



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

Single Market Enforcement

Notification of Regulatory Barriers

Message 201

Communication from the Commission - TRIS/(2024) 0827

Directive (EU) 2015/1535

Notification: 2024/0064/DK

Forwarding of the response of the Member State notifying a draft (Denmark) to request for supplementary information (INFOSUP) of European Commission.

MSG: 20240827.EN

1. MSG 201 IND 2024 0064 DK EN 13-05-2024 25-03-2024 DK ANSWER 13-05-2024

2. Denmark

3A. Erhvervsstyrelsen

3B. Indenrigs- og Sundhedsministeriet

4. 2024/0064/DK - S00S - HEALTH, MEDICAL EQUIPMENT

5.

6. The purpose of the notified draft Act is to implement a political agreement from November 2023 on a prevention plan targeting the use of tobacco, nicotine and alcohol by children and adolescents.

More than one third (35.1 %) of 15–29 year-olds in Denmark currently use at least one tobacco or nicotine product, up from 26.3 % in 2020. The negative development is largely driven by electronic cigarettes, where in particular the share of 15–17 year-olds using electronic cigarettes has increased significantly (from 4.5 % in 2020 to 10.1 % in 2022). Similarly, the use of smoke-free nicotine products across the age group has increased (from 9.1 % in 2020 to 12.9 % in 2022).

At the same time, Danish children and adolescents have a high alcohol consumption with a stronger focus on drunkenness than children and adolescents in other European countries. For example, 59 % of Danish 15–16-year-olds have had drunk five or more drinks on the same occasion (binge-drinking) within the last 30 days, while the European average is 34 %.

Consumption among minors is reported despite an existing age limit of 18 for the sale of tobacco and nicotine products and an age limit of 16 and 18 for alcoholic beverages.

Children and adolescents are particularly vulnerable to the harmful effects of nicotine and alcohol as their brains are not fully developed. Nicotine is highly addictive and can, among other things, damage the brain's development and learning ability and contribute to symptoms of anxiety and depression among children and adolescents. Binge-drinking is associated with an increased risk of depressive symptoms.

The political agreement thus seeks to ensure a necessary higher level of protection of the health of children and adolescents.

The purpose of the notified draft Act is to implement parts of this agreement.

Content of notified draft Act



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

The draft Act contains the following four elements:

1. Prohibition on the introduction, purchase, supply, receipt, manufacture, processing or possession of electronic cigarettes and nicotine refill containers containing illegal characterising flavours or an excessive nicotine content.
2. Legal basis for the Danish Safety Technology Authority to seize illegal tobacco and nicotine products.
3. Legal basis for the Danish Safety Technology Authority to use young control purchasers (mystery shoppers) when the Agency controls the age limits for the sale of tobacco, nicotine and alcohol in physical stores.
4. Requirement of a more effective age verification system for distance sales of alcoholic beverages. In parallel, previously introduced requirements for a more effective age verification system for distance sales of tobacco and nicotine products are put into effect.

The Ministry considers that it is only the last condition relating to the requirement for a more efficient age verification system for distance sales that may be relevant for information society services, as defined in Article 2(a) of the Directive on electronic commerce (2000/31/EC).

The requirement for more effective age verification applies only to those operators who commercially market tobacco, nicotine and alcohol to Danish consumers via distance selling. Age verification must be carried out in connection with the sale of the products. The requirement will also apply to cross-border distance selling.

There are already age limits for the sale of tobacco, nicotine and alcohol, cf. above, and there are already associated rules on how it is enforced for physical shops and for distance sales. This draft Act does not change the existing age limits. The draft Act only requires a more efficient age verification system for distance sales and means that the requirements are more equated with the requirements for physical shops, and thus that there will be a more level playing field.

The draft Act does not require a specific age verification system for distance sales. The key will be that the solution effectively verifies the buyer's age in connection with a sale. The notified draft Act provides examples of what can constitute an effective electronic age verification. This can be, for example, via the current national eID solution such as MitID or via user creation with a passport or other valid identification, as is the case for laughing gas in Denmark.

It is apparent from the explanatory notes to Sections 1(5), 2(4) and 3(2-3) of the notified draft Act that the requirement for more effective electronic age verification will not apply to online platforms, as defined in Article 3(i) of the Digital Services Act, including online platforms, which allow consumers to conclude agreements on distance selling with economic operators, as the protection of minors, including measures on age verification, falls within the total harmonised scope of the Regulation.

The Minister for the Interior and Health does not intend to lay down more detailed requirements for the age verification system pursuant to Section 15(5) of the Act on electronic cigarettes and Section 24(2) of the Act on tobacco products, etc., than those already stated in the notified draft Act. Thus, it will only be laid down that there is a requirement for a more effective age verification, that there is methodological freedom and that the requirement will not apply to online platforms.

Directive on electronic commerce (e-Commerce Directive)

Article 3(4) of the e-Commerce Directive allows Member States to take measures to derogate from the rule in Article 3(2) of the Directive, which states that Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. The derogation may be based, inter alia, on the protection of public health.

However, the judgment C-376/22 of the Court of Justice of the European Union states that it is not possible to introduce



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

general and abstract measures applicable to all providers of a category of information society services. Nor on the basis of Article 3(4).

It should be noted, as explained above, that the requirement of a more effective age verification system applies only to the operators who place, via distance selling, tobacco, nicotine and alcohol on the market which are harmful to health. In addition, the requirement for age verification applies only in connection with the specific sale of the specific products.

In addition, consideration may be given to whether the notified draft Act's requirement for a more effective age verification system falls outside the coordinated field, as defined by Article 2(h).

Recital 21 in the preamble of the e-Commerce Directive states that 'the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member States' legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products [...]'. Thus, for example, requirements for goods as such, as well as requirements for the supply of goods, are not covered by the coordinated field and may be governed by the legislation of the country of origin, see Article 2(h)(ii) and Article 3(1) and (2).

While the e-Commerce Directive ensures a high level of protection of the freedom to provide services, the general emphasis is placed on the protection of public health and the protection of minors. In that regard, reference is made, inter alia, to recital 11 in the preamble of the E-Commerce Directive.

In the light of the E-Commerce Directive's recitals relating to a high level of protection of public health, as well as recital 21 in the preamble, consideration may be given to whether the supply of products harmful to health such as nicotine and alcohol (for tobacco, see the section below), like medicinal products, must fall within the scope of national legislation and whether minimum age limits for sales and verification requirements, which also apply to cross-border distance sales to the Member State, can thereby be laid down at national level.

The Tobacco Products Directive

Furthermore, it should be noted that the rules governing the placing on the market of tobacco products, herbal products for smoking and electronic cigarettes are governed by Council Directive 2014/40/EU of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (the Tobacco Products Directive).

Article 18 of the Tobacco Products Directive regulates cross-border distance sales of tobacco products. Paragraph 4 of the Directive states, inter alia, that: '[r]etail outlets engaged in cross-border distance sales shall operate an age verification system, which verifies, at the time of sale, that the purchasing consumer complies with minimum age requirements provided for under the national law of the Member State of destination [...]'.

Article 2(36) of the Tobacco Products Directive further states that an age verification system means 'a computing system that unambiguously confirms the consumer's age electronically in accordance with national requirements'.

As a result of the Tobacco Products Directive, cross-border distance sales require an age verification system to be operated. In addition, it follows from the Tobacco Products Directive that the age limits for distance sales are set in the country where the product is marketed.

Previously notified legislation in this area

The rules for age verification for distance sales have been continuously adapted and also notified.

The Ministry has previously notified a draft Act requiring, among other things, a more effective age verification system for



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

distance sales of tobacco and nicotine products, where the Commission had no comments on this part of the draft Act. It is these requirements for a more effective age verification system which are put into effect by the present draft Act and which are supplemented by a similar requirement for alcoholic beverages.

In this regard, the Ministry may refer to notifications Nos 2020/0228/DK, 2023/0045/DK and 2023/0085/DK.

European Commission

Contact point Directive (EU) 2015/1535

email: grow-dir2015-1535-central@ec.europa.eu