

To: Frank Vandenbroucke
Deputy Prime Minister and Minister of Social Affairs and Public Health

Brussels, 12 August 2024

Subject: Belgium's Draft Royal Decree is Contrary to the EU's Tobacco Product's Directive, Fragments the Internal Market, and Creates Barriers to Trade

Your excellency,

On 14 May 2024, Belgium notified a draft *Royal Decree amending the Belgian Royal Decree of 7 April 2019 on the traceability and safety features of tobacco products* to the European Commission and to EU Member States through the EU's Technical Regulations Information System (TRIS). In simple terms, Belgium foresees the following changes:

- The extension of the obligation to provide track and trace (T&T) equipment to “*current and future*” (Article 3(8) of the Royal Decree, if amended).
- The introduction of a new obligation for manufacturers to reimburse economic operators the costs associated with the operation of the traceability system, *inter alia*, staff costs, equipment renewal and maintenance costs, and software costs (Article 3(9) of the Royal Decree, if amended).
- The introduction of a new requirement providing that, in order to obtain a Unique Identifier, tobacco products must figure on Belgium's list of validated products (Article 3(1) of the Royal Decree, if amended).

Tobacco Europe¹, its members and Philip Morris International believe that the draft Royal Decree clearly conflicts with the EU Tobacco Products Directive (TPD), raises issues of compliance with general EU law, and appears inconsistent with certain international trade principles and obligations. The draft Royal Decree and the envisaged changes to the T&T system would have a significant impact on the current well-functioning Single-Point-Of-Contact (SPOC) framework, which has been created to fulfil the obligation of tobacco manufacturers and importers to provide equipment under Article 15(7) of the TPD and has been successfully adopted by over 90% of economic operators across the EU since 2019. The draft Royal Decree would lead to important challenges for economic operators, including for tobacco manufacturers, and would likely impact supply chains across the EU by creating barriers to trade forcing, among others, tobacco manufacturers to significantly re-organise and modify their trading processes only for the Belgian market, creating unequal conditions for manufacturers operating in different EU Member States and introducing a trade access barrier.

First of all, and most evidently, **Belgium's envisaged amendments to the Royal Decree are in conflict with the TPD and its transposition across all other EU Member States**. More specifically, the extension of the scope of the obligation to provide “*current and future*” T&T equipment to operators, and the introduction of a new obligation for manufacturers to reimburse economic operators of the costs associated with the operation of the traceability system, *inter alia*, staff costs, equipment renewal and maintenance costs, and software costs in Article 3(8) and (9) of the Royal Decree, if amended, would be inconsistent with the clear wording of Article 15(7) of the TPD.

Article 15(7) of the TPD is clear in that it only requires tobacco manufacturers to provide the necessary equipment. It does not require manufacturers to cover any further operating costs of economic operators involved in the trade of tobacco products, including the costs related to the equipment already provided, its maintenance, or the related software or staff costs. Furthermore, Belgium's measure would create legal uncertainty, instead of the allegedly pursued legal certainty, in that it does not comprehensively define the scope of the reimbursement obligation by only providing examples. Implementing the requirements of Article 3(8) and (9) of the Royal Decree, if amended, would be **prohibitively costly and unworkable for manufacturers**, since the envisaged amendments would require

¹ <https://www.tobacco-europe.eu/>. Tobacco Europe AISBL is the umbrella organisation representing major European-based tobacco and nicotine products manufacturers.

manufacturers to not only reimburse the provision of the equipment necessary for compliance with the traceability requirements, but would also extend the reimbursement to any “costs associated with the operation of the traceability system”, such as “staff costs, equipment renewal and maintenance costs, and software costs”.

From a practical perspective, it would also be extraordinarily difficult to separate the share of the operating costs from the operating costs of supply chain operators’ broader logistical, accounting, and human resource operations.

Article 15(7) of the TPD does not contain an obligation for tobacco manufacturers to continuously cover the operational costs incurred by economic operators, namely the economic operators that are responsible under the TPD and EU Member States’ law to collect and transmit data. Article 15(7) of the TPD clearly limits the obligation of tobacco manufacturers to the provision of equipment only. **The provision of equipment should always be limited to the initial provision** and must not extend to instances where operators require new equipment due to any other reasons under their responsibility, such as negligent conduct, improper storage, misuse, or theft. Economic operators must assume responsibility for the business choices they make and the relevant costs of doing business in this sector.

We consider the envisaged measures to be **disproportionate**, aiming to address problems that do not exist. Given the involvement of the economic operators from manufacturing to the last economic operator before the first retail outlet, there is and must be a **shared obligation borne by tobacco manufacturers and by economic operators, which would be disproportionately altered and imbalanced by Belgium’s envisaged regulatory changes**. For instance, operators that were to choose solutions that involve periodic operational costs beyond the initial provision of equipment should bear full responsibility for such autonomous business decisions, as it would be unfair, unreasonable, and disproportionate for manufacturers to bear the risk of any business decision taken by third parties.

The measures would also be disproportionate by having an excessive impact on tobacco manufacturers. Notably, Article 3(8) and (9) of the Royal Decree, if amended, would significantly expand the burden and costs imposed on tobacco manufacturers. Consequently, **tobacco manufacturers would need to significantly re-organise and modify their trading processes only for the Belgian market**, which would lead to market fragmentation and go beyond what is necessary to establish a well-functioning T&T system as specified under Article 15 of the TPD.

The TPD sought to harmonise the EU rules for tobacco products. Belgium now seeks to regulate differently, on its own initiative, which **would fragment the internal market, pose significant challenges to operators on the EU internal market, and create unnecessary barriers to trade**. Any significant deviation from the rules harmonised by the TPD would lead to a disparity of requirements, creating unequal conditions for manufacturers operating in different EU Member States, and would risk jeopardising the very objective of harmonisation in the EU internal market. Tobacco manufacturers relying on logistics chains in Belgium would not be indifferent to these changes, as tobacco

The envisaged measure, by which products that do not figure on the **list of validated products** may not obtain a Unique Identifier, would become a **trade access barrier**. While, in theory, this requirement could be complied with for products destined for the Belgian market, as these products must figure on the list of validated products, it **could create a significant problem for products manufactured in Belgium and being shipped through Belgium, but destined for other EU Member States’ markets or exported to third country markets**, products which would not or not necessarily figure on the list of validated products and for which it would become impossible to comply with the mandatory TPD requirements.

Finally, the amendments foreseen to Belgium’s Royal Decree should also be considered in view of Belgium’s and the EU’s international trade commitments, as certain elements of the proposed rules, notably that tobacco products must appear on the list of validated products in order to obtain a Unique Identifier, could be perceived as **technical regulations posing unnecessary barriers to trade contrary to Article 2.2 of the TBT Agreement**. So far, **Belgium (i.e., the EU) has not notified the draft Royal Decree to the WTO**, thus not informing other WTO Members of the draft Royal Decree and depriving them of their right to submit comments and try to minimise the trade restrictive and disproportionate features or effects of the proposed measure.

Tobacco Europe, its members and Philip Morris International respectfully request Belgium to reconsider its draft Royal Decree and maintain the harmonised EU approach to the transposition of the relevant TPD legal requirements in line with other EU Member States, so as to not fragment the EU market, not impact the current well-functioning SPOC framework, not trigger disproportionate challenges for tobacco manufacturers, and not impact supply chains across the EU in a way that is arguably contrary to EU law and to the EU's international trade obligations.

In the Annex of this document, you will find our detailed argumentation. We look forward to your response and remain at your disposal for further discussions.

Yours sincerely,

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