



EUROPEAN COMMISSION
HEALTH AND CONSUMERS DIRECTORATE-GENERAL
Public Health and Risk Assessment
Health Law and International

Brussels, 31.01.2011
SANCO C.6/AM D(2011) Arcs 100838

Dear Dr. Andersson,

Subject: Tobacco Advertising – Your letter of 27 December 2010

Thank you for your letter in which you inform about tobacco advertising in public spaces in Bergisch Gladbach.

From the point of view of public health, we fully share your view that it is highly desirable to ban tobacco advertising in a comprehensive way. This would include public spaces like those you mention in your letter.

The provisions of the Framework Convention on Tobacco Control and in particular the guidelines for implementing Article 13 of the Framework Convention go exactly in this direction.

You rightly refer to EU Directive 2003/33 on Tobacco Advertising, which does not harmonise the specific case of outdoor advertising in the public or private sphere within the territory of a Member State. This is therefore outside the EU area of competence.

However, according to Council Recommendation 2003/54, Member States are encouraged to address tobacco advertising in a more holistic way. Article 2 (b) of this Recommendation, for example, states that Member States should prohibit:

(d) the use of billboards, posters and other indoor or outdoor advertising techniques (such as advertising on tobacco vending machines), ...

Whilst these provisions are not of a legally binding nature, most Member States have undertaken measures to restrict such advertising techniques. However, to our knowledge, there is no binding legislation to this end in force in Germany.

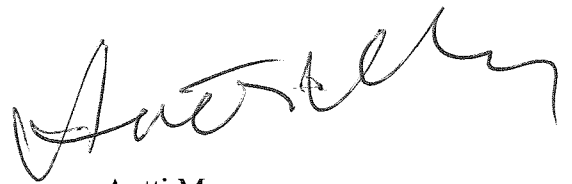
As far as the procurement aspect of the matter is concerned, your letter does not contain sufficiently detailed information to give any specific legal advice. It seems that the contract about to be signed or already signed is a service concession allowing the contractor the use of public spaces against payment of an amount to the city. Should this be the case, it has to be recalled that currently service concessions are not governed by any of the EU directives on public procurement. A European wide publication would in this case not be mandatory according to European law.

Dr. Carl Andersson
Carl.Andersson@gmx.de

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
Office: F101 - Tel. direct line +32 229-56819
antti.maunu@ec.europa.eu

However, if the service concession has relevance for the internal market, the contracting authority is nonetheless bound to comply with the fundamental rules of the Treaties, and with the consequent obligation of transparency and non-discrimination. The principles of transparency and non-discrimination do on the other hand not restrict the right of the contracting authority to define the content of the concession (tobacco advertising or not) in the publication. If excluding tobacco advertising in a transparent and non-discriminatory way reduces *de facto* the interest of potential contractors this does not constitute a violation of public procurement regulation. We therefore do not see - on the basis of the information available to us - how publishing a note for advertising on public spaces which excludes the possibility to advertise for tobacco products could infringe European rules on public procurement.

Let me assure you that we share the public health objectives of your organisation and that we work within the limits of our competencies towards the same goal, which is the reduction of tobacco consumption.

A handwritten signature in black ink, appearing to read 'Antti Maunu', written in a cursive style.

Antti Maunu
Acting Head of Unit