

## The failure of partial smoking bans in hospitality venues: The example of Germany and Spain

### Background

Conclusive evidence and international consensus demonstrate that there is no safe level of exposure to tobacco smoke. After the ratification of the WHO Framework Convention on Tobacco Control (FCTC) in 2003 and the adoption of guidelines on "Protection against the exposure to tobacco smoke" (Article 8, FCTC) by the Conference of the Parties in 2007<sup>4,21</sup>, several EU Member States like Finland, France, Ireland, Italy, Sweden and the United Kingdom introduced comprehensive smoking bans in public places. However, some countries, such as Spain, Germany, Denmark and Austria, decided to introduce partial smoking bans, which only cover some hospitality venues. The two case studies below demonstrate why partial smoking bans are not an alternative to comprehensive smoke-free legislation in Europe and undermine international tobacco control efforts.

### The "Spanish Model" – a failed approach<sup>7</sup>

*Legislation:* In January 2006, Spain enacted a tobacco control law<sup>16</sup> which banned tobacco advertising, restricted the sale of tobacco products and also banned smoking in public buildings, on public transport as well as in enclosed workplaces. Although the workplace smoking ban also covers hospitality workers, consumers in bars and restaurants are still allowed to smoke under specified conditions. The exceptions applying to bars and restaurants in Spain depend on the floor space accessible to the patrons and does not include kitchen, bar, storage or office space. If the accessible floor space has less than 100 square meters, the owner may choose to declare the establishment either a smoking or a non-smoking venue. If the floor space exceeds 100 square meters, smoking is permitted only in a separate room, which is subject to strict rules and regulations<sup>16</sup>. For instance, smoking rooms must be physically separated from the other rooms and cannot be larger than 30 percent of the publicly accessible area.

Additionally the law introduced a large number of exceptions and special rules for specific types of hospitality venues, e.g. if they are located in commercial centers or within workplaces as well as if they offer other services, such as sale of food products<sup>7</sup>.

*Implementation:* Spain's federal structure and regional responsibility for the implementation of the anti-smoking law have created a patchwork with numerous gaps in non-smoker protection in hospitality venues. Several of the autonomous cities and regions issued their own implementation regulations, thereby exacerbating the complexity of the "Spanish model". Regional exceptions exist for e.g. the definition of restaurant size, provisions for smoking rooms as well as the smoking ban in office buildings and other workplaces<sup>7</sup>.

In practice, giving small establishments the choice meant that smoking continues in the majority of the bars and restaurants, especially as 80 percent of the venues have less than 100 square meters accessible area. According to Spanish on-site inspections only ten percent of these venues became smoke-free one year after implementation<sup>18</sup>. Instead of improving non-smoker protection larger restaurants are often circumventing the law. In

85 percent of the inspected larger venues, the smoking rooms were bigger than allowed and in 37 percent the physical separation was not provided<sup>18</sup>.

*Evaluation:* Healthcare experts and health advocates thus describe the outcome of the "Spanish model" as "chaotic" and ineffective<sup>19,20</sup>:

- Hospitality workers remain unprotected from tobacco smoke in their workplaces.
- The vast majority of hospitality venues is not smoke-free<sup>18</sup>.
- According to opinion polls, the majority of Spaniards are in favour of a comprehensive ban on smoking in bars and restaurants<sup>3,11</sup>.
- Owners of larger restaurants have come out in favour of a uniform solution in order to correct the crass distortions of competition resulting from the law<sup>12</sup>.
- In an EU-wide study comparing measures to protect non-smokers, Spain was criticized for its "weak and ineffective" legislation on bars and restaurants<sup>17</sup>.

In conclusion the Spanish law does not solve the problem of secondhand smoke, but merely gives rise to endless disputes about how to improve non-smoking protection and to create fair competition in the hospitality sector. This has also been recognized on the political level. After the Spanish Ministers of Health called for more restrictive approaches in hospitality venues<sup>9</sup>, a revision of the law has been introduced to the legislative process and is expected to take effect as of January 2011<sup>10</sup>.

### Germany – another "patchwork" of exceptions

*Legislation:* Since September 2007, Germany has a federal law banning smoking in all federal buildings, public transportation (including taxis), and in all train stations. Smoking bans in indoor facilities of health care, education, recreation or sports facilities as well as in restaurants, bars, and pubs were enacted in Germany's 16 states (Länder) between August 2007 and July 2008. The majority of states have introduced legislation, which gave venues with two or more rooms the option to allow smoking in adjoining rooms that are structurally separate. Proprietors of smaller businesses which only had one publicly accessible room considered themselves to be disadvantaged by this exception and reported a disproportionate financial burden. Tobacco lobbyists and the German hospitality association (DEHOGA) supported this claim and publicly asked for the introduction of the "Spanish model"<sup>11,2,5,6,14</sup>. The main aim was to enable German bar and restaurant owners of smaller venues to decide whether guests are allowed to smoke or not.

Constitutional challenges brought before the Federal Constitutional Court and various state constitutional courts by a few bar and restaurant owners demanded "freedom of choice" and "mandatory designation". In July 2008 the Federal Constitutional Court ruled that the state laws were unconstitutional on the ground that they gave an undue advantage to owners of venues with two or more rooms. It also declared that the right to health

would be a higher good and the evidence on passive smoking conclusive to restrict personal freedoms and business rights. On those grounds it stated that a complete ban on smoking in public places would have been constitutional. However, as the federal and state governments did not implement a 100 percent smoke-free law, they already took the political decision of giving priority to business rights. The court thus ruled that the exceptions should either be removed or extended to all hospitality owners, especially those of one-room venues. It gave the state legislators time until 31 December 2009 to amend the laws accordingly. For the interim period until new state legislation was enacted it decided that one-room venues could decide to allow smoking under the following conditions:

- area accessible to consumers does not exceed 75 square meters,
- no prepared food is served,
- no access is granted to youth below 18 years of age<sup>13</sup>.

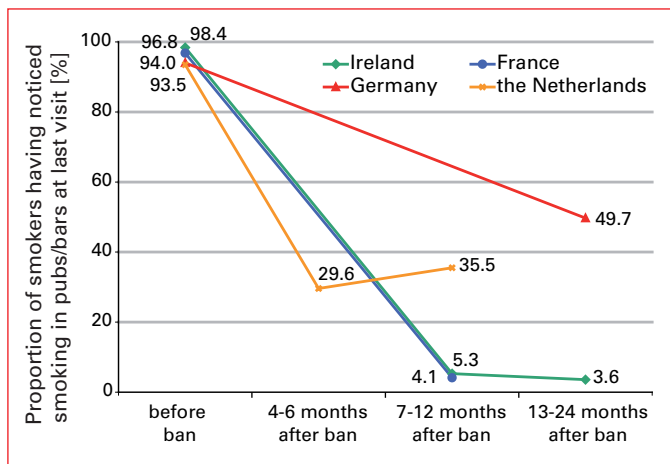
*Implementation:* After the ruling nearly all federal states introduced amendments to its legislation allowing the designation of smoking establishments under specified criteria based on the court ruling, but with regional differences regarding the definitions and enforcement policies. The only exceptions were Bavaria, which reintroduced a comprehensive smoking ban in 2010, after repealing it in 2009, and Saarland, where a comprehensive smoking ban is currently debated in court.

The German federal system led to a patchwork of different rules across the country. The exceptions in the hospitality sector undermine effective protection of non-smokers and the diverging rules fail to provide legal certainty to bar and restaurant owners leading to unfair competition in the hospitality sector. Enforcement is also problematic, as inspections and sanctions are organised on the lowest level of public administration.

*Evaluation:* Although the partial smoking bans introduced in recent years have improved the air quality in bars and restaurants, an effective protection from tobacco smoke is guaranteed only when smoking is completely banned. If there are smoking rooms, tobacco smoke penetrates into smoke-free rooms so that these are polluted four times as much as venues banning smoking completely. Particularly high levels of tobacco smoke pollution are still found in smoking rooms, smoking pubs and clubs<sup>8</sup>. Compared to countries with comprehensive smoke-free legislation (France and Ireland), the partial bans introduced in Germany only led to comparatively modest reductions in smoking in pubs, bars and restaurants (fig.1)<sup>15</sup>.

## Bavaria – the tide is turning

Contrary to the other federal states, Bavaria introduced a comprehensive smoking ban in 2008. Despite positive developments in the hospitality sector, the state legislators decided to repeal the law in 2009 and to allow smoking in separate rooms and small



**Fig. 1: Percentage of smokers who noticed smoking in pubs and bars at last visit, before and after hospitality sector smoking bans in Ireland, France, Germany and the Netherlands<sup>15</sup>.**

venues. A popular outrage followed. In November 2009 more than 1.2 million eligible Bavarians supported a petition for a referendum, which was conducted on 4 July 2010. In total 61 percent voted in favour of the reintroduction of a complete smoking ban in all hospitality venues. Since 1 August 2010 all bars, pubs, restaurants and beer tents are smoke-free. Although the popular beer fest Oktoberfest was exempt for 2010, the beer tent owners decided not to wait until 2011.

This success story demonstrates that the public supports comprehensive smoke-free laws in Germany. It is expected that the referendum instigates similar initiatives in other constituencies still affected by partial smoking bans.

## Conclusions

The partial smoking bans introduced in both countries have led to serious practical problems, especially due to exceptions and regional disparities (patchwork), which

- undermine non-smoker protection,
- distort business competition,
- discriminate against hospitality workers,
- threaten the health of workers and customers, and
- perpetuate the societal conflict between smokers and non-smokers.

Additionally experiences from several EU Member States show that, contrary to estimates divulged by tobacco industry and trade associations, neither dramatic reductions in sales nor massive losses of jobs are to be expected as a result of comprehensive smoking bans. Neither the Spanish nor the German model should thus be considered as alternatives to comprehensive smoking bans in hospitality venues.

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