

Reflections concerning TRIS-notifications 2024/0203/BE and 2024/0201/BE regarding amendments to the Belgian Royal and Ministerial Decrees on standardised packaging of tobacco products

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1. EXECUTIVE SUMMARY

- The Belgian authorities have notified two Draft Decrees on plain packaging to the Commission through the TRIS-procedure. These Draft Decrees extend the scope of the existing plain packaging rules applicable to certain tobacco products to non-tobacco products such as loose filters, papers and tubes.
- Mignot & de Block (**MdB**), a producer of *inter alia* rolling papers, loose filters and tubes, raises concerns that these Draft Decrees infringe upon several EU-laws and principles, namely (i) the EU principle of equality and non-discrimination (see, section 3.1); (ii) the EU principle of proportionality (see, section 3.2), (iii) the free movement of goods (see, section 3.3), and (iv) the freedom to conduct business (see, section 3.4).
- To address these concerns and to mitigate the infringements, MdB proposes the following simple amendments: (i) eliminate all mentions of (loose) filters, papers and tubes and retaining the exception pertaining to the above-mentioned products that derive their name recognition mainly from a tobacco-based product (see, section 4.1), or alternatively (ii) simply retain the exception pertaining to these products that derive their name recognition mainly from a tobacco-based product (see, section 4.2).

2. INTRODUCTION

We are writing to you regarding (i) the “Draft Belgian Royal Decree amending the Royal Decree of 13 April 2019 on the standardised package of cigarettes, roll-your-own tobacco and waterpipe tobacco” (the **Draft Royal Decree**), and (ii) the “Draft Belgian Ministerial Decree amending the Ministerial Decree of 16 April 2019 on the conditions for neutrality and standardisation of unit packets and outer packaging of cigarettes, rolling tobacco and waterpipe tobacco” (the **Draft Ministerial Decree**), hereinafter jointly referred to as the **Draft Decrees**.

As a Dutch private limited liability company that has been manufacturing and distributing for over 160 years, *inter alia*, rolling papers, loose filters and tubes that may be used, although not exclusively, in combination with tobacco products, Mignot & de Block (**MdB**) is very concerned by the potential impact of the Belgian draft regulations mentioned above, and more specifically by its threat to the proper functioning of the internal market.¹

It is our opinion that the Draft Royal Decree and the Draft Ministerial Decree, as notified pursuant to the TRIS-procedure under notification numbers 2024/0203/BE and 2024/0201/BE, may constitute a restriction to the free movement of goods within the European Union and has the potential to create market distortions. We hope the European Commission (the **Commission**) will alert decision makers to these, possibly unexpected, adverse consequences of the current Draft Decrees.

This paper, addressed to the Commission, is divided into two parts. The first part provides an overview of the principles of EU law that the Draft Decrees are infringing. In the second part, we set out our recommended and preferred solutions.

3. UNLAWFULNESS OF THE DRAFT DECREES

3.1 Equality and non-discrimination

1. MdB is facing discrimination as a result of the proposed amendments set out in the Draft Royal Decree and the Draft Ministerial Decree respectively, which propose to extend the scope of the Belgian rules on standardised packaging to all papers, filters and tubes. Importantly, these products, which are manufactured by MdB, are *not* tobacco products. We should therefore not be treated under the law in the same way as manufacturers of tobacco products.

Indeed, the principle of equality and non-discrimination is one of the general principles of EU law and is enshrined in the Treaties under Article 2 of the Treaty on European Union (**TEU**)², as well as in the Charter of Fundamental Rights of the European Union (**Charter**) under both Article 20³ and 21⁴. The definition of this principle has been well-established in the case-law and requires that “*different situations must not be treated in the same way unless such treatment is objectively justified*”⁵.

¹ We understand that the umbrella organisation, the European Rolling Paper Association (**ERPA**) intends to submit its comments regarding the aforementioned TRIS-notifications to the Commission. We would like to refer to ERPA’s submission as they further support our position outlined in this note.

² ‘Consolidated version of the Treaty on European Union’, Official Journal of the European Union, C 326/13, 26.10.2012, Article 2.

³ ‘Charter of Fundamental Rights of the European Union’, Official Journal of the European Communities, C 364/1, 18.12.2000, Article 20.

⁴ ‘Charter of Fundamental Rights of the European Union’, Official Journal of the European Communities, C 364/1, 18.12.2000, Article 21.

⁵ C-550/07 *Akzo Nobel Chemicals v. Commission* [2010] ECR I-8301, paras 54-55.

2. The objective of “Directive 2014/40/EU of the European Parliament and of the Council 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” (hereinafter; the **EU Tobacco Directive** or **Directive**), as set out in the Directive’s recitals, is to “*approximate the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products*”⁶. This Directive has been envisaged against the backdrop of the EU seeking to harmonise the regulation of tobacco products, as these are seen as “*not ordinary commodities*”⁷ due to their “*particularly harmful effects of tobacco on human health*”⁸.

3. It is clear from the Directive, however, that tobacco products are to be set apart from products such as papers, filters and tubes. This is evident from the definitions provided in the EU Tobacco Directive. « Tobacco products » are defined in the Directive as “*products that can be consumed and consist, even partly, of tobacco, whether genetically modified or not*”⁹, whereas products like filters and papers fall under the definition given for « ingredient », which means “*tobacco, an additive, as well as any substance or element present in a finished tobacco product or related products, including paper, filter, ink, capsules and adhesives*”¹⁰.

The distinction continues throughout the Directive as it aims to address different aspects when introducing tobacco products to the EU internal market. The rules on labelling and packaging of tobacco products are just one of six subject matters covered by the Directive.¹¹ “*Ingredients and emissions of tobacco products and related reporting obligations*” is an entirely separate topic that features a different scope to cater to the specific measures it sets out.¹² The rules on standardised packaging that are applicable to *tobacco products* can be found in Chapter II of the Directive¹³, whereas the rules with regard to *ingredients* are specified in Chapter I of the Directive¹⁴.

By arbitrarily grouping together products such as papers and filters alongside tobacco products when regulating plain packaging in its Draft Decrees, Belgium contravenes the clear objectives of the EU legislator who foresaw the two groups as being in different situations and therefore meriting different treatment.

6 Recital 60 of the EU Tobacco Directive.

7 Recital 8 of the EU Tobacco Directive.

8 Ibid.

9 Article 2 (4) of the EU Tobacco Directive.

10 Article 2 (18) of the EU Tobacco Directive.

11 Article 1 of the EU Tobacco Directive.

12 Article 1 (a) of the EU Tobacco Directive.

13 Articles 8 to 19 of the EU Tobacco Directive.

14 Articles 3 to 7 of the EU Tobacco Directive.

4. Indeed, Article 24(2) of the EU Tobacco Directive¹⁵ maintains the right of a Member State to introduce further requirements regarding the standardisation of packaging of tobacco products, provided these measures do “*not constitute a means of arbitrary discrimination*”. As stated above, it was clearly not the intention of the EU legislator for tobacco products and products like filters and papers to be considered as falling under the same category, and as such, it is discriminatory to propose stringent packaging rules that are not tobacco product-specific, but apply arbitrarily to products, even though these fall under a separate product category entirely.

The Draft Decrees risk to violate the general principle of equality and non-discrimination under EU law if the proposed amendments thereunder were to be accepted. Papers, filters and tubes are related products which are not considered by the EU legislator as comparable or even related to tobacco products¹⁶ and as such, these Draft Decrees, which would be treating different situations in the same way, cannot be objectively justified.

3.2 Proportionality

5. As stated above, with the “Royal Decree of 13 April 2019 on the standardised packaging of cigarettes, rolling tobacco and waterpipe tobacco” (the **existing Royal Decree**) and the “Ministerial Decree of 16 April 2019 on the conditions for neutrality and standardisation of unit packets and outer packaging of cigarettes, rolling tobacco and waterpipe tobacco” (the **existing Ministerial Decree**), Belgium originally chose to impose standardised packaging on the following products: cigarettes, roll-your-own tobacco, water pipe tobacco, cigarette tubes, cigarette papers and papers for roll-your-own tobacco, which are mainly known due to a tobacco product.¹⁷ As such, since 2019, Belgium has applied a differentiated approach whereby products not owing their reputation to tobacco products do not fall within the scope of the standardised packaging rules. However, the Draft Decrees seek to extend the scope of the products required to use standardised packaging to include: other tobacco products, herbal smoking products and devices, as well as to all paper, filters and tubes.¹⁸ Therefore, the products manufactured by MdB risk to now fall under the ambit of Belgian rules requiring standardised packaging.¹⁹

¹⁵ Article 24 (2) of the EU Tobacco Directive.

¹⁶ See, Article 1 (f) of the EU Tobacco Directive; “Product regulation”, the official website of the European Commission (https://health.ec.europa.eu/tobacco/product-regulation_en), last visited on 8 June 2024.

¹⁷ Article 12 of the existing Royal Decree and Article 9 of the existing Ministerial Decree.

¹⁸ Notification Detail, Ministerial Order amending the Ministerial Order of 16 April 2019 on the conditions for neutrality and standardisation of unit packets and outer packaging of cigarettes, rolling tobacco and waterpipe tobacco 2024/0201/BE (Belgium), 10/04/2024, and Notification Detail, Royal Order amending the Royal Order of 13 April 2019 on the standardised package of cigarettes, roll-your-own tobacco and waterpipe tobacco 2024/0200/BE (Belgium), 10/04/2024.

¹⁹ Please note that MdB manufactures its products in Germany, France and Austria, after which the products are marketed in the Netherlands to be sold across the EU.

6. Article 24(2) of the EU Tobacco Directive does provide for the right of EU Member States to introduce further requirements in relation to the standardisation of the packaging of tobacco products. However, this provision clearly states that any such measures are required to be proportionate in nature, as well as justified on grounds of public health.²⁰ Thus, for the extension of the scope of the Decrees to be considered justified it must be shown to be proportionate to the objective in view. However, the Belgian authorities have failed to adequately demonstrate this, as will be discussed below.

The principle of proportionality is enshrined in Articles 5(1)²¹ and 5(4)²² of the TEU, and it has been considered in well-established case-law that it “forms part of the general principles of law”²³. This principle means that it is necessary to consider firstly, the aim sought to be achieved under the proposed Member State act, as the act “must be objectively necessary in order to help achieve the aim sought”²⁴, and secondly, whether there are no less restrictive means capable of obtaining the same results, because “it must not be capable of being replaced by an alternative rule which is equally useful but less restrictive [...]”²⁵

7. In the TRIS Notification Details²⁶, through which Belgium notified the Commission of the relevant Draft Ministerial and Royal Decrees, the Belgian authorities set out the objective pursued by these Draft Decrees. It is stated that the objective is to extend standardised packaging to other tobacco products, herbal smoking products and devices, as well as to all papers, filters and tubes, with the primary aim of protecting children and those who do not yet use these products. This group is argued to be the most sensitive to brand elements and characteristics. According to the TRIS Notification Details, the basis for this objective is the WHO Framework Convention on Tobacco Control (**FCTC**)²⁷, which is in force in Belgium. In particular, the Belgian authorities rely on Article 11 of the FCTC²⁸ that lays down rules for packaging and labelling of tobacco products, in order to provide a justification. However, the guidelines for implementing this article are cited and state that “[p]arties should ensure that the packaging and labelling provisions related to Article 11 of the Convention apply equally to all tobacco products [...]”. As such, Belgium has used Article 11 of the FCTC to justify its Draft Decrees even though this provision is foreseen to extend to all tobacco products, but not to filters, papers and tubes. Therefore, this does not constitute a justification for the need to extend standardised packaging to the latter.

²⁰ Article 24 (2) of the EU Tobacco Directive.

²¹ ‘Consolidated version of the Treaty on European Union’, Official Journal of the European Union, C 326/13, 26.10.2012, Article 5(1).

²² ‘Consolidated version of the Treaty on European Union’, Official Journal of the European Union, C 326/13, 26.10.2012, Article 5(4).

²³ Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, EU:C:1970:114, Section II, para (b).

²⁴ Judgment of 4 October 1991, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, C 159/90, EU:C:1991:378, Opinion of Mr Advocate General Van Gerven delivered on 11 June 1991, EU:C:1991:249, para 27.

²⁵ Ibid.

²⁶ Notification Detail, Ministerial Order amending the Ministerial Order of 16 April 2019 on the conditions for neutrality and standardisation of unit packets and outer packaging of cigarettes, rolling tobacco and waterpipe tobacco 2024/0201/BE (Belgium), 10/04/2024, and Notification Detail, Royal Order amending the Royal Order of 13 April 2019 on the standardised package of cigarettes, roll-your-own tobacco and waterpipe tobacco 2024/0200/BE (Belgium), 10/04/2024.

²⁷ World Health Organisation, WHO Framework Convention on Tobacco Control (FCTC), 2003.

²⁸ Article 11 of the FTCT

8. In a further attempt to substantiate the need for these Draft Decrees, the Belgian authorities identified the following three aims for establishing plain packaging²⁹, none of which require restrictive measures to be extended to filters, papers and tubes:

- “reduce the attractiveness of packaging and brand image” – Please note that Belgium had already gone beyond the measures provided by the EU Tobacco Directive when they included papers and filters in the scope of application of the existing Decrees, but had also rightfully decided to limit this extended scope to those papers and filters that owe their reputation mainly to a tobacco product.³⁰ This aim only makes sense when read in relation to the attractiveness and brand image of tobacco products. Removing the specification that rules would only apply to filters, tubes and paper “when their trade names derive their name recognition mainly from a tobacco-based product” is therefore disproportionate and would in fact contradict the stated aim.
- “improve the efficiency of the textual or visual health warnings affixed on the packages of tobacco-based products” – Filters, papers and tubes are not tobacco-based products.
- “reduce consumer disinformation on the harmfulness of tobacco”. – Filters, papers and tubes do not contain tobacco or any other harmful substance for that matter.

Once again, Belgium fails to justify why a more restrictive approach is necessary to achieve the aims it has set out. The scope of the existing Decrees, which align with the Directive and the vast majority of the EU Member States, is less restrictive and perfectly adequate to achieve Belgium’s objectives.

9. We also found inconsistencies and irregularities in Belgium’s explanatory note in the TRIS Notification Details. For example, it states that the extension of the scope of the plain packaging rules to all papers, filters and tubes should be considered an objective on its own, which is nonsensical. Worse still, Belgium uses this as an excuse to legitimise how all products under the “Royal Decree of 3 March 2024 on the manufacture and marketing of tobacco products and herbal products for smoking” (the **Royal Decree on manufacture and marketing**) will also fall within the scope of the Draft Decrees. However, both the Draft Decrees on plain packaging and the Royal Decree on manufacture and marketing are transpositions of the EU Tobacco Directive. As explained in paragraph 3, these Decrees concern entirely different subject matters. Moreover, the Royal Decree on manufacturing and marketing explicitly defines filter and paper as “ingredients”³¹ and not “tobacco products”. This further confirms the importance of distinguishing filters, papers and tubes from the tobacco-related products that fall under the Draft Decrees on plain packaging.

Yet, in the next sentence of the TRIS Notification Details, Belgium mentions: “*The aim is therefore to harmonise the rules for these products. This is important to prevent manufacturers from using other tobacco products and*

²⁹ Notification Detail, Ministerial Order amending the Ministerial Order of 16 April 2019 on the conditions for neutrality and standardisation of unit packets and outer packaging of cigarettes, rolling tobacco and waterpipe tobacco 2024/0201/BE (Belgium), 10/04/2024, and Notification Detail, Royal Order amending the Royal Order of 13 April 2019 on the standardised package of cigarettes, roll-your-own tobacco and waterpipe tobacco 2024/0200/BE (Belgium), 10/04/2024.

³⁰ Article 12 of the existing Royal Decree and Article 9 of the existing Ministerial Decree.

³¹ Article 2, 19° of the Royal Decree on manufacture and marketing.

*herbal products for smoking to promote their brand and weaken the standardised package.*³² It recognises that the amendments proposed to the existing Decrees only serve to prevent tobacco producers – which MdB is not – from circumventing plain packaging rules by promoting other tobacco products and herbal products for smoking. There is no purpose to expand these restrictive measures to filters, papers and tubes. Doing so would be entirely disproportionate towards the intended objectives.

It appears that the Belgian authorities are attempting to “harmonise” rules that need not and should not be “harmonised”, whilst simultaneously diverging even further from the EU Tobacco Directive and its objective to effectively harmonise the domestic laws of the EU Member States regarding the different subject matters³³.

10. Finally, it is well-established under EU case-law that “[i]f a Member State has a choice between various measures for achieving the same aim, it should choose the means which least restricts the free movement of goods”³⁴, or otherwise put “provisions must be proportionate to the objective pursued and that objective must be incapable of being achieved by measures which are less restrictive of intra-Community trade”³⁵. On that account, we would like to emphasise that, by first mandating standardised packaging on an already wide range of products, including filters and papers, but limiting it to those mainly known due to a tobacco product, Belgium had chosen a measure which achieved the aim of protecting public health but in the least restrictive manner possible. Therefore, the arbitrary extension of this scope, without providing adequate justification, clearly shows that Belgium is now going beyond the least restrictive measure available. Belgium has demonstrated through its existing Decrees that the protection of public health can be achieved by less restrictive means. Without valid justification, we contend that the extension of the scope of this Royal Decree should not be permitted.

3.3 Free movement of goods

11. According to Article 34 TFEU, “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”. As is well known, all trading rules “which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade, are to be considered as measures having an effect equivalent to quantitative restrictions”³⁶.

Product requirements that relate to designation, form, size, composition, labelling, packaging, marking and presentation of goods are classic examples of indistinctly applicable measures having equivalent effect to a quantitative restriction on trade between EU Member States. They are capable of hindering, directly or

³² Notification Detail, Ministerial Order amending the Ministerial Order of 16 April 2019 on the conditions for neutrality and standardisation of unit packets and outer packaging of cigarettes, rolling tobacco and waterpipe tobacco 2024/0201/BE (Belgium), 10/04/2024, and Notification Detail, Royal Order amending the Royal Order of 13 April 2019 on the standardised package of cigarettes, roll-your-own tobacco and waterpipe tobacco 2024/0200/BE (Belgium), 10/04/2024.

³³ See, *supra* paragraph 3.

³⁴ Judgment of 20 September 1988, *Commission of the European Communities v Kingdom of Denmark*, Case 302/86, EU:C:1988:421, para. 6.

³⁵ Judgment of 12 October 2000, *Cidrerie Ruwet SA v Cidre Stassen SA and HP Bulmer Ltd*, Case C-3/99, EU:C:2000:560, para.50.

³⁶ Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837, 852.

indirectly, actually or potentially, intra-EU trade by running counter to the presumption of equivalence (mutual recognition) derived from Article 34 TFEU.³⁷

12. Through established case-law, the general principle of the presumption of equivalence or mutual recognition³⁸ was developed, which dictates that goods lawfully produced and marketed in one Member State should be allowed to be sold in another Member State without further restriction. This principle is now codified in Regulation (EU) 2019/515 of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State (**Regulation**).³⁹

This principle is defined in this Regulation as follows: “*To benefit from the principle of mutual recognition, goods must be lawfully marketed in another Member State. It should be clarified that, for goods to be considered to be lawfully marketed in another Member State, the goods need to comply with the relevant rules applicable in that Member State, and need to be made available to end users in that Member State.*” (own emphasis).⁴⁰

In the Netherlands (where MdB markets its products to be sold across the EU), loose filters, papers and tubes are considered “ingredients” as it correctly follows the definitions and rules set out in the EU Tobacco Directive.⁴¹ The rules on labelling and packaging of tobacco products are detailed in a related Decree⁴² and Regulation⁴³. The scope of these restrictive labelling and packaging rules are strictly limited to tobacco products, which are defined as “*products that can be consumed and consist, even partly, of tobacco, whether genetically modified or not*”⁴⁴.

Implementing the Draft Decrees would therefore prevent the products that are lawfully produced by MdB in Germany, France and Austria, and then lawfully marketed in the Netherlands from being sold on the market in Belgium, which constitutes a *prima facie* breach of Article 34 TFEU.

³⁷ Joined cases C-267/91 and C-268/91, *Keck and Mithouard*, ECLI:EU:C:1993:905, para. 1 and para. 15; case C-123/00, *Bellamy and English Shop Wholesale*, ECLI:EU:C:2001:214, para. 18, case C-51/94, *Commission v Germany*, ECLI:EU:C:1995:352, para. 30. See also Article 2(c)(i) of Regulation 2019/515. This is also reflected, for example in Recital 2, Directive 2000/13 of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs OJ L 109 , 06.05.2000 p. 29 which makes clear that the trade barriers caused by different labelling is the reason this had to be harmonised for food.

³⁸ Case 120/78 *Cassis de Dijon* [1979] ECR 649, para. 8 and 14; Commission Notice, Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (OJ C 100, 23.03.2021, p. 49-50), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0323\(03\)&from=EN#:~:text=%E2%80%94%20Article%2034%20TFEU%2C%20which%20relates,be%20prohibited%20between%20Member%20States](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0323(03)&from=EN#:~:text=%E2%80%94%20Article%2034%20TFEU%2C%20which%20relates,be%20prohibited%20between%20Member%20States).

³⁹ Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008, OJ L 91/1, 29.03.2019.

⁴⁰ *Ibid.*, Recital 15.

⁴¹ Article 1 (1) of the Dutch Tobacco and Smoking Products Act of 10 March 1988 (*Tabaks- en rookwarenwet*, **Dutch Tobacco Act**)

⁴² Articles 3.1 - 3.4 of the Dutch Tobacco and Smoking Products Decree of 14 October 2015 (*Tabaks- en rookwarendecreet*; **Dutch Tobacco Decree**)

⁴³ Articles 3.1-3.12 of the Dutch Tobacco and Smoking Products Regulation of 10 May 2016 (*Tabaks- en rookwarenregeling*, **Dutch Tobacco Regulation**).

⁴⁴ Free translation of “*producten die geconsumeerd kunnen worden en die, al is het slechts ten dele, bestaan uit tabak, ook indien genetisch gemodificeerd*” (Article 1 (1) of the Dutch Tobacco Act).

13. Such a breach can only be justified if the measures are (i) necessary in order to satisfy an objective of public interest, and (ii) proportionate to the aim in view.⁴⁵ It must also be kept in mind that any “exceptions” to the free movement of goods are to be interpreted narrowly.⁴⁶

Setting aside the inconsistent and irregular wording by the Belgian government in its TRIS Notification Details (see, *supra* paragraphs 7-9), we will presume that the objective of public interest sought is the protection of public health⁴⁷.

However, even if the objective is accepted, measures having equivalent effect to a quantitative restriction must comply with the principle of proportionality.⁴⁸ In other words, the means chosen by the EU Member State must be confined to what is actually appropriate and necessary to safeguard the legitimate objective pursued. In this case, extending the scope of the measures to filters, papers and tubes is not appropriate to attain the objective in mind, and would restrict the free movement of good more than what is necessary. As provided in the previous title 3.2 on proportionality, it is evident that the Belgian authorities have failed to prove that imposing the standard packages on filters, papers and tubes is proportionate, given that it restricts the free movement of goods more than necessary.

14. Therefore, Belgium's intention to impose the same stringent labelling and packaging requirements on products such as loose filters and papers, as those applied to tobacco products, would constitute a breach of the free movement of goods pursuant to Article 34 of the TFEU.

3.4 Freedom to conduct business

15. In relation to the previous title, we wish to bring your attention to Article 16 of the EU Charter of fundamental rights that recognises the freedom to conduct business. This freedom has long been recognised as a general principle of EU law⁴⁹. Admittedly, “*restrictions may be imposed on [its] exercise*” but only “*provided that the restrictions correspond to objectives of general interest and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed*”⁵⁰.

For all information related to the disproportionality, we refer you to the paragraphs 7-10 and 13.

⁴⁵ Case 120/78 *Cassis de Dijon* [1979] ECR 649, para. 14; Commission Notice, Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (OJ C 100, 23.03.2021, p. 49-50), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0323\(03\)&from=EN#:~:text=%E2%80%94%20Article%2034%20TFEU%2C%20which%20relates,be%20prohibited%20between%20Member%20States](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0323(03)&from=EN#:~:text=%E2%80%94%20Article%2034%20TFEU%2C%20which%20relates,be%20prohibited%20between%20Member%20States).

⁴⁶ Case C-111/89 *Staat der Nederlanden v P. Bakker Hillegom BV* [1990] ECLI:EU:C:1990:177, para. 8.
⁴⁷ Article 36 of the TFEU.

⁴⁸ Case 120/78 *Cassis de Dijon* [1979] ECR 649, para. 14; Commission Notice, Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (OJ C 100, 05.05.2023, p. 75), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0323\(03\)&from=EN#:~:text=%E2%80%94%20Article%2034%20TFEU%2C%20which%20relates,be%20prohibited%20between%20Member%20States](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0323(03)&from=EN#:~:text=%E2%80%94%20Article%2034%20TFEU%2C%20which%20relates,be%20prohibited%20between%20Member%20States)

⁴⁹ See e.g. C-184/02 and C-223/02 *Spain and Finland v. Parliament and Council* [2004] ECR I-7829, para. 51 and references contained therein.

⁵⁰ *Ibid.*, para. 52.

4. PROPOSED SOLUTIONS

We understand that the Commission may issue a detailed opinion to the Belgian authorities in view of removing the presumed infringements of EU law and the barriers to the internal market.

Below we have outlined the possible outcomes we deem legitimate and appropriate, ranked from most to the least favourable.

4.1 Amending the Draft Decrees – Removal of “filters” and “papers” and retain exception

As set out above⁵¹, we believe that the Draft Decrees, as notified to the Commission, largely constitute an arbitrary extension of the existing Decrees' scope, rendering the measures needlessly more restrictive and disproportionate to the objective of public health protection. More specifically, we recommend that any mentions of “filters” meaning loose filters and “papers” in the Draft Decrees are excluded from the final texts. In addition, the provision in Articles 9 and 12 of the existing Royal Decree and the existing Ministerial Decree respectively, which excludes the application of restrictive measures to certain products “*when their trade names derive their name recognition mainly from a tobacco-based product*” should be retained, as explained in detail in the following section⁵².

This approach will allow Belgium to effectively extend the scope of the existing Decrees on plain packaging to herbal products for smoking and any novel tobacco products, thereby achieving their intended public health objectives without infringing EU-laws by arbitrarily including products like filters and papers without distinction.

4.2 Amending the Draft Decrees – Retain exception

If Belgium can provide adequate justification for parts of the amendments envisioned in the Draft Decrees, and/or if the Commission deems revocation infeasible, we propose the following amendments to Article 15 of the Draft Royal Decree and Article 14 of the Draft Ministerial Decree respectively:

	Draft Decrees as notified	Amendments proposed by MdB
Article 15 of the Draft Royal Decree	<p><i>Article 12 of the [Royal] Decree is replaced by the following:</i></p> <p><i>“Article 12. § 1. Articles 4, 5, 6, 7, 9, 10 and 11, § 1(1), (2) and (6) and §§ 2 to 4 shall apply to outer packaging and unit packages of cigarette tubes, rolling tobacco paper, cigarette paper, plant-based smoking paper and filters.”</i></p>	<p><i>Article 12 of the [Royal] Decree is replaced by the following:</i></p> <p><i>“Article 12. § 1. Articles 4, 5, 6, 7, 9, 10 and 11, § 1(1), (2) and (6) and §§ 2 to 4 shall apply to outer packaging and unit packages of cigarette tubes, rolling tobacco paper, cigarette paper, plant-based smoking paper and filters when their trade names derive their name</i></p>

⁵¹ See, *supra* paragraphs 6-10.

⁵² See *infra* in section 4.2.

		<i>recognition mainly from a tobacco-based product.”</i>
Article 14 of the Draft Ministerial Decree	Article 9 of the [Ministerial Decree] is replaced by the following: “Article 9. Articles 2, 3, 4 shall apply to outer packaging and unit packages of apparatus, cigarette tubes, rolling tobacco paper, cigarette paper, paper for plant-based smoking products and filters.”	Article 9 of the [Ministerial Decree] is replaced by the following: “Article 9. Articles 2, 3, 4 shall apply to outer packaging and unit packages of apparatus, cigarette tubes, rolling tobacco paper, cigarette paper, paper for plant-based smoking products and filters when their trade names derive their name recognition mainly from a tobacco-based product.”

We still strongly believe that treating MdB, which is a non-tobacco producer, in the same exact way as producers of products based on tobacco or other harmful substances would in any case violate the principles laid down in the first part of this paper. However, by simply reverting to the wording currently applied under the existing Royal Decree and Ministerial Decree, the adverse effects of the Draft Decrees could be largely mitigated.

4.3 Providing adequate transitional measures and sufficient time

Finally, in the, hopefully unlikely, event that the Belgian authorities proceed with the implementation of the Draft Decrees as it is currently notified to the Commission, it would be of the utmost importance to at least provide adequate transitional measures and sufficient time for producers like MdB to adjust to these new plain packaging measures.

However, we must emphasise that we consider the solutions iterated in the two previous points to be entirely appropriate and justified. Simply implementing transitional measures and an extended application date will not suffice to safeguard against the breaches of EU law.