

Dear Ms Polito,

I am writing you on behalf of Vape Business Ireland (VBI), a business alliance committed to an open debate about vaping products in Ireland. VBI's membership spans the vaping product supply chain from manufacture to sale and we believe vaping products must be regulated in a responsible manner while upholding the principles of consumer choice for adults, particularly for adult smokers who wish to find an alternative to tobacco products.

It has come to our attention that the Estonian Government has notified to the European Commission a draft Act which bans the use of flavourings in e-cigarettes, except for tobacco flavour. This draft Act has been notified under the TRIS procedure (2016/648/EE) and interested parties have until 14 March to submit comments on potential breaches of the EU internal market by the provisions of the Act.

We note that the Tobacco Products Directive 2014/40/EU (TPDII) expressly regulates electronic cigarettes differently from traditional cigarettes whereby it bans the use of characterising flavours in cigarettes and RYO tobacco products, but does not ban the use of flavours in e-cigarettes and even goes as far (recital 47) to state that *'[i]t could be useful for Member States to consider allowing the placing on the market of flavoured products'*. Art. 20(4)(b)(ii) explicitly mentions that electronic cigarette packaging, unlike tobacco products, can include information on the nicotine content and flavourings, which means that unlike tobacco products, flavourings are deemed to be a key information for consumers and their use in e-cigarettes is allowed as they can be indicated on the pack (although with some limitations).

Having said that, the key concern of VBI in this case is that, if adopted, the Estonian Act will deprive Irish companies who produce e-liquids for use in vaping products of the possibility to sell their products to Estonia.

As such, we would be grateful if the Irish Government could consider submitting a detailed opinion to the European Commission – under the TRIS procedure – which highlights that the draft Estonian Act, if adopted, will constitute an obstacle to the free movement of goods within the EU internal market because:

- A. It violates the free movement requirements of Article 24 of the Tobacco Products Directive 2014/40/EU.** E-cigarettes are products covered by TPDII. Article 24(1) provides that Member States cannot prohibit or restrict the placing on the market of products covered by TPDII that comply with its requirements. TPD2 does not require that flavours aside from tobacco flavour are banned in e-cigarettes - therefore e-cigarettes that are compliant with TPDII requirements and that contain flavours others than a tobacco flavour should not be prohibited or restricted by Estonia.

It appears that the Estonian Government are justifying the ban on the basis of Article 24(3) which provides an exemption to the free movement rule of 24(1). For the avoidance of doubt, pursuant to the EU Court of Justice ruling Case C-547/14, *Philip Morris and BAT*, a Member State may invoke Article 24(3) to ban the entire category of electronic cigarettes, but a Member State that allows electronic cigarettes (as is the

case in Estonia) cannot ban specific types of e-cigarettes that are compatible with TPDII, such as e-cigarettes containing flavours other than tobacco flavour.

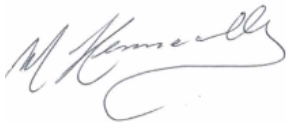
- B. It violates Article 34 Treaty on the Functioning of the European Union (“TFEU”).** This article prohibits *“quantitative restrictions on imports and all measures having equivalent effect”* between Member States and the Estonian Government has not demonstrated that its draft law could qualify for derogation under Article 36 TFEU2.
- C. It violates EU Law**
The Proposal violates e-cigarette manufacturers’ freedom to conduct a business under Article 16 of the EU Charter of Fundamental Rights.

We believe the arguments above prove the Estonia draft Act is in breach of the internal market and the rights of the Irish vaping companies to do business within the EU and would appreciate to meet to discuss this issue further.

In any event, we would be grateful for a response as to how you intend to proceed in this matter at your earliest convenience.

Sincerely yours,

Michael Kenneally



Director

Vape Business Ireland