

## **POLICY NOTE**

### **THE TOBACCO AND PRIMARY MEDICAL SERVICES (SCOTLAND) ACT 2010 (INCIDENTAL PROVISION AND COMMENCEMENT NO. 4) ORDER 2013**

#### **SSI 2013/**

The above Order is made in exercise of the powers conferred by sections 40(2), 42 and 43(3) of the Tobacco and Primary Medical Services (Scotland) Act 2010 (“the 2010 Act”). The instrument is subject to affirmative procedure.

#### **Policy Objectives**

The Order commences section 9 of the 2010 Act which makes it an offence for a person who has the management or control of premises to have an automatic vending machine for the sale of tobacco products available for use.

Article 2 of the Order contains provision which is incidental to the commencement of section 9. It substitutes the existing section 9 with a provision which is in identical terms. It is required to ensure that section 9 is brought into force with full effect. Section 42 of the 2010 Act (Ancillary Provision) provides that Scottish Ministers may by order make such incidental provision as they consider appropriate for the purpose of giving full effect to any of the provisions of the 2010 Act.

This note provides information as to the circumstances which have given rise to the need for this incidental provision.

Section 9 was judicially reviewed by Imperial Tobacco and by a tobacco vending machine company, Sinclair Collis (a subsidiary of Imperial Tobacco). The Imperial Tobacco case was appealed to the Supreme Court and the Sinclair Collis case was appealed to the Inner House. The courts at all stages have found in favour of the Scottish Ministers. The litigation is now completed and Scottish Ministers are in a position to implement the provisions.

The Sinclair Collis petition in the Outer House of the Court of Session sought various orders including declarator that section 9 is inapplicable and unenforceable because of failure of the United Kingdom to notify it to the Commission in accordance with Article 8(1) of Directive 98/34/EC (“the Technical Standards Directive”).

Scottish Ministers position in relation to this ground of challenge was that the provision in section 9 is not a technical regulation and accordingly notification is not required. However in view of the potential for this point to add to the delay before the policy could be implemented the pragmatic decision was taken that this part of the challenge should be disposed of by notifying the provision in section 9. This was done as a protective measure to reduce the grounds of challenge preventing the implementation of the legislation.

Section 9 was a provision in an ASP with Royal Assent, although it had not yet been commenced. It was therefore not possible to follow the standard procedure for notifications. An alternative procedure was therefore adopted by which the provision in section 9 was

notified to the Commission by sending a draft Order to Commission containing the provision in section 9.

The provision in section 9 was therefore duly notified to the Commission and the ground of challenge was dropped. No comments were received from either the Commission or from any other member states.

Article 2 of the Order is required as a technical, procedural step to complete the notification process under the Technical Standards Directive. The effect of the substitution is that section 9 as commenced is the provision which was notified to the Commission under the Directive.

This is incidental to the commencement of section 9 and is a necessary procedural step to ensure that the provision commenced is fully enforceable as Parliament intended it to be so. No substantive change is being made to section 9.

### **Consultation, Impact Assessments and Financial Effects**

A full consultation and Business and Regulatory Impact Assessment were completed in respect of section 9 of the 2010 Act before that legislation was enacted. Details are available on the Scottish Government website.