Brussels on 14 October 2025

Contribution to TRIS Notification 2025/7022/XI – United Kingdom Tobacco and Vapes Bill in respect to Northern Ireland (hereafter, the 'Bill')

On behalf of Tobacco Europe[1], the umbrella organisation representing three of the main manufacturers of traditional tobacco and new nicotine products in Europe, we wish to comment on certain provisions of the Bill, which are incompatible with EU law as incorporated into Northern Ireland via the Windsor Framework and given direct effect by section 7A of the EU (Withdrawal) Act 2018:

1. Particularly, the ban on the sale of tobacco products and cigarette papers to persons born on or after 1 January 2009 (hereafter, ´generational ban´); and
2. The ban on the advertising of e-cigarettes and refill containers.

With this contribution, Tobacco Europe calls on the European Commission and Member States to uphold the integrity of the EU legal order in Northern Ireland under the Windsor Framework, thus preventing the creation of precedents that could undermine the uniform application of EU law.

It is important to acknowledge that the Republic of Ireland, on the basis of preliminary legal advice, has also acknowledged that a generational ban is incompatible with EU law, as stated by the Irish Government.[2]

1) The generational ban related to the sale of tobacco products is incompatible with EU Directive 2014/40/EU (hereafter the 'Tobacco Products Directive' or 'TPD')

(1) Under the Windsor Framework[3], Northern Ireland remains aligned with the EU acquis,[4] particularly the Treaty provisions governing the free movement of goods as regards products

[1] Please see: https://www.tobacco-europe.eu/

[2] Department of Health, 'Ministers for Health Announce Government Approval to Raise the Age of Sale of Tobacco to 21' (14 May 2024); https://www.gov.ie/en/department-of-health/press-releases/ministers-for-health-announce-government-approval-to-raise-the-age-of-sale-of-tobacco-to-21

[3] https://commission.europa.eu/strategy-and-policy/relations-united-kingdom/eu-uk-withdrawal agreement/windsor-framework_en

[4] Article 5(4) of the Windsor Framework: "*The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland*".

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imported from the Union (Articles 34 and 36 of the TFEU),[5] The territory is therefore subject to the Tobacco Products Directive (TPD).

(2) The placing on the market of tobacco products is harmonised under the TPD, which regulates the manufacture, presentation, and sale of tobacco and related products across the EU, with the aim of ensuring the proper functioning of the internal market. For this reason, Article 24(1) of the TPD forbids Member States to restrict and prohibit the placing on the market of tobacco products that comply with the Directive. The only exception to this rule is Article 24(3) of the TPD, which allows Member States to prohibit a certain *specific category* of tobacco products but only in view of an exceptional situation in a Member State and considering the already "*high level of protection of human health achieved through this Directive*".

(3) In fact, as the Commission's register of notifications under Article 24(3) shows that this exception is used exclusively to prohibit specific ***categories*** of products (e.g., disposable e-cigarettes and chewing tobacco), and not to introduce sales restrictions such as generational bans[6]. Such an interpretation is also confirmed by the Court of Justice that clarified that the wording of Article 24(3) is strict and limited only to *"categories of products"*, as it provides that Member States may prohibit a *"certain **category** of tobacco or related products".*

(4) The Court of Justice has clarified that Article 24(3) of the Directive concerns an aspect of tobacco regulation that is not covered by the harmonisation measures mandated in Article 24(1). Article 24(3) "*seeks to delineate the scope of the Directive by clarifying that tobacco and related products which comply with the requirements laid down by the Directive may move freely on the internal market, provided that those products belong to a category of tobacco*

[5] Article 7(1) of the Windsor Framework: *"Without prejudice to the provisions of Union law referred to in Annex 2 to this Protocol, the lawfulness of placing goods on the market in Northern Ireland shall be governed by the law of the United Kingdom as well as, as regards goods imported from the Union, by Articles 34 and 36 TFEU".*

[6] For example, Member States have notified prohibitions on specific product categories such as: Belgium's ban on disposable electronic cigarettes (Commission Decision C(2024) 1673 final); France's prohibition of certain categories of electronic cigarettes (C(2024) 6680 final); Greece's ban on chewing and nasal tobacco (C(2020) 1066 final); Finland's prohibition of certain smokeless tobacco products (C(2016) 4592 final); and Austria's ban on chewing tobacco (C(2016)7685 final). These precedents confirm that Article 24(3) is invoked to prohibit products based on their objective characteristics, not consumer attributes like year of birth.

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products or related products which is, as such, lawful in the Member State in which they are marketed"[7].

(5) The generational ban does not prohibit a certain specific *"category of products"* based on their characteristics (as may be the case under Article 24(3) of the TPD). It establishes a restriction on the placing on the market of tobacco products based on consumer attributes (year of birth), irrespective of the category, whereby the sale of tobacco products may be lawful to consumers born before 1 January 2009, but unlawful for consumers born on or after that date [8].

(6) As such, the proposed generational sales ban is incompatible with Article 24(1) of the TPD and cannot be justified under its Article 24(3).

(7) This interpretation is further confirmed by Member States' practice. Denmark, after announcing in 2022 its intention to introduce a generational sales ban, publicly acknowledged that the measure was precluded by the Tobacco Products Directive and abandoned the proposal.[9] Likewise, in 2024, the Republic of Ireland, on the basis of its own preliminary legal advice, stated that it could not pursue a *'smokefree generation'* policy due to the EU's Single Market rules and the TPD.[10]

(8) Indeed, the generational ban constitutes a measure having equivalent effect to a quantitative restriction on imports, which is prohibited under Article 34 of the TFEU. While applicable to both domestic and imported products, the measure's principal effect is the progressive elimination of the entire consumer market for tobacco products in Northern Ireland. This outcome is functionally equivalent to a ban on placing these products on the

[7] Please see Judgment in *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, para. 90: "*It follows that Article 24(3) of Directive 2014/40 concerns an aspect which is not covered by the harmonisation measures in the directive and which is not, therefore, to be subject to the rules laid down in Article 114(4) to (10) TFEU relating to the introduction of national measures derogating from a harmonisation measure*".

[8] This distinction is critical: a product-based prohibition removes a specific item from the market, whereas a consumer-based prohibition targets groups of people and progressively erodes demand for all products, amounting to a *de facto* prohibition on the placement on the market of products that comply with the TPD.

[9] Please see statement of the Danish Minister of Health to the Danish Parliament, 6 April 2022, following the Government's initial announcement of 15 March 2022 on plans to introduce a generational sales ban on tobacco products. Reported by *Euractiv*, "*EU laws block Danish government's nicotine ban*" (7 April 2022).

[10] Republic of Ireland, Department of Health press release (15 May 2024), announcing plans to raise the minimum age of sale of tobacco to 21, stating that "*preliminary legal advice suggests Ireland cannot pursue a 'smokefree generation' policy as has been suggested in other jurisdictions due to the EU's Single Market rules and Tobacco Products Directive*".

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market. By depriving imported products of any effective access to successive cohorts of adult consumers, the measure hinders their market access and ability to compete, contrary to Article 34 of the TFEU.

(9) In addition, this measure cannot be qualified as mere "*selling arrangement*" falling outside the scope of Article 34 of the TFEU. Unlike rules governing conditions of sale (e.g., shop-opening hours[11]), a generational ban does not concern how products are sold but instead ensures their progressive withdrawal from the lawful market.

2) The generational ban related to the sale of cigarette papers is incompatible with the Treaty of the Functioning of the European Union (TFEU)

(10) With respect to cigarette papers, insofar as such products are imported into Northern Ireland from the Union, the generational ban affecting their sale must be assessed under Article 34 of the TFEU, which prohibits measures having equivalent effect to quantitative restrictions, unless such a measure can be justified in accordance with Article 36 of the TFEU, or on overriding grounds in line with EU case law.

(11) In line with EU case law, such justification requires Member States to demonstrate, on the basis of evidence, that the measure is suitable to achieve the stated objective, necessary in the sense that no less trade-restrictive alternative could attain the same objective, and to be proportionate.

(12) For any restriction falling under Article 34 of the TFEU to be justified under Article 36 of the TFEU on grounds of public health, the Member State must demonstrate that it is proportionate. This requires proof that the measure is suitable to achieve the stated objective and, crucially, that no less trade-restrictive measures could achieve the same end[12]. The UK's own TRIS submission acknowledges a critical lack of evidence supporting the necessity of the ban, stating that:

[11] Please see Judgment in *Tankstation 't Heukske vof and Boermans* (C-401/92, EU:C:1994:220), which upheld non-discriminatory rules on shop-opening hours as lawful selling arrangements.

[12] Please see Judgment in *Commission v Denmark* (C-192/01, EU:C:2003:492), paras. 46-48, 56-57. The Court stated that a general prohibition on marketing fortified foodstuffs was disproportionate as the Member State failed to demonstrate, on the basis of detailed scientific evidence, that the specific products posed a real risk and that no less restrictive measures were available.

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"The analysis of these measures only considers nicotine and non-nicotine vaping products. This is in part due to limited evidence and data on other nicotine products, herbal smoking products and cigarette papers (…) We have not included these products in our analysis, partly due to limited evidence and data on these products. As a result, we have also not been able to quantify the potential impact specifically on small and micro businesses that sell these products (emphasis added)."

(13) As such, a generational ban, the most restrictive form of market interference, would require conclusive evidence that less restrictive measures (e.g., stricter enforcement of existing age limits and public health campaigns) are insufficient, evidence which has not been provided.

(14) Accordingly, the measure fails the 'proportionality test' required under EU case law, does not advance evidence that generational ban would achieve the desired objectives, and lacks consideration of less restrictive alternative options in order to achieve the same purpose.

3) The advertising restrictions on e-cigarettes and refill containers are incompatible with the TPD

(15) Under Article 20 (5) of the Tobacco Products Directive, commercial communication related to electronic cigarettes and refill containers is forbidden save some exceptions, particularly in "publications that are intended exclusively for professionals in the trade of electronic cigarettes or refill containers".

(16) Part 6 of the Bill makes an offense of the publication, designing, printing, distributing, etc. of any advertisement of e-cigarette products and refill containers, with no exception for trade/professional publications, within the spirit or language of Article 20 (5) of the TPD.

(17) Thus, such a measure is also incompatible with EU law.

4) Age-based discrimination

(18) The generational ban is incompatible with the Charter of Fundamental Rights of the European Union, ('the Charter'). It draws an arbitrary distinction between two categories of adults who are otherwise in fully comparable situations, treating them differently based solely on their year of birth. This is contrary to the rationale of the TPD itself, as Recital 21 explicitly encourages Member States to adopt age limits for the express purpose of preventing sales to "*children and adolescents*". Unlike traditional age-of-sale limits justified by the vulnerability of

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minors, this ban applies to persons who have already reached the age of majority and thus enjoy full legal capacity. This contravenes Article 20 ("*Everyone is equal before the law*") and Article 21(1) ("*Any discrimination based on…age…shall be prohibited*") of the Charter.

5) Enforcement challenges

(19) The generational ban risks creating trade distortions along the Ireland–Northern-Ireland border, where consumers prohibited from purchasing tobacco products and cigarette papers in Northern Ireland would be able to cross into the Republic of Ireland to access them. This divergence in legal regimes will disadvantage Northern Ireland retailers and is likely to further incentivise illicit trade. In addition, it would be impractical for retailers to ensure compliance, as they will have to distinguish between ever-older customers, with the paradox of for example 47-year-olds being banned from buying tobacco, while 48-year-olds are not.

6) Less-trade restrictive measures

(20) Effective and proportionate tools already exist within the current legal framework: strict enforcement of the minimum legal sales age, enhanced retailer licensing schemes, targeted prevention campaigns, and robust cessation support. These measures can achieve the same objectives without creating discrimination between adult consumers, without undermining the internal market, and without conflicting with EU law applicable in Northern Ireland.

Furthermore, the proposed generational ban extends to heated tobacco products as well, and it adds concerns in terms of proportionality vis-à-vis intended objectives as it removes access to a potentially less harmful alternative for those who would otherwise continue smoking and it therefore undermines the achievement of public health objectives.

Conclusion

While the ambition to reduce smoking among young people is legitimate, the above measures are incompatible with relevant legislation. Therefore we respectfully ask Member States and the European Commission to consider it when assessing them.

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