar (10 mg per cigarette), nicotine (1.0 mg per cigarette) and carbon monoxide (10 mg per cigarette) per cigarette. It furthermore tasks the BMEL and the Ministry of Economy and Energy to work together in order to intensify the research on emission levels. Both measures are based on article three of the directive.
- §5 bans characteristic flavours in cigarettes and roll-your-own tobacco as written in article seven of the 2014/40/EU directive. It also bans filters and cigarette capsules which contain tobacco or nicotine. The BMEL and the Ministry of Economy and Energy are appointed to define the characteristic additives which will be banned. The departments are also appointed to enforce the regulations as stated in the bill.

- §6 introduces the bigger health warnings with a combination of text and pictorial messages, as based on article eight of the directive.
- §7 only allows tobacco products to be brought to market if they carry a unique identifier (article 15 of directive) and security feature (article 16 of directive). The unique identifier must carry several information such as the data and place of manufacturing, the product description, etcetera. The security feature is introduced in order to combat illicit tobacco trade.
- §11 bans bringing tobacco for oral use to the market, as based on article 17 of the directive.
- §12 requires tobacco manufacturers and importers to submit a digital notification of a novel tobacco product to the BMEL, at least six months before the product will be placed on the German market.
- Chapter 3: Other products
  - §13 and §14 set the e-cigarette regulations as explained on page 20 and 21 of this dissertation and in article 20 (3) of the directive. Manufacturers and importers of e-cigarettes and refill containers are furthermore obliged to follow the digital notification of a novel product, as described in the previous point. E-cigarettes and liquids that were put on the market before May 20, 2016 have six months to submit the report to the BMEL.
  - §15 obliges e-cigarette and liquid manufacturers/importers to include a leaflet in their products with instructions on the product, contra-indications, warnings for specific risk groups, possible adverse effects, addictiveness and toxicity and contact details of the manufacturer or importer, as explained in article 20 (4) (a). Unit packets should include a list of all the ingredients and carry a health warning when nicotine is included in the liquid.
  - §16 requires manufacturers and importers of e-cigarettes and liquids to create a system for collecting information about the suspected adverse effects on human health as based on art. 20 (9).
  - §17 introduces health warnings for herbal products for smoking that covers 30 per cent of the packaging, as based on article 21.
- Chapter 4: Regulations applying to tobacco and related products
  - §19 - §21 ban e-cigarette marketing in the following forms: commercial communications in Information Society services, in the press and other printed publications, on the radio, audio-visual commercial communications. E-cigarette and liquid companies are no longer allowed to sponsor radio programs or any event with the aim of direct or indirect promotion of e-cigarettes and refill containers, as based on article 20 (5).



- §22 concerns the cross-border distance sales of tobacco and related products as laid down in article 18 of the directive. Germany will allow cross-border distance sales but requires those operating on the market to firstly register at the authorities and second include an ID verification system on online websites, so that minors cannot purchase tobacco and related products.
- §23 assigns the BMEL as the competent authority to oversee the implementation and enforcement of the transposition bill. Tobacco stakeholders are required to conduct research and manufacturers and importers of e-cigarettes and refill containers have to annually inform the BMEL about their sales volume, consumer groups, market surveys, etc. as based on article 20 (7). It must be made available to the public. Manufacturers and importers are furthermore required to create a system for collecting information about the suspected adverse effects on human health as based on article 20 (9).

The bill included transitional procedures, as different measures have different deadlines. If tobacco stakeholders fail to comply with the deadlines as given in table five, penalties and even imprisonment up to one year could be the result (“Gesetzentwurf der Bundesregierung”, 2015, p. 26).

Product or category:	Transitional procedure:
Tobacco products or herbal products	<ul style="list-style-type: none"> <li>• If produced or brought to the market before May 20, 2016, therefore not complying with the new regulations, products are still allowed to be sold until May 20, 2017.</li> </ul>
E-cigarettes and liquid	<ul style="list-style-type: none"> <li>• If produced or brought to the market before November 20, 2016, therefore not complying with the new regulations, products are still allowed to be sold until May 20, 2017.</li> </ul>
Unique identifier and security feature on packaging	<ul style="list-style-type: none"> <li>• Cigarettes and roll-your-own tobacco must carry a unique identifier and security feature before May 20, 2019.</li> <li>• Other tobacco products will have to comply before May 20, 2024.</li> </ul>
Characteristic flavours in cigarettes and roll-your-own tobacco	<ul style="list-style-type: none"> <li>• As of May 20, 2020, tobacco products containing a characteristic flavour or additives will no longer be allowed to be sold.</li> </ul>

*Table 5 Transitional procedures for 2014/40/EU directive in Germany ("Gesetzentwurf der Bundesregierung", 2015, p. 33-34)*

### Conclusion

The transposition of the 2014/40/EU directive into national Member State law was given the deadline of May 20, 2016 by the European Commission. In Germany, the Ministry of Food and Agriculture or "*Bundesministerium für Ernährung und Landwirtschaft*" was selected as the responsible institution to oversee and enforce the rules and regulations of the directive. On November 10, 2015, the party of *Bündnis 90/die Grünen* asked the federal government why Germany still did not present any proposal to the parliament. A month later, Secretary of State of the BMEL responded by stating that there was not an agreement within the government on the proposal and that it still required some time. She furthermore explained that the parliament does not have the right to interfere with the decision-making process before a bill is presented to the parliament. Soon after the letter was sent to the parliament, the minister of BMEL, Christian Schmidt, presented his proposal to the German federal parliament on December 16, 2015, in which the new rules and regulations as complying with the 2014/40/EU directive were laid down. As of May 20, 2016, Germany will have the 2014/40/EU directive in full effect and the BMEL will enforce and oversee the directive. If tobacco stakeholders fail to comply with the new regulations before a set of given deadlines, penalties or even imprisonment could be a consequence.

## **VII. Chapter 5: Stakeholder Response to Directive 2014/40/EU**

**In the following chapter, several tobacco stakeholder opinions on the 2014/40/EU directive are analysed, including the opinions of tobacco stakeholders after Christian Schmidt of the BMEL announced the transposition of the directive into German national law. Conducted research is taken into account in order to compare the arguments of the tobacco industry with those of research institutions. In the case study at the end of this chapter, the opinions of e-cigarette stakeholders, such as an e-cigarette vendor operating in Bielefeld, North Rhine-Westphalia, will be presented.**

### **Deutscher Zigarettenverband v. Christian Schmidt**

The German Association for Cigarettes or “Deutscher Zigarettenverband” in German represents 60 per cent of the German tobacco market through their member companies. Their main member companies are British American Tobacco Germany, Japan Tobacco International, Heintz van Landewyck GmbH, von Eicken GmbH and Reemtsma GmbH. Japan Tobacco International has its German headquarters in North Rhine-Westphalia but operates throughout the country. The DZV offers consultation on tobacco and cigarette policy in the areas of politics, economics and the media. They furthermore work together with several organisations, including the association of the German tobacco industry and the Tobacco Branch organisation (“DZV: Über uns”, 2015).

The DZV shared their point of view on the 2014/40/EU directive and had the following to say: “We feel the new directive does not regulate the tobacco industry on a useful, proportionate and scientifically supported way” says Mr. Heddenhausen of the DZV (2015). Not only does the DZV criticise the content of the directive, they furthermore feel the transposition phase of the directive is inefficient and a burden to the members of the DZV. At the time of the correspondence with the DZV, namely in November 2015, the German government did not propose any bill that would transpose the 2014/40/EU directive (Heddenhausen, 2015). The German tobacco branch organisation feels the lack of details from the federal government on the new national regulations coming from the 2014/40/EU directive would cause problems for the production of cigarettes. It would take 12 to 18 months for the tobacco production companies to adjust their production and adapt to the measures as stated in the directive (“die EU-Tabakprodukttrichtlinie”, 2015).

After Christian Schmidt announced the transposition plan for Germany, it became clear that not only does the new plan implement the measures of the 2014/40/EU directive; the minister will introduce a ban of tobacco advertising as well. The DZV responded to the transposition by first of all stating that

the new plan could cost up to 100,000 jobs in the German tobacco industry. Small and medium tobacco enterprises could cease to exist. In a research commissioned by the DZV, the Leipzig University of Applied Sciences concluded that the technical changes required to adjust the production of tobacco products to the new technical standards and health warnings would take at least 15 months. The DZV predicted that the ban on menthol cigarettes would mean the government would miss out on 1,8 billion euros in taxes. An increase in pictorial health warnings would mean a decrease in the product offering, therefore limiting the free choice for consumers. As a response to the proposed ban on advertising, the DZV feared that tobacco companies will no longer be able to communicate with their consumers, even though they sell a legal product. The ban on advertising would mean a loss of 250 million euros per year for the tobacco industry. The DZV concludes by asking the government for not banning the marketing of tobacco products and more time in order to comply with the directive (“Eine Branche fordert 1:1”, 2015). As the plan was already presented in the *Bundestag*, it seems unlikely tobacco companies will receive more time to adjust their production. Christian Schmidt furthermore said to the parliament that tobacco companies do have enough time to comply with the new regulations (“145. Sitzung”, 2015).

#### **Japan Tobacco International (JTI) v. Smoke Free Partnership**

The CEO of JTI in Cologne, George Blestas, reported on April 29, 2014 that he disagreed with the measures of the 2014/40/EU directive, as the new regulations would restrict the way how tobacco products are manufactured, packaged and sold. The impact of the directive would affect millions of undertakings, whether it are cigarette producers or retailers. As the time frame in which the new regulations should be implemented is, in his opinion, short, it is important for the German authorities to timely inform the industry about the necessary changes. He furthermore predicted that the directive will lead to an increase of illegal trade of tobacco (“JTI zur EU Tabakproduktrichtlinie”, 2014).

The NGO Smoke Free Partnership, a coming together of Cancer Research UK, the European Heart Network and Action on Smoking and Health, responded to the expected increase of illegal trade in their “Tobacco Myths” report. They stated that the impact assessment, as carried out by the Commission, confirmed that bigger health warnings would lead to the illegal trade of tobacco. They pointed out that in the directive, cigarette packages will require to have a tracking and tracing system in order to combat illicit trade (Kemp, 2014).

### **Pöschl Tabak v. KMPG**

As a response to the tracking and tracing system, Pöschl Tabak, manufacturer of snuff tobacco, shag, cigarettes and pipe tobacco, said that such a system was already in place. The so called “batch code” displayed the manufacturer, location and date of production. The new system as implemented by the 2014/40/EU directive requires the unique code to be placed on a tobacco product during production. This code must include the transportation to wholesalers and or retailers, which, according to Pöschl Tabak, means small and medium tobacco manufacturers are unable to adjust their production in order to include the unique code (n.d.).

In 2014, KMPG, commissioned by the Digital Coding & Tracking Association, investigated how a track and trace system influences illicit tobacco trade. At the time of the report, illicit tobacco trade accounted for 10 to 12 per cent of the global tobacco market, therefore hurting the profit for the tobacco industry and tax revenue for governments. In Germany, illicit cigarette trade falls between 10 to 19.9 per cent of the market share. The FCTC introduced the mandate to implement track and trace systems for tobacco products, which was adopted in the 2014/40/EU directive. The necessity to introduce a track and trace system to combat illicit trade became evident during the FCTC meetings, as article eight of the FCTC aims to combat illicit trade. Tracking and tracing helps companies to keep track of their products throughout the supply chain. It does require supply chain partners to work together in order to record a product or product part while it passes the supply chain. Tracking and tracing through a unique identifier is different than an authentication system, as an authentication system only shows whether a product is valid and not a counterfeit, whereas a unique identifier displays the complete supply chain. As tracking and tracing cigarettes would help stakeholders such as Pöschl Tabak to combat illicit trade, KMPG recommends the implementation of such a system (“Track and Trace”, 2014).

### **Arguments of tobacco industry compared to Tobacco Industry Framework**

As discussed in Chapter two, page 24, the German tobacco industry during the 1900s based their tobacco control arguments on a framework in which economic, libertarian, courtesy and health frames were used in order to lobby the government and argue in favour of the tobacco industry (Grüning et al. 2008). When comparing the arguments by the tobacco industry used against the 2014/40/EU directive, some similarities are present with the tobacco industry framework. Once again, the economic frame is used to present the importance of tobacco for the German economy, as the DZV argued that a ban on menthol cigarettes would cost money and jobs. By an increase of health warnings,

customers would have less choice the DZV argued. This means the libertarian frame is used as well, as it harms the freedom of choice. Even though those two frames are used by the DZV, the courtesy and health frame are not relevant at the time of the 2014/40/EU directive. Social acceptability is decreasing in Germany, as an increase in tobacco control and a decrease of smoking occurs since the 1900s, as discussed in Chapter two (page 27). At the time of the 2014/40/EU directive, there was more scientific research available proving the dangers of tobacco and even tobacco companies themselves inform consumers about the dangers of using the product.

**Case Study: E-cigarette Stakeholders in Germany on 2014/40/EU Directive**

After analysing the arguments of traditional tobacco companies, it is evident that most oppose the ideas of the 2014/40/EU directive. Even though tobacco products face new regulations, it will be the first time that e-cigarettes and liquids will be regulated. In this case study, an analysis of the different e-cigarette and liquid stakeholder opinions, including an e-cigarette vendor in Bielefeld, North Rhine-Westphalia will be given.

**German e-cigarette market**

The German e-cigarette market is growing, as die Welt reported that in 2014 the German e-cigarette branch had a turnover of 200 million euros, which was an increase of 100 per cent as compared to 2013. Christian Schmidt, minister of BMEL, was concerned with the increase in popularity of e-cigarettes, as there could be potential health hazards in connection with e-cigarette consumption. In Germany, both e-cigarettes and liquids with and without nicotine are included to be regulated in the transposition bill of the 2014/40/EU directive, as the minister wanted to prevent children and youth to start smoking. The position of the BMEL on e-cigarettes is that smoking e-cigarettes could function as a gateway product to traditional smoking; however, in an interview with an e-cigarette vendor in Berlin, die Zeit reported that almost all of the customers are people that switch from traditional tobacco products to e-smoking ("Das Millionenschwere Geschäft", 2015).

**Verband des E-Zigaretten-Handels (VdeH)**

The German Association of E-Cigarette Vendors (VdeH) responded to the position of Christian Smidt on e-cigarettes that, as there were 18 million smokers in Germany in 2015, the potential market for e-cigarettes was big enough. It is for this reason that the e-cigarette industry does not target children or youth, but focuses on consumers that want to switch from traditional tobacco to e-cigarettes ("Das Millionenschwere Geschäft", 2015). In 2013, the VdeH responded to the final version of the 2014/40/EU directive which was presented by the European Commission. In general, they felt it was time for the regulation of e-cigarettes, as the situation before the directive meant rules for e-cigarettes were not always clear and different from Member State to Member State. The association did have critique on the content of the directive. In a previous version of the directive, the Commission banned brand stretching of e-cigarettes. This would mean tobacco companies could not extend their traditional brands to e-cigarette variations, for example by bringing an e-cigarette brand to the market with the same name as the traditional cigarette brand. However, the final



version (and the one harmonised into German law) does not include this ban on brand stretching. The VdeH is critical of this measure, as they feel e-cigarettes with the same name as a traditional cigarette brand could work as a gateway to the traditional cigarettes (“VdeH sieht eZigaretten”, 2013).

### **Bündnis für Tabakfreien Genuss (BftG)**

Representing different e-cigarette and liquid undertakings in Germany, the BftG lobbies in the interests of the e-cigarette branch through consultations with politicians and the media. It furthermore provides resources for conducting research (“das Bündnis”, 2015). In a response to the transposition draft of the BMEL, the lobby group feels the regulation of the production and sales of e-cigarettes is timely correct, although they disagree on some aspects with the directive. First of all, it is questioned why e-cigarettes are seen as equals of traditional tobacco products. The organisation feels that e-cigarettes are a completely different product line. The BftG stated that their members already comply with several measures of the directive, for example the sales restriction to minors. Like the VdeH, the members of the BftG only target adult smokers that want to switch from traditional tobacco products to e-cigarettes. According to their own studies, more than 75 per cent of the customers of e-cigarettes are above 29 years of age. In conclusion, the organisation once again stated the need for regulation of the e-cigarette market, while not restricting undertakings in their business practices (“E-Zigaretten Markt”, 2015).

### **Interessengemeinschaft E-Dampfen (IG ED)**

On January 11, 2014, the German E-Vaping Interest Group (IG ED) wrote an open letter to members of the European Parliament stating their opinion on the 2014/40/EU directive. In their letter, they asked the politicians to vote against including e-cigarettes and liquids in the 2014/40/EU directive, for several reasons. As the 2014/40/EU directive is based on the agreements within the World Health Assembly and the FCTC, the IG ED looked at the agreement and concluded that the FCTC does not include the regulation of nicotine containing products. At last, they criticized the objectivity of the Commission in their judgement of nicotine containing products (IG-ED, 2014).

### **Dampf In, Bielefeld**

In a structured interview with “Dampf In”, an e-cigarette, e-shisha and e-liquid store in Bielefeld, it became clear the store was informed about the coming changes in the 2014/40/EU directive. In comparison with tobacco vendors, most were uninformed about the directive and felt they were

unable to take part in the structured interview. The store was informed through a publication of an e-cigarette manufacturer and agreed with the regulation of e-cigarettes, as the situation before made it hard to operate in, due to the fact that rules and regulations were not always clear for e-cigarette companies.

### Conclusion

Chapter five compared the arguments of several tobacco stakeholders on the 2014/40/EU directive, beginning with the opinion of the German Association for Cigarettes and the Tobacco Branch Organisation. Both organisations felt it took the federal government too long before a transposition plan for the directive was presented. On December 16, 2015, Christian Schmidt presented the plan to the German parliament, stating that tobacco companies will have enough time to adjust their production. The Association responded with their position, presenting new arguments such as a loss of 1,8 billion euros in taxes after menthol cigarettes will be banned on the German market. Japan Tobacco International felt the restriction on a legal product would harm the industry and would lead to an increase of illegal trade of tobacco. The Smoke Free Partnership NGO responded to this argument by stating that due to the implementation of a new tracking and tracing system on tobacco products, illicit trade will decrease. However, Pöschl Tabak argued against the new tracking and tracing system, stating that it will be difficult for small and medium tobacco enterprises to implement such a system, as the unique identifier needs to be placed on the product during production. KMPG conducted a research on tracking and tracing systems for the tobacco industry and concluded that not only the industry, but also governments and consumers will benefit from a more intensive tracking and tracing system on tobacco products. As the complete supply chain of the products will be tracked and traced, illicit trade will decrease as real products will be identified.

The case study explored different stakeholder views on the e-cigarette regulations. In general, all the parties mentioned in the case study felt a regulation of the e-cigarette and liquid market is needed. The directive provides clarity for small undertakings such as “Dampf In” in Bielefeld, for which it was hard to operate in an unregulated environment. The interpretation of the European Commission and the BMEL that minors should be protected of e-cigarettes was seen as understandable, but the e-cigarette interest groups do point out that the main target group of the industry are adult smokers who want to switch from traditional tobacco products to e-cigarettes, not minors.

## VIII. Conclusion

This dissertation analysed the measures of the 2014/40/EU tobacco directive, the political, cultural and historical context of tobacco control in Germany and North Rhine-Westphalia and the transposition process of the directive into German and North Rhine-Westphalian law. It furthermore examined the response of German tobacco stakeholders to the tobacco control measures and ended with a case study on the e-cigarette industry and stakeholder response to the coming changes for the e-cigarette market.

### Measures of the 2014/40/EU directive

As presented in chapter one, the revised tobacco directive 2014/40/EU of the European Parliament and the Council presents strong tobacco control measures for European Member States. The European Commission felt the need to revise the original 2001/37/EC Tobacco Products Directive as the tobacco market changed since 2001. Electronical cigarettes and vaping devices, more commonly referred to as e-cigarettes, became a part of the global tobacco market around 2004 and gained in popularity on the European market. As the original tobacco directive did not have any measures in place, the revised tobacco directive includes several chapters on regulating e-cigarettes.

The changing European tobacco market was not the only reason for revising the 2001 directive. In 2003, the European Union together with other members of the World Health Assembly adopted the Framework Convention on Tobacco Control or FCTC. The non-binding agreement presented measures in order to help members of the Assembly to introduce stronger tobacco control legislation. Some measures of the 2014/40/EU directive can be linked to the agreements of the FCTC, such as the ban on characterising flavours in cigarettes.

Other measures of the 2014/40/EU directive include the following:

- The tar, nicotine and carbon monoxide levels per cigarette may not exceed: 10 mg of tar, 1 mg of nicotine and 10 mg of carbon monoxide.
- New labelling and packaging rules require tobacco packaging to include 65 per cent of pictorial and text health warnings on both the front and the back. Member States have the possibility to introduce plain packaging on their own.
- Snus tobacco remains banned with the exception of Sweden. Smokeless tobacco will follow the same rules for cigarettes, as health warnings are required on the packaging and characterising flavours of smokeless tobacco will be banned.

- Member States have the possibility to ban cross-border distance sales of tobacco products, for example the purchase of cigarettes through an online web shop.
- Tobacco companies are required to inform the Member State when a novel tobacco product is brought to the tobacco market. An extensive research report must be submitted to and monitored by the Member State.
- E-cigarettes are now regulated, as nicotine-containing liquid in e-cigarettes must not exceed 10 ml, cartridges or tanks may not exceed 2 ml, liquid which contains nicotine may not have more than 20 mg/ml of nicotine and several additives (vitamins, caffeine or taurine and additives which give emissions colour) are banned.

Member States have to create new and/or adapt old legislation in order to comply with the 2014/40/EU directive before May 20, 2016. Some measures, for example the ban on menthol cigarettes, will have a longer transposition phase to allow the tobacco industry to adapt to the measures.

### **Historical context of German tobacco control measures**

Germany's stance on tobacco control was relatively weak throughout the 1900s and at the beginning of the 2000s. Chapter two explained how an extensive lobbying framework by the tobacco industry attempted and succeeded to keep the amount of tobacco control laws low in Germany. Tobacco consumption was seen as a great importance to the German economy, which is why the tobacco industry argued that it would be bad if smoking would be heavily regulated. Furthermore, as cigarettes are a liberal choice for consumers, increasing tobacco control would interfere with the freedom of choice, especially reminding society and politicians of the extensive anti-tobacco campaign which occurred during the Nazi regime. Even though scientific developments improved the knowledge of the dangers of tobacco smoking throughout the 1900s, the tobacco industry claimed first of all that research was not objectively conducted. Secondly, they claimed the connection between smoking and health risks could not be found. Thirdly, the tobacco industry pointed to environmental risks, as this would be a possible cause for the smoking-related diseases.

The extensive lobbying campaign was noticeable in the objection of the German government against the 1998/43/EC directive, in which tobacco advertising would be completely banned in the European Member States, and against the 2003/33/EC tobacco directive. With both directives, Germany sued the European Commission as the German government felt the directives were in breach of the principle of subsidiarity. The 1998/43/EC directive was annulled by the European Court of Justice;

however, the 2003/33/EC directive, a modified version of the 1998/43/EC directive, complied with the principle of subsidiarity according to the European Court of Justice. Germany agreed upon the implementation of the directive in 2006. Directive 2001/37/EC brought the obligation for Member States to use a set of general warnings and additional warnings on cigarette packaging. Decision 2003/641/EC of the Commission furthermore gave Member States the opportunity to introduce pictorial health warnings, but the German government did not transpose the decision into national law.

### **Political Dimension of 2014/40/EU Directive in Germany**

Chapter three sought to explain German federalism and the strong position for the German states in the political arena, which is apparent in the 2006 tobacco policy reform of the federal government. Through the reform, German states were allowed to introduce tobacco control measures on their own; a policy area formerly only under federal control. The North Rhine-Westphalian parliament introduced the *Nichtraucherschutzgesetz* in 2007, banning smoking in public places. The bill was furthermore expanded to ban smoking in restaurants, bars and clubs in 2013. E-cigarette smoking does not follow the *Nichtraucherschutzgesetz*, as the High Court of Munster decided in 2014 that e-cigarette smoking is allowed in bars and restaurants.

The state government of North Rhine-Westphalia consisted of the SPD, CDU, *Bündnis 90/Die Grünen*, FDP and the *Piratenpartei* after the 2012 elections. The governing party, SPD (in a coalition with *Bündnis 90/Die Grünen*), has its foundations in the social democratic movement, where state intervention in the economy, equality and workers' interests are heavily represented in the founding ideals of social democracy. The strong state intervention of the economy led to a shift from the original, more socialistic, principles, towards a flexible, market-friendly approach to politics. Nowadays, the SPD in North Rhine-Westphalia is committed to the digital economy and education for all. The coalition party of *Bündnis 90/Die Grünen* was the coming together of representatives of women's, peace and environmental movements in 1979. The party's main policy concern remained with ecological aspects of society for a long time; however, in order to prevent to become a single-issue party, the party pursued a left agenda with similarities to the social democrats.

One of the other political parties of North Rhine-Westphalia, the CDU, has a long history in German politics. The Christian democrats identify their program with principles on values, faith, ethics and religion, with Christianity as the key component. During the unification of East and West Germany, the party gained support and helped East Germany to assimilate into West Germany. After the 2012

elections, the party did not govern in North Rhine-Westphalia but it was one of the governing parties of the federal government. Another party in the opposition is the FDP, a liberal party active since the ending of World War II. The party attracted dissatisfied voters of the government from 2005 to 2009 but plummeted in the elections after that, not even entering the *Bundestag* since the party did not receive sufficient votes.

At last, the *Piratenpartei* was represented in the North Rhine-Westphalian parliament after the 2012 elections for the first time. The newly founded party focuses on digital policy with freedom of expression, especially online. The party shared their point of view on e-cigarettes due to the role of the internet in e-cigarette sales and promotion. German State parliaments have the right to engage in political discussions on European policy, if the policy affects the interests of the states. It is for this reason that the *Piratenpartei* presented a bill to the North Rhine-Westphalian parliament on January 22, 2013, in which they shared their point of view on the 2014/40/EU directive proposal of the Commission and questioned the principle of subsidiarity. If the bill would have passed, it would have been sent to the *Bundesrat*, the institution in which State interests are represented. However, the bill did not receive enough support as the opposing parties did not question the principle of subsidiarity and felt it was not necessary to provide feedback on individual measures of the directive. The *Bundesrat* did share their opinion, as the Commission asked Member States to provide feedback on their proposal for the directive in 2013. The *Bundesrat* felt plain packaging should be taken out as an obliged measure in the directive, as it would hurt the German economy.

### **Transposition Procedure of Directive in German Law**

After the 2014/40/EU directive passed the European Council and the European Parliament, Member States were given until May 20, 2016 to transpose the directive into national law. The German Federal Ministry of Food and Safety was selected as the authority to oversee and enforce the rules and regulations coming from the 2014/40/EU directive. As the ministry did not share any information on the exact transposition, politicians of the national parliament and the tobacco industry were left with questions as to when and how the directive will be transposed. Even though several questions were answered in a short letter from the Secretary of State of the ministry on December 10, 2015, it was not until Christian Schmidt, Minister of Food and Safety, appeared in the *Bundestag* to present the transposition bill on December 16, 2016.

After the bill was presented to the national parliament, it became clear that as of May 20, 2016, the German tobacco market will have to comply with the directive. The decisions were made from the

federal level and will therefore be applicable on the North Rhine-Westphalian market. As the directive left some freedom to the Member States to regulate specific measures, the following choices were made by the ministry:

- Germany will not introduce plain packaging, as it would harm the economy.
- Cigars, cigarillos and snuff tobacco will not carry the same health warnings as cigarettes and roll-your-own tobacco products. The minister felt the products do not act as a gateway to smoking cigarettes.
- Besides the new regulations from the 2014/40/EU directive, Germany will ban outdoor tobacco advertising and will restrict tobacco advertising in cinemas, as clarified in Chapter two (page 31-32).

### **German Tobacco and E-cigarette Stakeholder Response**

In the final chapter, responses of the German tobacco and e-cigarette industry to the directive were analysed. Through extensive contact with the German Association of Cigarettes, their position on the directive became clear. The association felt the need to have a proportionate and useful regulation of the tobacco industry, which, in their point of view, is lacking in the 2014/40/EU directive. The transposition deadline of the directive was too short, as they measured that production changes in order to comply with the directive would at least take 15 months. After the Ministry of Food and Safety presented the transposition bill, the association presented new arguments similar to the arguments of the industry during the 1900s. From an economic perspective, the new bill would cost 100,000 jobs and the federal government would lose out on 1,8 billion euros in taxes. From a societal point of view, tobacco companies will no longer be able to communicate with customers, even though they sell a legal product. Small and medium business owners will not be able to adapt to the changes, an argument also raised by Pöschl Tabak. The tracking and tracing system, as required to be implemented as of May 20, 2019, requires small and medium businesses to adapt their complete production system. In a counter-argument, KMPG researched the usefulness of a tracking and tracing system for the tobacco industry, arguing that it would help to combat illicit trade and present real tobacco products to the market.

The final part of this dissertation was a case study on the e-cigarette industry and the stakeholder response to the coming regulations. As it is the first time that the e-cigarette market will be regulated, several stakeholders felt positive that there finally will be rules and regulations to comply with. One issue stakeholders had with the directive was the position of politicians on e-cigarettes; e-cigarettes

were seen as a gateway to the smoking of cigarettes. Stakeholders responded by stating that e-cigarette products are not marketed towards new smokers but instead to smokers that want to switch from smoking cigarettes to normal cigarettes. As there were approximately 20 million smokers in Germany in 2014, e-cigarette stakeholders have a potential market big enough to remain sustainable.

### **Conclusion**

This dissertation presented the transposition of the 2014/40/EU directive into German law. After reading the dissertation, the measures of the 2014/40/EU directive will be clear, including the transition from the 2001/37/EC directive and the occurrences which led to the revision of the tobacco directive. The German political dimension is displayed, as the historical and political overview provided the context in which the directive will be transposed. The exact transposition procedure, as laid down in Chapter four, provided the roadmap in which the directive will be implemented from the federal level. At last, as stakeholder responses were analysed, not only the political context can be understood but also the industry's context.

Starting May 20, 2016, the European tobacco market will change. Long-term studies will show whether the aim of the Commission, namely decreasing smoking across the continent, will be a success. In Germany, even though there were protests of the tobacco industry, the directive was transposed in time and all the measures will be completely implemented as of 2024.



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## I. Appendices

The content of the appendices is as following:

- i. Correspondence with *Deutscher Zigarettenverband* (Questions in English, answers in German)
- ii. Correspondence with *Piratenpartei Nordrhein-Westfalen* (In German)
- iii. Interview questions for *Dampf In*, Bielefeld (English)
- iv. Basic Law articles 71, 72, 73, 74 (English)
- v. List of German cigarette brands banned as of May 20, 2020 (in English)

### i. Correspondence with *Deutscher Zigarettenverband*

Through e-mail correspondence with the *Deutscher Zigarettenverband* and Mister Matthias Heddenhausen, manager of industry politics, from October 23 till November 5, 2015, the following answers were gathered:

#### **A. Revised tobacco directive**

##### **1. What is the stance of your organisation on the revised tobacco directive (Directive 2014/40/EU)?**

Die Mitgliedsunternehmen des DZV Deutscher Zigarettenverband vertreten weiterhin die Position, dass die neue Richtlinie das Ziel einer sinnvollen, verhältnismäßigen und wissenschaftlich fundierten Regulierung der Tabakbranche verfehlt. Die neue TPD greift massiv in die Rechte von Unternehmen zur Vermarktung eines legalen Produktes ein und bevormundet den Verbraucher in bislang nicht dagewesener Weise ohne dabei einen höheren Gesundheitsschutz, geschweige denn ein besseres Funktionieren des EU-Binnenmarktes, zu erreichen.

Nichtsdestotrotz ist die politische Auseinandersetzung zur TPD mit ihrer Verabschiedung beendet – die Mitgliedsunternehmen des DZV bereiten sich unabhängig von ihrer inhaltlichen Kritik auf eine Umsetzung der neuen Vorgaben vor. Hierfür muss die neue Richtlinie allerdings zügig in deutsches Recht übertragen werden. Zu berücksichtigen ist dabei, dass zahlreiche Detailfragen weiterhin offen sind und zunächst vom nationalen Gesetzgeber und der EU-Kommission geklärt werden müssen, bevor die Unternehmen mit der konkreten Umsetzung beginnen können. Der für die Umsetzung der Richtlinie in nationales Recht und für die Anpassung der Hersteller an die geänderten Vorgaben vorgesehene Zeitraum bis zum 20. Mai 2016 ist nunmehr zu knapp bemessen. Bis zum jetzigen Zeitpunkt (November 2015) hat der deutsche Gesetzgeber noch keine Rechtsklarheit für eine fristgerechte Umstellung der Produktion zum Mai 2016 in allen Fragen geschaffen.

Die wichtigsten Kritikpunkte des Richtlinienentwurfs aus Sicht des Deutschen Zigarettenverband in Kürze zusammengefasst:

Beschränkung der Möglichkeiten der Produktbeschreibung sowie der Aufmachung und des Inhalts der Packung

Neu: Bei der Kennzeichnung der Packung und des Tabakerzeugnisses selbst werden Elemente und Merkmale verboten, die sich etwa auf Aromastoffe, Geschmack oder die Produktqualität beziehen. Dies kann Namen, Zeichen oder Texte betreffen. Zigarettenpackungen müssen quaderförmig sein und dürfen mit Ausnahme des Klappdeckels bzw. der Klappschachtel-Öffnung nicht wiederverschließbar sein.

Bisherige Regelung: Nach geltendem Rechtsrahmen dürfen keine Bezeichnungen auf Packungen verwendet werden, die den Eindruck erwecken, dass ein bestimmtes Tabakerzeugnis weniger schädlich als andere sei (dies betrifft z.B. die Begriffe mild oder light).

Auswirkungen: Die weitgehende Standardisierung in Verbindung mit den großflächigen Warnhinweisen lässt eine ausreichende Differenzierung der Produkte im Wettbewerb und die Vermarktung von Neuheiten (dies betrifft auch risikoreduzierte Produkte) nicht mehr zu. Es steht zu befürchten, dass der Kampf um Marktanteile künftig vorwiegend über den Preis erfolgt.

#### Vergrößerung der gesundheitsbezogenen Warnhinweise

Neu: Alle Zigaretten- und Feinschnittpackungen werden einen kombinierten Warnhinweis (bestehend aus einem Bild und einem Text) auf 65 Prozent der beiden Hauptdarstellungsflächen der Packung tragen, der an die Oberkante der Packung grenzt. Hinzu kommen zwei Textwarnhinweise, die jeweils 50 Prozent der Packungsseitenflächen einnehmen müssen.

Bisherige Regelung: Gegenwärtig müssen auf einer Zigarettenpackung in Deutschland zwei Textwarnhinweise auf 30 Prozent der Vorder- bzw. 40 Prozent der Rückseite abgebildet werden. Die Entscheidung über die Verwendung von Bildwarnhinweisen obliegt allein den EU-Mitgliedstaaten.

Auswirkungen: In Verbindung mit der Verpflichtung zum Aufdruck eines Sicherheitsmerkmals, Identifizierungs- und EAN-Code und des Steuerzeichens verbliebe den Herstellern insgesamt deutlich weniger als die Hälfte der Verpackungsfläche für individuelle Gestaltungselemente zur Differenzierung der Produkte im Wettbewerb.

#### Verbot Tabakprodukten mit einem charakteristischen Aroma

Neu: Zigaretten und Feinschnitttabak mit einem charakteristischen, vom Tabak unterscheidbaren Aroma werden verboten. Dies wird in erster Linie mit Menthol versetzte Erzeugnisse betreffen.

Bisherige Regelung: Die Regulierung von Zusatzstoffen ist bislang in der EU nicht harmonisiert. Die Verwendung von Menthol als Tabakzusatzstoff ist in keinem Mitgliedstaat oder einem anderen Staat auf der Welt untersagt.

Auswirkungen: Mentholisierte Zigaretten werden verboten. Diese haben in Deutschland einen Marktanteil von 2,7 Prozent und tragen rund 490 Mio. Euro zum Steueraufkommen bei.

#### Rückverfolgbarkeit und Sicherheitsmerkmale

Neu: Durch ein Rückverfolgungssystem und Sicherheitsmerkmale für Verpackungen soll der illegale Handel mit Tabakprodukten in der EU eingedämmt werden.

Bisherige Regelung: Trotz einer seit 2001 bestehenden Regelungskompetenz ist die EU-Kommission bislang untätig geblieben. Durch die Verabschiedung eines internationalen Protokollvertrags besteht nun eine Verpflichtung der EU-Mitgliedstaaten zur Implementierung eines Systems.

Auswirkungen: Legalen Herstellern und Händlern von Tabakprodukten entstehen hohe Kosten (durch die Anschaffung teurer Soft- und Hardwarelösungen für die gesamte Lieferkette) und

bürokratische Belastungen (Verwaltung von hunderten Milliarden Datensätzen pro Jahr). Kriminelle Hersteller von illegalen bzw. gefälschten Zigaretten werden sich natürlich nicht an diese Anforderungen halten – deswegen ist keine Eindämmung des Schwarzhandels zu erwarten. Zugleich gehen die Vorgaben der EU deutlich über die Verpflichtungen des internationalen Protokollvertrags hinaus. Es ist unsicher, ob das zukünftige EU-System kompatibel zu den Rückverfolgungssystemen der übrigen Vertragsstaaten sein wird. Im Jahr 2013 war etwa jede fünfte in Deutschland gerauchte Zigarette nicht hierzulande versteuert.

#### Delegierte Rechtsakte

Neu: In einer Vielzahl von Artikeln erhält die EU-Kommission die Befugnis zum Erlass sogenannter delegierter Rechtsakte. Die EU-Kommission kann die allgemeinen Regelungen der Richtlinie durch konkrete Verordnungen ergänzen bzw. an neue Entwicklungen anpassen ohne die demokratisch legitimierten Abgeordneten des Europäischen Parlaments und die Regierungen der Mitgliedstaaten vorab konsultieren zu müssen.

Bisherige Regelung: Gegenwärtig ist die Regelungskompetenz der EU-Kommission auf die Anpassung von Messverfahren, die Inhalte der Warnhinweise und die Kennzeichnung zum Zweck der Identifizierung und Rückverfolgbarkeit von Tabakerzeugnissen beschränkt. Die Regierungen der Mitgliedstaaten müssen hierbei in die Entscheidungen einbezogen werden.

Auswirkungen: Die EU-Kommission hat z.B. die Befugnis, den Grenzwert für den Nikotingehalt in Zigaretten anzupassen und sogar auf Null abzusenken (s. Art. 3 Abs. 2). Dies hätte das Verbot des gesamten legalen Zigarettenmarkts in der EU zur Folge.

## **2. Does the revised tobacco directive affect the marketing of tobacco products in North Rhine- Westphalia/Germany?**

- If not, is any future legislation planned to prohibit the display of cigarettes on for example billboards or in window shops of tobacco vendors? (If yes, what is the stance of your organisation on this legislation?)

Grundsätzlich ist die Umsetzung der EU-Tabakproduktrichtlinie in nationales Recht in Deutschland ausschlaggebend für die Auswirkungen auf mögliche Werbemaßnahmen. Dies trifft auch auf den Bundesland Nordrhein-Westfalen zu. Eine nationale Umsetzung der EU-Tabakproduktrichtlinie ist zum derzeitigen Stand noch nicht erfolgt. Unabhängig von der konkreten Umsetzung der Richtlinie in nationales Recht ergeben sich aufgrund der TPD u.a. folgende Einschränkungen:

- Vergrößerung der gesundheitsbezogenen Warnhinweise (Erklärungen siehe Frage 1)
- Beschränkung der Möglichkeiten der Produktbeschreibung sowie der Aufmachung und des Inhalts der Packung (Erklärungen siehe Frage 1)

Der DZV fordert eine zügige 1 zu 1 Umsetzung in nationales Recht in Deutschland. Angesichts der erheblichen Belastungen, die auf die deutsche Tabakwirtschaft durch die Umsetzung der Bestimmungen der Richtlinie zukommen, fordert der DZV eine zügige 1:1-Umsetzung der TPD in deutsches Recht. Die TPD und der Prozess der Umsetzung hat somit erhebliche Auswirkungen auf die Vermarktung von Zigaretten in Nordrhein-Westfalen.

**3. How are tobacco vendors informed about the revised tobacco directive?**

Tabakverkäufer werden über die EU-Tabakproduktrichtlinie wie folgt informiert:

- durch die Öffentlichkeitsarbeit der Europäischen Kommission
- durch die Öffentlichkeitsarbeit der Bundesregierung
- durch die Berichterstattung auf regionaler und nationaler Ebenen
- durch Informationen des Bundesverbands des Tabakwaren-Einzelhandels e.V. (BTWE)
- durch die Öffentlichkeitsarbeit der Zigarettenhersteller
- durch den Außenhandel der Zigarettenhersteller
- durch die Öffentlichkeitsarbeit des Deutschen Zigarettenverbandes

Die Öffentlichkeitsarbeit des Deutschen Zigarettenverbandes besteht aus Pressearbeit, Social Media und Webseitenaktivitäten. Des Weiteren werden regelmäßige Newsletter (Rauchmelder) veröffentlicht.

**4. Does your organisation feel tobacco vendors (including tobacco shops, supermarkets, night clubs/restaurants through cigarette machines) will feel an impact of the revised tobacco directive? If yes, what kind of impact?**

Aufgrund der fehlenden Umsetzung der EU-Tabakproduktrichtlinie sind bis jetzt in Bezug auf Werbung keine konkreten Auswirkungen erkennbar. Im Falle der Umsetzungen kommt es zu den in Frage 1 und 2 beschriebenen Änderungen. Diese werden negative Auswirkungen auf die Vermarktung von Zigaretten haben.

**B. Tobacco policies****5. Does your organisation agree with the level of tobacco legislation implemented till this date, both from a national (German), regional (North Rhine-Westphalia) and supranational (European) level?**

Grundsätzlich befürworten wir präventive Maßnahmen, die einen verantwortungsbewussten Umgang mit dem risikobehafteten Produkt Zigarette fördern. Die derzeit geltenden Vorschriften in Deutschland, verbunden mit Informations- und Präventionsmaßnahmen, waren mit einer Halbierung der Raucherprävalenz bei Jugendlichen unter 18 Jahren in den letzten 10 Jahren erfolgreich.

**6. How did your organisation respond to the 2007 "Nichtraucherschutzgesetz" in North Rhine-Westphalia?**

Für die Einführung des Nichtraucherschutzgesetzes im Bundesland Nordrhein-Westfalen hat der Deutsche Zigarettenverband keine konkrete Position. Unsere grundsätzliche Position zu Nichtraucherschutzgesetzen ist folgende:

Wir befürworten eine Regelung des Rauchens an öffentlichen Orten und unterstützen Maßnahmen, die ein rücksichtsvolles Miteinander von Rauchern und Nichtrauchern ermöglichen. Wir sprechen

uns für Rauchverbote aus an Orten, an denen Menschen sich aufhalten müssen, wie Ämtern oder Krankenhäusern. Wir sprechen uns dafür aus, dass an diesen Orten auf freiwilliger Basis abgetrennte Raucherräume geschaffen werden können.

Wir glauben, dass ein Miteinander von Rauchern und Nichtrauchern an den Orten, an denen sich Menschen freiwillig aufhalten, auch ohne weitere Verbote möglich ist. Somit treten die Mitgliedsfirmen durchaus für eine angemessene Trennung in Gebäuden und Räumen auf. Gleichzeitig sollte jedoch das Rauchen in klar abgegrenzten Bereichen möglich sein, so dass Millionen erwachsener Raucher die Möglichkeit haben, an für sie angenehmen Orten zu rauchen. Das schließt auch Restaurants, Bars, Kneipen etc. mit ein.

**7. What was the impact on your organisation after the “Nichtraucherschutzgesetz” was implemented in North Rhine-Westphalia?**

Die Änderung des Nichtraucherschutzgesetzes hatte keine Auswirkungen auf den DZV und kaum Auswirkungen auf die Vermarktung von Zigaretten von Seiten der DZV-Mitgliedsunternehmen in NRW.

**8. What is the stance of your organisation on pictorial health warnings for cigarette packages?**

Das erklärte gesundheitspolitische Ziel von Warnhinweisen auf Tabakprodukten ist es, die Verbraucher über die Gesundheitsgefahren des Rauchens zu informieren und auf diese Weise zu einer Verminderung des Tabakkonsums beizutragen.

In Bezug auf eine verbesserte Wirksamkeit von kombinierten Warnhinweisen gegenüber Textwarnhinweisen hat die EU-Kommission keinen Beleg präsentiert, dass diese dazu beitragen würden, den Tabakkonsum zu reduzieren. Die Gesundheitsrisiken des Rauchens sind allgemein bekannt. Große „Schockbilder“ auf Zigarettenpackungen tragen jedoch nicht zu einer sachlichen und objektiven Informationsvermittlung bei und diskriminieren das legale Produkt und seine erwachsenen Konsumenten.

Es fehlen überzeugende Nachweise, dass mit einer Vergrößerung der Fläche der Warnhinweise die Informationsvermittlung an den Verbraucher verbessert werden könnte. Daher ist die Forderung nach genereller Reduzierung der Attraktivität der Verpackungen durch eine Vergrößerung der Warnhinweise kein legitimes gesundheitspolitisches Ziel. Eine bewusste Schädigung der Marke verstößt gegen art. 5, 12 und 14 GG, ist unverhältnismäßig und damit rechtswidrig.

**9. Are German tobacco companies required to implement pictorial health warnings on the packaging of cigarettes after the implementation of the 2014/40/EU directive?**

Nach der Umsetzung der EU-Tabakproduktrichtlinie in nationales Recht in Deutschland werden die Mitgliedsunternehmen des Deutschen Zigarettenverbandes die gesetzlichen Bestimmungen umsetzen, um gesetzeskonform zu produzieren. Dies gilt auch für die vorgesehenen Bildwarnhinweise.

**10. What is the stance of your organisation on plain packaging on cigarettes?**

Plain Packaging bedeutet die Einführung einer neutralen (generischen) Verpackung von Tabakwaren, also eine standardisierte Gestaltung unter Verwendung einheitlicher Schriftart, Schriftgröße und Farbgebung. Markenlogos, individuelle Schriftzüge, Bildmarken und sonstige Gestaltungsmittel würden verboten werden.

Marken sind in allen Branchen ein wertvolles Geschäftsvermögen. Eine Einführung von Plain Packaging würde die Hersteller von Tabakwaren ihrer Markenrechte und die Marken ihrer Identität berauben. Dies würde eine Enteignung der eingetragenen Marken bzw. der zum Auf- und Ausbau der Marken getätigten Investitionen bedeuten.

Als gesundheitspolitische Maßnahme wäre Plain Packaging nicht nur unverhältnismäßig sondern sogar kontraproduktiv.

Es fehlt eine überzeugende wissenschaftliche Grundlage, dass Plain Packaging tatsächlich den Tabakkonsum reduzieren würde. Gleiches gilt für einen Nachweis, dass die Gestaltung der Verpackung insbesondere Kinder und Jugendliche zum Rauchen verleitet oder Impulskäufe von Konsumenten bewirkt. Es ist kein legitimes gesundheitspolitisches Ziel, die Attraktivität von Tabakprodukten per se reduzieren zu wollen.

Plain Packaging würde – in Verbindung mit Werbeverböten – zwangsläufig zur Zementierung von Marktanteilen und in letzter Konsequenz zu einer Marktabstottung führen. Innovative Produkte, gerade auch weniger gesundheitsschädliche, hätten keine Chance sich am Markt durchzusetzen. Ohne eine individuelle Verpackungsgestaltung würde der Preis zum primären Differenzierungsmerkmal im Wettbewerb. Plain Packaging hätte dadurch eine – aus jugendschutz- und gesundheitspolitischer Perspektive kontraproduktive – Verbilligung von Tabakwaren zur Folge. Darüber hinaus wären ein Anstieg des illegalen Handels und insbesondere ein vermehrtes Aufkommen von gefälschten Tabakerzeugnissen zu erwarten, die unter diesen Voraussetzungen einfacher herzustellen und zu verkaufen wären.

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## ii. Correspondence with *Piratenpartei Nordrhein-Westfalen* (In German)

The following e-mail correspondence was conducted with Mister Tom Odebrecht, speaker for European politics in the North Rhine-Westphalian government.

Sehr geehrter Herr Heteyey,

die Fraktion der Piraten im Landtag NRW hat bereits im Januar 2013 einen umfassenden Antrag nach [§§ 3 und 5 EUZBLG](#) gestellt, der sich mit der damals neuen Richtlinie zu Tabakerzeugnissen *KOM (2012) 788 final* beschäftigt. Das EUZBLG räumt den deutschen Landtagen die Möglichkeit ein, zu Europagesetzgebung Stellung zu nehmen.

Ihre Fragen werden in unserem Antrag ([hier](#)) weitestgehend beantwortet. Zum besseren Verständnis möchte trotzdem die Möglichkeit nutzen, auf Ihre Fragen im Einzelnen kurz einzugehen.

### **1. Was ist die Meinung Ihrer Partei nach den neuen Richtlinien für Tabakprodukte der Europäischen Union?**

Antwort: Wir anerkennen das Ziel der Europäischen Kommission, die Anzahl von Todesfällen in Zusammenhang mit dem Konsum von Tabakerzeugnissen in der EU zu reduzieren und ein angemessenes Nichtraucherschutzniveau insbesondere für junge Menschen im europäischen Binnenmarkt aufrechtzuerhalten.

Zudem sind wir der Auffassung, dass die Bürgerinnen und Bürger der EU auf Grundlage genauer, objektiver und wissenschaftlich fundierter Informationen über die Gesamtheit der gesundheitlichen Folgen des Konsums von Tabakerzeugnissen unverfälschte Kaufentscheidungen treffen können müsse.

### **2. Was war die Meinung Ihrer Partei von der Tabakssituation in Nordrhein Westfalen vor der neuen Richtlinien? Waren die bereits umgesetzten Maßnahmen gegen das Rauchen genügend?**

Antwort: Wir sind der Ansicht, dass die bestehende Richtlinie 2001/37/EG bereits für ein hohes Nichtraucherschutzniveau sorgt und den einzelnen Mitgliedsstaaten die Möglichkeit einräumt, höhere nationale Standards, auch im Hinblick auf junge Menschen, einzuführen.

Beim „neuen“ Richtlinienvorschlag bestanden zudem nach unserer Auffassung grundlegende Subsidiaritätsbedenken, da, ausgehend vom bestehenden Nichtraucherschutzniveau in der EU, weitergehende Nichtraucherschutzstandards effektiver und zielgerichteter von den Mitgliedsstaaten auf der Grundlage nationaler oder regionaler Konsum- und Kaufpräferenzen bei Tabakerzeugnissen und Veränderungen dieser sowie national und regional erhobener wissenschaftlicher Daten sichergestellt werden können.

Die Piraten haben auch keine unverhältnismäßige Einschränkung des Funktionierens des europäischen Binnenmarkts erkennen können, die als Begründung für die neue Richtlinie *KOM (2012) 788* herangezogen wurde. Denn aufgrund der zuvor bestehenden Richtlinie 2001/37/EG die Mitgliedsstaaten in wesentlichen Anwendungsbereichen bereits heute *nicht* unilateral, also den Binnenmarkt potenziell störend, tätig werden konnten.

**3. Was sind, ihrer Meinung nach, die (sowohl Positive und Negative) Folgen der neuen Richtlinien für Tabakprodukten in Nordrhein-Westfalen?**

Antwort: Die Folgen sind vielfältig und im Einzelnen noch nicht absehbar. Grundsätzlich haben wir folgende inhaltliche Bedenken zur Richtlinie (diese dienen auch als Kritik an der Umsetzung der Richtlinie in NRW):

- Artikel 6 des ursprünglichen Richtlinienvorschlags sieht ein Verbot von Tabakerzeugnissen mit einem charakteristischen Aroma (hier wird auf Wasserpfeifenkonsum abgestellt) vor. Die Kommission legte aber in keiner Weise dar, wie ein Verbot für aromatisierte Tabakerzeugnisse im Zusammenhang zum Nichtraucherchutz steht. Wir halten es für gerechtfertigt, ohne fundierte wissenschaftliche Begründung derartig in den Konsumgütermarkt einzugreifen und das Inverkehrbringen einer gesamten Produktkategorie verbieten zu lassen.
- Wir begrüßen die Regelungen (gemäß Artikel 12 des Richtlinienvorschlags), der unter anderem untersagt, falsche, irreführende und täuschende Mittel zur Bewerbung von Tabakerzeugnissen sowie Werbeaussagen, die spezielle Wirkungen des Tabakerzeugnisses suggerieren, einzusetzen.
- Die Aufnahme von E-Zigaretten in die Richtlinie halten wir für falsch. In Artikel 18 („Nikotinhaltige Erzeugnisse“) wurden erstmals Produkte vom Regelwerk der Tabakrichtlinie erfasst, die keinen Tabak enthalten und von denen aus unserer Sicht keine Gesundheitsgefahren des herkömmlichen Tabakkonsums ausgehen (der Entwurf der neuen Tabakrichtlinie sieht ja vor, nikotinhaltige Erzeugnisse wie die E-Zigarette nach Artikel 18 zu behandeln).
- Wir sind der Ansicht, dass es sich bei der E-Zigarette nicht um ein Mittel zur Rauch- oder Nikotinentwöhnung handelt, sondern allein um eine Alternative zu Tabakerzeugnissen, die Nikotinsüchtigen zur Gewährleistung der Nikotinzufuhr dienen kann. Abgesehen von den gesundheitsschädigenden Effekten der Nikotinaufnahme verursacht die E-Zigarette nach gegenwärtigem wissenschaftlichen Erkenntnisstand keinerlei Gesundheitsschäden, die auf den Konsum von Tabakerzeugnissen zurückzuführen sind.

Ich hoffe, Ihre Fragen konnten zufriedenstellend beantwortet werden.

Mit freundlichen Grüßen  
Tom Odebrecht

Referent für Europapolitik

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### iii. Interview questions for “Dampf In”, e-cigarette stakeholder

The following questions were used in the structured interview with “Dampf In”:

**Question 1:** are you aware of the changes coming to the European tobacco market through directive 2014/40/EU? If yes, how did you get informed?

**Question 2:** One of the measures will prohibit the sale of menthol cigarettes as of 2020. What is your opinion on this measure?

**Question 3:** Do you agree or disagree with the following statement: “Bigger health warnings on e-cigarette packages will have a bad effect on my business”

**Question 4:** Are you in favour of the proposed health warnings on e-cigarette packages?

**Question 5:** Did your business already take measures to comply with the revised directive? If yes, which measures?

**Question 6:** Do you agree or disagree with the new measures for e-cigarettes?

The answers can be found on the filled in questionnaire on the next page.

#### iv. Basic Law articles 71, 72, 73, 74

As explained in chapter three, the following articles explain the decision-making process of German politics and the role of the German States.

##### **Article 71 of the German Basic Law:**

[Exclusive legislative power of the Federation]

On matters within the exclusive legislative power of the Federation, the Länder shall have power to legislate only when and to the extent that they are expressly authorised to do so by a federal law.

##### **Article 72 of the German Basic Law**

[Concurrent legislative powers] (1) On matters within the concurrent legislative power, the Länder shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law. (2) The Federation shall have the right to legislate on matters falling within clauses 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest. (3) If the Federation has made use of its power to legislate, the Länder may enact laws at variance with this legislation with respect to: 1. hunting (except for the law on hunting licenses); 2. protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life); VII. Federal Legislation and Legislative Procedures 58 3. land distribution; 4. regional planning; 5. management of water resources (except for regulations related to materials or facilities); 6. admission to institutions of higher education and requirements for graduation in such institutions. Federal laws on these matters shall enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the Bundesrat. As for the relationship between federal law and law of the Länder, the latest law enacted shall take precedence with respect to matters within the scope of the first sentence. (4) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by Land law.

##### **Article 73 of the German Basic Law**

[Matters under exclusive legislative power of the Federation]

(1) The Federation shall have exclusive legislative power with respect to:

1. foreign affairs and defence, including protection of the civilian population;
2. citizenship in the Federation;
3. freedom of movement, passports, residency registration and identity cards, immigration, emigration and extradition;
4. currency, money and coinage, weights and measures, and the determination of standards of time;
5. the unity of the customs and trading area, treaties regarding commerce and navigation, the free movement of goods, and the exchange of goods and payments with foreign countries, including customs and border protection;
- 5a. safeguarding German cultural assets against removal from the country;

6. air transport; VII. Federal Legislation and Legislative Procedures 59

6a. the operation of railways wholly or predominantly owned by the Federation (federal railways), the construction, maintenance and operation of railroad lines belonging to federal railways, and the levying of charges for the use of these lines;

7. postal and telecommunications services;

8. the legal relations of persons employed by the Federation and by federal corporations under public law;

9. industrial property rights, copyrights and publishing;

9a. protection by the Federal Criminal Police Office against the dangers of international terrorism when a threat transcends the boundary of one Land, when the jurisdiction of a Land's police authorities cannot be perceived, or when the highest authority of an individual Land requests the assumption of federal responsibility;

10. cooperation between the Federation and the Länder concerning a) criminal police work, b) protection of the free democratic basic order, existence and security of the Federation or of a Land (protection of the constitution), and c) protection against activities within the federal territory which, by the use of force or preparations for the use of force, endanger the external interests of the Federal Republic of Germany, as well as the establishment of a Federal Criminal Police Office and international action to combat crime;

11. statistics for federal purposes;

12. the law on weapons and explosives;

13. benefits for persons disabled by war and for dependents of deceased war victims as well as assistance to former prisoners of war;

14. the production and utilisation of nuclear energy for peaceful purposes, the construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionising radiation, and the disposal of radioactive substances. VII. Federal Legislation and Legislative Procedures 60 (2) Laws enacted pursuant to clause 9a of paragraph (1) require the consent of the Bundesrat.

#### **Article 74 of the German Basic Law:**

[Matters under concurrent legislative powers] (1) Concurrent legislative power shall extend to the following matters: 1. civil law, criminal law, court organisation and procedure (except for the correctional law of pretrial detention), the legal profession, notaries, and the provision of legal advice; 2. registration of births, deaths and marriages; 3. the law of association; 4. the law relating to residence and establishment of foreign nationals; 4a. (repealed) 5. (repealed) 6. matters concerning refugees and expellees; 7. public welfare (except for the law on social care homes); 8. (repealed) 9. war damage and reparations; 10. war graves and graves of other victims of war or despotism; 11. the law relating to economic matters (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges and private insurance), except for the law on shop closing hours, restaurants, game halls, display of individual persons, trade fairs, exhibitions and markets; 11a. (repealed) 12. labour law, including the organisation of enterprises, occupational health and safety, and employment agencies, as well as social security, including unemployment insurance; 13. the regulation of educational and training grants and the promotion of research; 14. the law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74; VII. Federal Legislation and Legislative Procedures 61 15. the transfer of land, natural resources, and means of production to public ownership or other forms of public enterprise; 16. prevention of the abuse of economic power; 17. the promotion of agricultural production and forestry (except for the law on land consolidation), ensuring the adequacy of food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, and preservation of the coasts; 18. urban real estate transactions, land law (except for laws regarding development

fees), and the law on rental subsidies, subsidies for old debts, home building loan premiums, miners' homebuilding and homesteading; 19. measures to combat human and animal diseases which pose a danger to the public or are communicable, admission to the medical profession and to ancillary professions or occupations, as well as the law on pharmacies, medicines, medical products, drugs, narcotics and poisons; 19a. the economic viability of hospitals and the regulation of hospital charges; 20. the law on food products including animals used in their production, the law on alcohol and tobacco, essential commodities and feedstuffs as well as protective measures in connection with the marketing of agricultural and forest seeds and seedlings, the protection of plants against diseases and pests, as well as the protection of animals; 21. maritime and coastal shipping, as well as navigational aids, inland navigation, meteorological services, sea routes, and inland waterways used for general traffic; 22. road traffic, motor transport, construction and maintenance of long-distance highways, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue; 23. non-federal railways, except mountain railways; VII. Federal Legislation and Legislative Procedures 62 24. waste disposal, air pollution control, and noise abatement (except for the protection from noise associated with human activity); 25. state liability; 26. medically assisted generation of human life, analysis and modification of genetic information as well as the regulation of organ, tissue and cell transplantation; 27. the statutory rights and duties of civil servants of the Länder, the municipalities and other corporations of public law as well as of the judges in the Länder, except for their career regulations, remuneration and pensions; 28. hunting; 29. protection of nature and landscape management; 30. land distribution; 31. regional planning; 32. management of water resources; 33. admission to institutions of higher education and requirements for graduation in such institutions. (2) Laws enacted pursuant to clauses 25 and 27 of paragraph (1) shall require the consent of the Bundesrat.

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[https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic\\_law-data.pdf](https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf)

**v. List of German cigarette brands banned as of May 20, 2020**

<b>Product:</b>	<b>Manufacturer:</b>
Allure Menthol Super Slim 100	Joh.Wilh. von Eicken
Burton Menthol	
Black Vanilla Classic	Planta
Chesterfield Menthol	Philip Morris
Club Menthol (and Club Menthol Frisch)	JT International
Couture Menthol	Grand River Enterprises
Davidoff Menthol	Reemtsma
Eckstein	
Djarum Menthol Filter	H. Woermann GmbH
Ducal Menthol	Heintz van Landewyck
Dunhill Fine Cut Menthol	British American Tobacco
Elixir Menthol	Heintz van Landewyck
Excellent Lemon Mint/Exotic Fruit/Sweetie	Planta
Gauloises Blondes Menthol	Reemtsma
Fairwind	
Juno ohne Filter	
John Player Ice	
Golden American	British American Tobacco
Lux	
Lucky Strike Mentha Piperita	
Marlboro White Menthol	Philip Morris
M Menthol	JT International
Mohawk Menthol	Grand River Enterprises
Krone	British American Tobacco
Reyno Classic and White (menthol)	JT International
Pall Mall Menthol Blast	British American Tobacco
Peer 100	
Route 66	Reemtsma
Salem	
West Ice	
Winston Menthol	JT International
Winfield	British American Tobacco

(DTV Tobacco Wholesale Association, 2015)

(“Diese Zigarettenmarken werden verschwinden”, 2015)