



**To:**

Mr Richard MCGEEHAN  
Directorate-General for Health and Food Safety  
B232 07/082  
B – 1049 Brussels

**Cc:**

Ms Ilze Juhansone  
Secretariat-General  
European Commission  
Rue de la Loi 200/ Wetstraat 200  
B - 1049 Bruxelles/Brussel

Brussels, 10<sup>th</sup> June 2024

**Subject: Tobacco Europe concerns in the context of the Commission Implementing Decision of 18 March 2024 (C(2024) 1673 final), approving the ban on the placing on the market of disposable electronic cigarettes in Belgium**

Dear Mr Mc Geehan,

Following our complaint completed on the ‘Code of Good Administrative Conduct for European Commission staff in their relations with the public’ platform, Tobacco Europe<sup>1</sup> and its members were advised by Mr Linder, Directorate C - Transparency, Efficiency & Resources SG.C.2-Ethics, Good Administration & Relations with the European Ombudsman, to address our concerns directly to DG SANTE. We understand that a copy of our complaint has already been shared with you last week.

Therefore, you’ll find in the below our concerns in the context of the Commission Implementing Decision of 18 March 2024 (C(2024) 1673 final), approving the ban on the placing on the market of disposable electronic cigarettes in Belgium, in particular on the following principles and standards:

- Quality service: the two citations to Special Eurobarometer 539, which was unpublished at the time of the Decision’s Adoption, and which remains unpublished at the time of lodging this complaint challenges the standard of ‘quality service’ that requires DG SANTE to act openly and transparently;
- Consistency: to cite unpublished Eurobarometer data in an EU act does not follow normal practice and is an exception to the principle of ‘consistency’ which should have been justified;
- Lawfulness: DG SANTE should have prevented Belgium’s use of Article 24(3) as disposables are a type of electronic cigarette, but not a category, as it is clear from Articles 2(16) and 20 (11) of EUTPD. By verifying and approving Belgium’s notified measure, DG SANTE arguably did not act in accordance with EU Law. Similarly, the above is also clear from Commission Implementing Decision (EU) 2015/2183 of 24 November 2015 establishing a common format for the notification of electronic cigarettes and refill containers, which states under point 3. PRODUCT INFORMATION SUBMISSION AND DESCRIPTION — PART A the following: *“Product\_Type” and “type of product concerned”*.

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<sup>1</sup> [Tobacco Europe](#) AISBL is the umbrella organisation representing the three largest tobacco and nicotine products manufacturers, namely British American Tobacco, Imperial Brands and Japan Tobacco International.

**Proportionality:** The Commission Implementing Decision does not, in any way, discuss issues related to the free movement of goods on the EU market and the significant impact of the notified measure on the free movement. Arguably, considerations on the implications of the free movement of the products concerned should have been part of the verification by DG SANTE. Moreover, DG SANTE did not conduct a thorough review of the available alternative measures and, therefore, did not sufficiently verify whether the notified measure is indeed “necessary”. Furthermore, the considerations on environmental risks and environmental-related health risks are not valid grounds to verify a national provision under Article 24(3) of the EUTPD. Finally, DG SANTE did not thoroughly assess the consequences outlined by the Belgian government following the implementation of the proposed measure.

We herewith further illustrate our concerns with precise details, as follows:

**1. DG SANTE did not thoroughly assess the consequences outlined arising by the measure notified**

- *“removing the supply of disposable electronic cigarettes will have a positive impact on the prevalence of disposable electronic cigarette”* the validation of this statement ignores that parallel (or illegal) channels may continue to provide access to these products to various categories of consumers, and that those products and channels will escape any control;
- While rules are claimed to be challenging to enforce by the Belgian government, DG SANTE does not raise any concern on how an outright prohibition to sell would be easier to enforce (e.g., acknowledging *“the significant difficulties that Belgium encounters in the enforcement of the sales ban to minors”*; *“effective enforcement of the ban on online sales of disposable electronic cigarettes, as well as of the advertising ban for these products (that increasingly happens online and in closed groups on social media), have proven to be very difficult in practice.”*)

**2. Shortcomings in enforcement**

- *“Certain disposable electronic cigarettes contain nicotine, often in high concentration”* If SANTE meant those beyond TPD2 limits, then it failed to recall the national government’s responsibility on first enforcing TPD2;
- *“Nicotine content is often not indicated clearly or accurately on disposable electronic cigarettes”* can be addressed with existing regulation and is, in fact, another requirement for the Member State to enforce *«controls in market access»* are quoted but DG SANTE did not seek clarification on what they refer to. Only EU-CEG notification is currently in place (beside safety certifications for electric devices).

**3. Alternative measures**

- Attractive design, flavor descriptors, packaging – could be addressed via restrictions instead of banning a type of electronic cigarettes;
- Online marketing – could be addressed via restrictions instead of banning a type of electronic cigarettes;

- “*illegal sales to minors*” – where the prohibition is in place, enforcement at retailer level should first be explored;
  - “*low prices*” – not addressed via price-related measures (e.g., excise taxation or minimum price).
4. **Environment and public health**
- Lack of proportionality, unnecessary – impact on environment comes from components of disposable vapes.
5. **Other**
- DG SANTE validates a risk of “*[use of disposable electronic cigarettes] being a gateway to traditional tobacco consumption among young people and non-smokers*” without reporting any supporting facts/evidence/statistics on gateway effect;
  - DG SANTE claims, among supporting arguments behind its decision, that there is a correlation between higher share of disposable vapes and “*in particular an increased use of tobacco and related products, especially among young people and non-smokers.*” but no facts/evidence/statistics is again provided;
  - DG SANTE validates a concept of “*misperception of the risk associated*” while communication to consumers is being limited due to EU legislation;
  - Objectivity and impartiality: the above breaches strongly suggest that SANTE may have acted under pressure from Belgium and the Belgium Presidency of the EU. Belgian Minister of Health Frank Vandenbroucke actively sought to influence the European Commission to approve the ban on disposables, aiming also to set a precedent for other Member States to follow. For instance, in his speech at the Belgian Alliance for a Smoke-Free Society on March 14, 2024 (just days before the Decision’s adoption) the Minister stated: “*we want to ban them [disposable electronic cigarettes] starting from 2025. I hope we will soon hear from the European Commission that we can proceed with our idea to ban disposable e-cigarettes in Belgium and the rest of the European countries will follow suit*”.<sup>2</sup>

To conclude, Tobacco Europe and its members urge DG SANTE to adhere to the binding principles and standards set out in the ‘Code of Good Administrative Behavior’ when verifying notifications under Article 24(3). We also expect DG SANTE to carry out a thorough verification of France’s own notification to ban disposables, which is ongoing, as well as of any future notifications. At the same time, we hope that our concerns regarding the lawfulness of DG SANTE actions in the context of the Commission Implementing Decision of 18 March 2024 (C(2024) 1673 final) are heard and considered.

Yours sincerely,



Nathalie Darge  
Tobacco Europe Secretary General

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<sup>2</sup> <https://www.smokefreepartnership.eu/news/minister-vandenbroucke-speech-at-the-alliance-for-a-smoke-free-society>