



ERS

EUROPEAN
RESPIRATORY
SOCIETY

every breath counts

Adoption of Tobacco Endgame Policies in the EU:

Can Member States introduce a generational sales ban?

2025



Table of Contents

Acknowledgements	3
Executive Summary	4
Introduction	5
Defining ‘endgame’	12
Tobacco Control in the EU	15
European Court of Justice caselaw	26
Tobacco endgame policies	33
Industry interference	50
Pathway to proportionality	60
Areas for further research	61
EU call to action	63
Conclusion	66

Acknowledgements

This report was written by Steven Baylis, a fellow of the School for Moral Ambition placed with ERS for the duration of his fellowship. ERS would like to thank the School of Moral Ambition and everyone who has given their time to contribute to the development of report and for their support to Steven, and we thank Steven for his hard work to produce this important report.

About the Tobacco Control Committee

The report was overseen by the European Respiratory Society's standing committee on Tobacco Control. The Tobacco Control Committee coordinates the European Respiratory Society's (ERS) activities on tobacco control at every level.

The committee works with professionals who are on the frontline in hospitals, clinics and universities; at the European level, with an office to monitor tobacco control; and at the international level through global conferences and membership of organisations such as the Global Alliance for Tobacco Control.

Executive Summary

The answer is yes. The power to introduce a generational sales ban, where it will never be legal to sell tobacco products to people born after a certain date, lies firmly within the competence of the Member States. There is no impediment, under EU law, to introducing such an endgame policy on the grounds of public health, given that it can be demonstrated to be both a proportionate and necessary measure to achieve a legitimate objective. Importantly, although such a ban would constitute a reduction in market based on age of sale it does not represent a prohibition on the placing on the market of tobacco products.

Member States have primary competence for the responsibility for health protection and in determining domestic sales arrangements and applicable age limits. In addition, under Article 2.1 of the WHO FCTC and Article 24(3) of the EU Tobacco Products Directive, Member States can introduce further appropriate and necessary actions. Of note, a successful reduction of the market based on the age of sale has previously been enacted when all Member States increased their age of sale to 18, or more recently when Latvia and Ireland increased their respective age of sales to 20 and 21, respectively.

The approach taken to the proportionality analysis, that is consideration of whether a measure is appropriate and necessary to achieve a legitimate objective, is clearly illustrated in *Scotch Whisky* case, which draws on established Court of Justice of the European Union caselaw and whose approach is evident in subsequent caselaw. Consideration of this case allows a framework to be identified, which could be applied to the introduction of a generational sales ban.

The proposed pathway for Member States to ensure that their case for proportionality is robust involves:

- 1 Establish a tobacco endgame target – e.g. a Member State could seek to reduce the harmful health consequences of combustible tobacco use, particularly by prioritising prevention to protect children and young people from the harmful effects of tobacco, and that it therefore aims to achieve at a minimum a reduction to <5% tobacco prevalence within its population by 2040, in line with EBCP.
- 2 Establish the Member State's current position against the target e.g. what is the prevalence within the total population, defined as 15+ consistent with the Eurobarometer, and including the prevalence and trends of combustible tobacco use in children and young people.
- 3 Assess the existing FCTC measures within the Member State :
 - (1) For measures already in place, assess their effectiveness and implementation. Are there steps that might increase their impact (e.g. faster increases in tobacco taxation) or improve compliance (mass media campaigns or investing in enforcement)?
 - (2) Further assess whether there are any available FCTC core and advanced measures which are not currently implemented, why not and whether they can be implemented?
- 4 Model the capacity of existing measures to deliver the Member State's smoking prevalence target within the timeframe.
- 5 Model the consequence of implementing any additional core and advanced measures from point 3(2).
- 6 Identify any alternative age of sale measures which could be introduced instead of a generational sales ban, such as raising it to a fixed point. Model the impact of the different options for delivery of the Member State's target, including the generational sales ban, to establish the evidence base in support of the measure ultimately chosen.
- 7 Assess whether any of the proposed measures in point 6 would also enable the target from point 1 to be achieved and, if so, whether any of the proposed measures could be considered to be less restrictive on trade than a generational sales ban when assessed at the relevant target date. Also consider whether it would be beneficial to include a built-in review point of the legislation.
- 8 Establish that, post-implementation, there will be continual monitoring of the impact of legislation to establish evidence of effectiveness (implementation science) as this may be required within litigation. This should also include monitoring to confirm that there are no unintended consequences of note, e.g. take up of alternative risky or harmful behaviours, or change in volume of illicit trade.

¹ European Parliament, 'Answer to Parliamentary Question P-9-2022-001318' (2022) https://www.europarl.europa.eu/doceo/document/P-9-2022-001318-ASW_EN.html accessed 11 October 2024.

² European Commission, 'Notification 2023/23978' (2023) <https://technical-regulation-information-system.ec.europa.eu/en/notification/23978> accessed 24 October 2024.

³ European Commission, 'Notification 2023/26010' (2023) <https://technical-regulation-information-system.ec.europa.eu/en/notification/26010> accessed 24 October 2024.

⁴ Case C-333/14 *Scotch Whisky Association and Others v The Lord Advocate* [2015] ECLI:EU:C:2015:845

⁵ Joint Action on Tobacco Control 2, WP9 Indicator Compendium (28 April 2023) <https://jaotc.eu/wp-content/uploads/2023/12/M.9.1-Indicator-compendium-28-April-2023.pdf> accessed 28 November 2024.; pages 68-73 checklist for core and advanced tobacco control measures

Introduction

The right to health and right to life are fundamental human rights

The World Health Organisation ('WHO') Framework Convention on Tobacco Control ('FCTC')¹, the international treaty aimed at reducing the supply and demand of tobacco products, whilst not being a human rights treaty, is grounded in fundamental human rights principles. Entering into force on 27 February 2005, the successful implementation of the tobacco control measures identified within the FCTC has reduced the supply and demand of tobacco products² and has led to a significant reduction in smoking-related burden, with fewer younger smokers and increased cessation by smokers³.

The FCTC recalls in its preamble Article 12 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') the "*right of everyone to the enjoyment of the highest attainable standard of physical and mental health*."⁴ The preamble also recognises that the Constitution of the WHO includes the principle that "*the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition*"⁵ and Article 24 of the Convention on the Rights of the Child ('CRC') recognises "*the right of the child to the enjoyment of the highest attainable standard of health*".⁶ That parties to the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') shall take appropriate measure to eliminate discrimination against women in healthcare is also recalled in the preamble.⁷ Article 3 of the Universal Declaration of Human Rights⁸ specifies that everyone has a right to life, as do Article 2 of the Charter of Fundamental Rights of the European Union⁹ ('the Charter'), Article 2 of the European Convention on Human Rights¹⁰ ('ECHR') and Article 6 of the International Covenant on Civil and Political Rights¹¹.

The European Union ('EU') and its Member States are all parties to the FCTC. The Tobacco Products Directive¹² ('TPD'), Tobacco Tax Directive¹³ ('TTD') and Tobacco Advertising Directive¹⁴ ('TAD') give

¹ World Health Organization Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166.

² Shannon Gravely et al, 'Implementation of Key Demand-Reduction Measures of the WHO Framework Convention on Tobacco Control and Change in Smoking Prevalence in 126 Countries: An Association Study' (2017) 2 *The Lancet Public Health* e166-e174

³ Paraje, G., Flores Muñoz, M., Wu, D.C. et al. Reductions in smoking due to ratification of the Framework Convention for Tobacco Control in 171 countries. *Nat Med* 30, 683–689 (2024). <https://doi.org/10.1038/s41591-024-02806-0>

⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁵ Constitution of the World Health Organization (adopted 22 July 1946, entered into force 7 April 1948) 14 UNTS 185.

⁶ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁷ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

⁸ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

⁹ Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) [2000] OJ C 364/1.

¹⁰ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

¹¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹² Tobacco Products Directive (EU) 2014/40/EU of the European Parliament and of the Council of 3 April 2014 [2014] OJ L 127/1.

¹³ Tobacco Tax Directive (EU) 2011/64/EU of the European Parliament and of the Council of 21 June 2011 [2011] OJ L 176/26.

¹⁴ Tobacco Advertising Directive (EU) 2003/33/EC of the European Parliament and of the Council of 26 May 2003 [2003] OJ L 152/16.

effect to the requirements of the FCTC.¹⁵ Even though the EU itself is not a party to the ICESR, CRC or other major international human rights treaties, its Member States are, and as Garde and Toebees explain, “[t]hese instruments are therefore used to identify and flesh out the general principles of EU law with which all instruments of secondary law need to comply.”¹⁶ Consistent with the above internationally recognised rights, the EU’s European Social Charter (Revised) on economic and social rights (‘ESC’) contains the “right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable”¹⁷ and Article 35 of the Charter includes that “[e]veryone has the right of access to preventive health care”.¹⁸ Article 168(1) of the Treaty on the Functioning of the European Union (‘TFEU’) stipulates that “[a] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”¹⁹ Article 114(3) of the TFEU requires that the European Commission’s legislative proposals “concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts.”²⁰ Article 3(1) of the Treaty on European Union²¹ (‘TEU’) includes that the EU’s “aim is to promote ... the well-being of its peoples”, for which their health must be a key component. The right to health for all citizens of the EU is therefore established beyond doubt.

The clearly established harms of tobacco products

In the oft-referenced Human Rights assessment of Philip Morris International by the Danish Institute for Human Rights (‘DIHR’), it was concluded “[t]obacco is deeply harmful to human health, and there can be no doubt that the production and marketing of tobacco is irreconcilable with the human right to health. For the tobacco industry, the UNGPs [United Nations Guiding Principles on Business and Human Rights] therefore require the cessation of the production and marketing of tobacco.”²² Further, the 2018 Cape Town Declaration on Human Rights and a Tobacco-free World found that “the manufacture, marketing and sale of tobacco are incompatible with the human right to health”²³ and reaffirmed the General Comment No.14 of the Committee on Economic, Social and Cultural Rights’ statement that the “failure to discourage production, marketing and consumption of tobacco” is a “violation of the obligation to protect under Article 12 (right to health) of the ICESCR.”²⁴ The 10th Conference of the Parties included a Human Rights declaration, which:

1. ENCOURAGES Parties to consider including WHO FCTC principles and implementation efforts when engaging with the United Nations human rights mechanisms;
2. REQUESTS the Convention Secretariat to foster coordination and collaboration with entities in the United Nations system pursuing human rights mandates in order to raise awareness of the importance of the WHO FCTC implementation in the fulfilment of human rights.²⁵

¹⁵ The TAD was drafted prior to the entry into force of the FCTC, but the FCTC is expressly addressed at recital (8)

¹⁶ Amandine Garde and Brigit Toebees, ‘Is there a European human rights approach to tobacco control?’ in M E Gispen and B Toebees (eds), *Human Rights and Tobacco Control* (Edward Elgar Publishing 2020) 112.; page 113

¹⁷ European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS 163.

¹⁸ Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) [2000] OJ C 364/1.

¹⁹ Treaty on the Functioning of the European Union (consolidated version, adopted 13 December 2007, entered into force 1 December 2009) [2008] OJ C 115/47.

²⁰ Ibid.

²¹ Treaty on European Union (consolidated version, adopted 7 February 1992, entered into force 1 November 1993) [2012] OJ C 326/13.

²² Human Rights Assessment in Philip Morris International, Danish Institute of Human Rights (2017).

²³ Cape Town Declaration on Human Rights and a Tobacco-free World (adopted 7 April 2001).

²⁴ General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (adopted 11 August 2000) UN Doc E/C.12/2000/4.

²⁵ World Health Organisation, FCTC/COP10(20) Contribution of the WHO FCTC to the Promotion and Fulfillment of Human Rights (adopted 15 November 2010).

Despite the clarity of this position in international and European law, the DIHR's conclusion and the acceptance by the tobacco industry and the courts²⁶ that combustible tobacco products are harmful to human health, the production and marketing of commercial combustible tobacco products continues, generating substantial profit for tobacco industry companies.

Commercial combustible tobacco products (primarily cigarettes, but also cigars, cigarillos, pipe tobacco, hookah (waterpipe) tobacco, bidis and kreteks) are responsible for killing more than 8 million people each year²⁷ with 700,000 of these being in the EU²⁸. The tobacco industry is the only industry whose product kills at least half (up to two-thirds in an Australian study²⁹) of its regular consumers when used precisely as intended³⁰ and is dangerous for non-smokers through inhalation of second-hand and third-hand smoke. Whilst the TPD is intended to ensure a high level of health protection, this cannot yet be considered to have been achieved where, in addition to killing people, usage of combustible tobacco causes serious diseases, including cancer, cardiovascular disease, and respiratory conditions. Tobacco consumption is the leading cause of preventable cancer.³¹

Young people and tobacco use

Although the prevalence of tobacco use seems to be decreasing among young Europeans, concerning 21% of youth currently take up smoking.³² Despite all EU policies and activities requiring a high level of human health protection, the TPD has not been updated since 2014, the TTD since 2011 and the TAD since 2003, whilst new tobacco and nicotine products continue to be developed and marketed. The scientific knowledge base regarding the harmfulness of these products is firmly established and continuing to expand.

It is established that smoking is a behaviour most commonly adopted in childhood or young adolescence, with very few adults over the age of 25 beginning smoking, and because of the neurological immaturity of children and young people, the addiction to nicotine can take place very quickly³³. Due to the highly addictive nature of nicotine contained within combustible tobacco which makes it extremely difficult for people to stop using it, and the accepted harm to human health of such usage not only to the individual consuming it, prevention is the most effective manner to avoid these risks and to not violate an individual's right to health.

²⁶ See, for example paragraph 18 of *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin) “The tobacco companies do not dispute or seek to undermine the universal medical consensus as to the profound harm caused by smoking” and Case number: K181220231 (The Hague Court of Appeal) paragraph 5.3 “The serious health risks of smoking are not contested in the counter-argumentation presented by the tobacco manufacturers. This was also the case regarding the addictive effect of cigarettes. The most significant addictive substance in tobacco is nicotine. This substance has both a physical and psychological addictive effect” and paragraph 6.1 “The defendants offer cigarettes in the full knowledge that they are addictive and can be hazardous for the health of active and passive smokers. The Court of Appeal operates on the assumption that the defendants do so for the purpose of making a profit.”

²⁷ WHO clinical treatment guideline for tobacco cessation in adults. Geneva: World Health Organization; 2024.; Executive Summary xi

²⁸ Motion for a European Parliament Resolution on Strengthening Europe in the Fight Against Cancer – Towards a Comprehensive and Coordinated Strategy (2020/2267(INI)) (adopted 16 September 2020).

²⁹ Emily Banks et al, ‘Tobacco Smoking and All-Cause Mortality in a Large Australian Cohort Study: Findings from a Mature Epidemic with Current Low Smoking Prevalence’ (2015) 25 *BMC Medicine* 13, 38.

³⁰ WHO Tobacco Control Playbook (World Health Organization Regional Office for Europe 2020). and paragraph 74 of *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award (8 July 2016). “It is not in dispute between the Parties that smoking cigarettes and other tobacco products represents a serious health risk. Cigarettes are a legal consumer product that is highly addictive and cause the deaths of up to half of long-term consumers when used as intended.”

³¹ Commission Staff Working Document, Review of Europe's Beating Cancer Plan, SWD(2025) 39 final, Brussels, 4 February 2025.; page 3

³² Healthier Together: EU Non-Communicable Diseases Initiative (European Commission, June 2022).; page 69

³³ *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin).; para 63

Introducing the generational sales ban

In 2022, New Zealand passed legislation³⁴ which meant, among other measures, that anybody born after 1 January 2009 would never legally be able to purchase cigarettes. This legislation recognised the importance of prevention. Other than a temporary ban on the sale of tobacco products in Bhutan³⁵, and a 20-week ban in South Africa in response to COVID-19³⁶, no other country had implemented such a measure.³⁷

New Zealand's Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022³⁸ adopted a three-pronged approach, including a reduction in retail points and the introduction of Very Low Nicotine Content ('VLNC') cigarettes. However, it was the age of sale provision which garnered the most attention within New Zealand and internationally. Following a change of government, the legislation was overturned in November 2023.³⁹ That was a result of the coalition agreement between two parties, despite none of the main parties including in their manifestoes an intention to alter this legislation. Subsequently, in March 2024, the United Kingdom's then Conservative government introduced proposed legislation, The Tobacco and Vapes Bill⁴⁰, which followed New Zealand's approach in respect of the age of sale. Although this legislation was not enacted before the election in the summer of 2024, the current Labour government committed to maintaining this and has continued to progress the legislation, introducing an updated version of the Bill in November 2024.⁴¹

Legislation which follows this age of sale approach is often termed a '**generational sales ban**'. A policy which introduces a generational sales ban is also commonly referred to as creating a '**smokefree generation**' or '**tobacco-free generation**'. Interest in this type of policy and the creation of a smokefree or tobacco-free generation has gained momentum in recent years among tobacco control advocates, governments and elected officials, and the public. At the 10th Conference of the Parties an expert group was established⁴² to present a report on forward-looking tobacco control measures within the scope of Article 2.1⁴³. This report will be presented at the 11th Conference of the Parties in Geneva in November 2025.

A generational sales ban in the EU?

³⁴ Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (New Zealand).

³⁵ World Health Organization, Country Office for Bhutan, *The Big Ban: Bhutan's Journey Towards a Tobacco-Free Society* (Thimphu, 2019).

³⁶ Corné van Walbeek, Robert Hill, and Samantha Filby, 'Quitting Behavior During the Tobacco Sales Ban in South Africa: Results from a Broadly Nationally Representative Survey' (2023) 21 *Tobacco Induced Diseases* 102 <https://doi.org/10.18332/tid/168594> accessed 18 March 2025.

³⁷ In 2022 Malaysia had proposed banning sales of tobacco products and smoking substances to individuals born on or after 1 January 2007 but withdrew this proposal in the revision of the bill in 2023 due to lobbying from the tobacco industry. Tobacco Tactics, 'Tobacco Industry Interference with Endgame Policies' (Tobacco Tactics, 17 December 2024) <https://www.tobaccotactics.org/article/tobacco-industry-interference-with-endgame-policies/> accessed 24 March 2025.

³⁸ New Zealand government, The Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act 2022 (2022); <https://legislation.govt.nz/bill/government/2022/0143/latest/whole.html> accessed 15 October 2024

³⁹ Lucy Craymer, 'New Zealand Set to Scrap World-First Tobacco Ban' *Reuters* (27 February 2024) [https://www.reuters.com/business/healthcare-pharmaceuticals/new-zealand-set-scrap-world-first-tobacco-ban-2024-02-27/#:~:text=WELLINGTON%2C%20Feb%2027%20\(Reuters\),could%20die%20as%20a%20result](https://www.reuters.com/business/healthcare-pharmaceuticals/new-zealand-set-scrap-world-first-tobacco-ban-2024-02-27/#:~:text=WELLINGTON%2C%20Feb%2027%20(Reuters),could%20die%20as%20a%20result). accessed 17 October 2024.

⁴⁰ Tobacco and Vapes Bill, HC Bill 220 (2023-24), (20 March 2024).

⁴¹ Tobacco and Vapes Bill, HC Bill 172 (2024-25), (5 November 2024).

⁴² World Health Organization, FCTC/COP10(12) Forward-Looking Tobacco Control Measures (in relation to Article 2.1 of the WHO FCTC) (2023).

⁴³ World Health Organization Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166.; page 12

Within the EU, whilst Denmark considered introducing a generational sales ban in 2022, and although some Member States have already established tobacco endgame targets, none have introduced this tobacco endgame policy. Whilst the UK has left the EU, The Windsor Framework⁴⁴ ensures that EU law continues to apply to Northern Ireland. The question of whether a generational sales ban is compatible with EU law may therefore be tested, should the Tobacco and Vapes Bill become law.

In May 2024, as part of its announcement of the proposal for legislation to increase the age of sale for combustible tobacco in Ireland from 18 years of age to 21 years of age, the Irish government stated: “[p]reliminary 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.”⁴⁵ This statement appeared without further reasoning or explanation. Whilst the advice was presumably only intended to be applicable to Ireland, it has been relied upon by those opposed to such measures as evidence that a generational sales ban is not permitted within the EU. Could it be that, despite the recognised harm to health and the environment that combustible tobacco products cause, Member States of the EU would be unable to protect their citizens in the manner they consider to be required because of the single market?

Elsewhere within the EU, The Netherlands is currently exploring the legal feasibility of a nicotine-free generation, following the *Nicotinee* Citizens Initiative⁴⁶, which was presented to the Dutch parliament in December 2024. The proposal within *Nicotinee* is the end of legal sale of all products containing nicotine to people born on or after 1 January 2012. As identified in recital 43 of the Tobacco Products Directive (‘TPD’), “[e]lectronic cigarettes can develop into a gateway to nicotine addiction and ultimately traditional tobacco consumption, as they mimic and normalize the action of smoking”. Other nicotine products can have the same effect and in the Mission Letter from Ursula van der Leyen, Commission President, to Oliver Varhelyi, (current) Commissioner for Health and Animal Welfare, he is tasked with “[e]valuating and revising the tobacco legislation, notably by addressing concerns about young people’s access to novel tobacco and nicotine products”.⁴⁷ The Dutch government is required to report to the parliament before the summer break in 2025 on the legal feasibility of such legislation. Such legislation will need to be considered within the framework of the TPD and the principle of the free movement of goods within the EU’s single market.

Whilst this report addresses the potential end of legal sales of commercial combustible tobacco products only within a Member State of the EU, it will necessarily consider similar themes as the Dutch government’s legal analysis must do. The focus on combustible tobacco products is deliberate, addressing the worst, first. Such focus is not intended to detract from the position taken by *Nicotinee* which addresses the harm caused not only by combustible tobacco, but by nicotine addiction, consistent with the general obligations on the Parties to the FCTC.

ERS has previously issued a statement on novel nicotine and tobacco products, products which would be considered within a legal analysis of the *Nicotinee*-type approach, rather than this report which focuses on commercial combustible tobacco products. In that statement it is recognised that “[g]iven there is no safe level of exposure to these substances, the ERS position remains that all nicotine or

⁴⁴ The Windsor Framework (agreed 27 February 2023).

⁴⁵ 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/press-release/4d48a-ministers-for-health-announce-government-approval-to-raise-the-age-of-sale-of-tobacco-to-21/> accessed 7 October 2024.

⁴⁶ *Nicotinee* <https://nicotinee.nl/> accessed 18 December 2024.

⁴⁷ European Commission, *Mission Letter to Olivér Várhelyi, Commissioner-Designate for Health and Animal Welfare* (17 September 2024) https://commission.europa.eu/document/download/b1817a1b-e62e-4949-bbb8-ebf29b54c8bd_en?filename=Mission%20letter%20-%20VARHELYI.pdf accessed 3 October 2024.

tobacco products inherently carry risks, particularly considering their uncertain long-term health impact". It further calls for independent research on the safety and risks of these products; does not recommend the use of novel products; recognises the harmful health effects and gateway potential of electronic cigarettes; calls adherence to the "precautionary principle" crucial for the tobacco control community; does not support the use of these devices as replacement therapy for current smokers; recognises the evidence which suggests novel tobacco and nicotine product users often engage in dual or poly tobacco use; and rejects the tobacco industry's claim that there is a hardening (high dependence and low motivation to quit) among the smoking population.⁴⁸ ERS's position on novel nicotine and tobacco products is therefore clear and the decision to adopt a focus on commercial combustible tobacco products within this report must therefore not be viewed as ignoring the harms of novel nicotine and tobacco products.

However, by taking the approach of focusing on commercial combustible tobacco products, and following the examples of New Zealand and the UK, it follows the approach presented by van der Eijk, who argued for creating *"an endgame that to some extent conserves consumer choice, while progressively phasing in a cigarette sales prohibition. This sounds like an oxymoron, but is not impossible. As argued, top priorities for endgames should be the protection of children and the phasing out of cigarettes. Thus, policies could start by phasing out cigarette sales with a TFG-type legislation, while allowing nicotine consumption in other forms such as ENDS [electronic nicotine delivery systems] or SLT [smokeless tobacco]. Sales and marketing of these products should be regulated. This would more correctly create a 'cigarette-free or smoke-free generation', who would still have access to nicotine products in adulthood, making the law less choice restrictive and perhaps more accepted."*⁴⁹ For some public health advocates, this may be a difficult proposal to fully endorse given the increasingly established information about the harm caused by other nicotine products, which ERS's statement recognises⁵⁰. Crucially in terms of justification, the approach follows the EU's own objective of creating a 'Tobacco-Free Generation', as detailed in Europe's Beating Cancer Plan⁵¹.

In contrast to Ireland's government statement, this report will argue that the EU's single market does not serve as a complete barrier to EU Member States being able to introduce a generational sales ban, consistent with New Zealand and the UK's legislation. It will argue that it is legally feasible for Member States to introduce a generational sales ban.

The framework for this report

The report will begin by setting out what endgame is, as there is often a conflation of points when the term endgame is used. There will then be consideration of tobacco control, as this report will demonstrate that achieving tobacco endgame, and implementing a generational sales ban, is not possible in the EU without comprehensive tobacco control. The report will then consider the relevant legal framework that Member States operate in, taking into account FCTC, TPD and relevant Court of Justice of the European Union ('CJEU') caselaw, as well as reflecting upon caselaw within the World Trade Organisation ('WTO') Dispute Settlement Body. The report will then address the relevant legal

⁴⁸ Daniel Tzu-Hsuan Chen, Jonathan Grigg, and Filippus T. Filippidis, 'European Respiratory Society statement on novel nicotine and tobacco products, their role in tobacco control and "harm reduction"' (2024) 63(2) *European Respiratory Journal* 2301808 <https://doi.org/10.1183/13993003.01808-2023> accessed 13 March 2025.

⁴⁹ Yvonne van der Eijk, 'Development of an Integrated Tobacco Endgame Strategy' (2015) 24 *Tobacco Control* 336-340.; Page 338

⁵⁰ Daniel Tzu-Hsuan Chen, Jonathan Grigg, and Filippus T. Filippidis, 'European Respiratory Society statement on novel nicotine and tobacco products, their role in tobacco control and "harm reduction"' (2024) 63(2) *European Respiratory Journal* 2301808 <https://doi.org/10.1183/13993003.01808-2023> accessed 13 March 2025.

⁵¹ Europe's Beating Cancer Plan (European Commission, 2021) https://health.ec.europa.eu/system/files/2022-02/eu_cancer-plan_en_0.pdf accessed 4 November 2024.

tests arising from the law and how these should be considered by Member States considering introducing a generational sales ban for combustible commercial tobacco products. The report will then consider the tobacco industry's role in seeking to counter tobacco control legislation and the arguments it relies upon. The report will then provide a suggested pathway for Member States when they are considering introducing tobacco endgame legislation. The report concludes with identifying areas for further research and actions the EU should take to support Member States.

This report is written so that it can be considered by governments and civil society in all Member States. The applicable principles should therefore be applicable all EU Member States. The report is focused on EU law and does not address the individual constitutions of the Member States or any jurisdictions outside of the EU. Whilst this report considers various legal aspects, it is written to be accessible to a wide audience and therefore avoids overly legal terminology. Where appropriate, caselaw is quoted to demonstrate the legal basis for the position taken.

Defining ‘endgame’

The increasing interest in tobacco endgame is seen within the tobacco control world as a positive and represents a significant challenge for the tobacco industry. Indeed, the Tobacco Reporter, a major industry trade magazine which ceased trading in December 2024, cited tobacco endgame initiatives as an indirect reason for this decision.⁵²

Across literature and government papers, the term ‘tobacco endgame’ is used interchangeably to mean either a target or a policy. In some circumstances it is clear what is being advocated for, but other times the lack of clarity causes confusion and risks undermining the arguments being presented. A lack of clarity around terminology could be detrimental to progress, much like the tobacco industry’s co-option of the term ‘harm reduction’ has caused confusion across governments and tobacco control advocates. Whilst harm reduction is a legitimate public health approach, it has been used by the tobacco industry to promote its non-combustible products, such as electronic cigarettes and heated tobacco products. The tobacco industry has therefore influenced the meaning of harm reduction when considered in respect of tobacco control. The tobacco industry must not be able to repeat this with tobacco endgame and be able to provide a definition which aligns with its corporate objectives or leads to uncertainty about what is being considered when the term is used. It is therefore considered necessary to address this at the outset.

This report uses the terms tobacco endgame and tobacco endgame policies. These are distinct terms and must be treated as such. They are defined as:

- Tobacco endgame - the achievement of a set target for the prevalence of combustible tobacco products within a defined jurisdiction, or other identifiable target established by a country. For example, within Europe’s Beating Cancer Plan (‘EBCP’) the target is that less than 5% of the EU population will use tobacco by 2040⁵³. This describes the situation at which tobacco endgame will be deemed to have been achieved within the EU.
- Tobacco endgame policies - the legislative means which will be deployed to seek achievement of a set target. For example, the UK’s proposed legislation preventing the legal sale of tobacco products to people born on or after a certain date; the generational sales ban.

Whilst the EBCP is put forward here as an example of a clear target at which tobacco endgame will be achieved, it is important to note that linguistic confusion is also present within that Plan.

The EBCP also uses the term ‘Tobacco-Free Generation’ when referring to the <5% target. The <5% target “is assumed to be the threshold at which the tobacco smoking epidemic would become unsustainable, limited to a negligible number of adolescent experimenters who do not proceed to regular smoking and a similarly low number of older addicted hard-to-reach or hard-to-engage smokers who are unwilling or unable to give up”⁵⁴ and “is comparable to the global prevalence of 6% for illicit drug use.”⁵⁵

⁵² Tobacco Reporter (December 2024) <https://tobaccoreporter.com/wp-content/uploads/2024/12/Tobacco-Reporter-December-2024.pdf> accessed 15 January 2025

⁵³ European Commission, *Europe’s Beating Cancer Plan* (2021) https://health.ec.europa.eu/system/files/2022-02/eu_cancer-plan_en_0.pdf accessed 4 November 2024.

⁵⁴ Graham Moon et al, ‘The Tobacco Endgame: The Neglected Role of Place and Environment’ (2018) 53 *Health & Place* 271-278; doi: 10.1016/j.healthplace.2018.06.012

⁵⁵ Sahaana Tamil Selvan, Xue Xin Yeo and Yvette van der Eijk, ‘Which countries are ready for a tobacco endgame? A scoping review and cluster analysis’ (2024) 12(6) *Lancet Global Health* e1049–e1058. <https://www.thelancet.com/action/showPdf?pii=S2214-109X%2824%2900085-8> accessed 18 October 2024; page e1049

The EBCP target is addressed at the overall population level and not at a specific generation within the population. The intermediate objectives of a 30% relative reduction in tobacco use by 2025, compared to 2010, which within the EU would be a reduction of smoking prevalence from 29% in 2010 to 20% in 2025, are also general population targets and not generational targets. As the authors of a recent study explain, “[t]he tobacco-free generation aims to prevent the sale of tobacco to people born after a specific year.”⁵⁶ The EU’s terminology within the EBCP is not consistent with this approach, although the Council of the European Union Working Party on Public Health used the term ‘tobacco-free Europe’ in its Draft Council conclusions on the Future of the European Health Union, which more accurately reflects the total population target established in the EBCP.⁵⁷

Whilst the term Tobacco-Free Generation may more easily capture media and public attention, by including it when not introducing generation specific legislation, it risks conflating an overall population target for tobacco endgame with a policy directed at certain generations, as the UK’s proposed legislation does⁵⁸. Application of the terms ‘tobacco-free generation’ or ‘smokefree generation’, should be confined to measures which seek a generational target, not an overall population target. It should also be noted that *tobacco-free* and *smokefree* are also terms that can sometimes be used interchangeably, but do have different meanings. Smokefree is generally considered to apply only to combustible tobacco products, whereas tobacco-free would cover all products containing, or derived from, tobacco including heated tobacco products and smokeless tobacco. Whilst the use of generation is common across these terms, the precise target may be different for countries depending on the formulation of their target, and the language used to describe this should be consistent with the specifics of the target to avoid any confusion. Given the details of the strategy and overall population target, a tobacco free Europe, not generation, is the accurate terminology for the EBCP.

Tobacco endgame in Member States

Currently seven Member States (Belgium, Finland, France, Ireland, The (Kingdom of the) Netherlands, Slovenia and Sweden) have established targets at which they will have achieved tobacco endgame. These targets are better described and mostly avoid the linguistic confusion that arises within the EBCP.

- The Member States whose goal is described in terms of generation are Belgium (Smoke-free generation), France (Tobacco-free generation) and The Netherlands (Smoke-free generation).
- The other Member States (Finland, Ireland, Slovenia and Sweden) have an overall population target and are described as smoke-free or tobacco-free without inclusion of ‘generation’.

Only Belgium’s official goal encounters a similar linguistic error as the EU’s target, describing its goal in generational terms, but including an overall population target without a specific generational target. However, it could be argued that the target “[t]o reduce the number of people who start using tobacco products to 0% or almost 0%” could be seen as generational, given that the majority of people who begin smoking do so before they are 20.⁵⁹

⁵⁶ Julia Rey Brandariz et al, ‘Estimated Impact of a Tobacco-Elimination Strategy on Lung Cancer Mortality in 185 Countries: A Population-Based Birth Cohort Simulation Study’ (2024) 9 *The Lancet Public Health* [745-754].; page 745

⁵⁷ Council of the European Union, *Draft Council Conclusions on the Future of the European Health Union* (Brussels, 29 May 2024).; page 15

⁵⁸ The Explanatory Notes of the Tobacco and Vapes Bill explain that it will “create a smoke-free generation, gradually ending the sale of tobacco products across the country and breaking the cycle of addiction and disadvantage.” Tobacco and Vapes Bill, *Explanatory Notes* (HC Bill 121, introduced in the House of Commons on 5 November 2024).; page 3

⁵⁹ Hanna Ollila, Otto Ruokolainen, Tiina Laatikainen, et al, ‘Tobacco Endgame Goals and Measures in Europe: Current Status and Future Directions’ *Tobacco Control* Published Online First: 17 June 2024, doi: 10.1136/tc-2024-058606 accessed 9 October 2024.; page 7

Tobacco endgame and tobacco control

The term tobacco endgame can also be seen within some literature as being distinct from tobacco control. However, this may arise because of the inconsistent use of the term tobacco endgame referring to both targets and policies. It is therefore important to address at this stage that tobacco endgame, the achievement of a set target, could be achieved without the introduction of explicit tobacco endgame policies. Caution must therefore be exercised when considering any suggestion that tobacco endgame is somehow distinct from tobacco control. Tobacco endgame policies can be distinct from tobacco control policies, but tobacco endgame can be the consequence of tobacco control policies without requiring explicit tobacco endgame policies to be introduced. Or put another way, policies introduced as part of comprehensive tobacco control can, in and of themselves, enable Member States to achieve their tobacco endgame. This is consistent with the FCTC definition of tobacco control⁶⁰ which is not just about reduction, but includes elimination of consumption of tobacco products and exposure to tobacco smoke. The FCTC also explicitly recognises, in Article 2.1, that countries are encouraged to implement measures which go beyond traditional tobacco control⁶¹, which is wording that all governments, including the EU, agreed to.

Key points:

- Use the terms correctly – tobacco endgame, tobacco endgame policies, Tobacco-Free (or Smoke-Free) Generation;
- Remember that the achievement of tobacco endgame does not always require the introduction of tobacco endgame policies.

⁶⁰ World Health Organization Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166.; page 4

⁶¹ *ibid.*; page 5

Tobacco Control in the EU

Pursuant to the Treaty on the Functioning of the European Union (TFEU)⁶², the EU has shared competence with Member States in respect of the internal market (Article 4). The EU has exclusive competence in the establishment of competition rules necessary for the functioning of the internal market (Article 3) and a supporting competence for the protection and improvement of human health (Article 6). Tobacco control engages these areas and therefore consideration of how tobacco control is legally constructed within the EU is not always straightforward.

With the EU and its Member States all being parties to the FCTC, as well as the EU and 19 Member States⁶³ being parties to the WHO's Protocol to Eliminate Illicit Trade in Tobacco Products⁶⁴ which entered into force on 25 September 2018, the starting point for any tobacco control measures is the FCTC.

The FCTC provides a floor, not a ceiling, for tobacco control and parties to the FCTC “*are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.*”⁶⁵

FCTC and MPOWER

The WHO has devised the MPOWER strategy⁶⁶, which is a set of six evidence-based measures to assist countries in implementing the FCTC. These are:

1. Monitor Tobacco Use and Prevention Policies (M)

This principle emphasises the importance of accurate and comprehensive surveillance of tobacco use and the effectiveness of tobacco control measures. Monitoring provides critical data to guide policy decisions, evaluate interventions, and measure progress. Without such data, governments are unable to assess the size of the problem or tailor their policies to effectively address this.

Within the EU, this is monitored at a regional level, through the Eurobarometer⁶⁷, and at individual Member State level. The most recent report (2023) identified that “[t]he proportions of smokers vary widely across countries. Over a third of respondents say they currently smoke in Bulgaria (37%), Greece (36%) and Croatia (35%). Respondents are least likely to say this in Sweden (8%) and in the Netherlands (11%)”⁶⁸ How prevalence is defined is important, and it must be consistent. The WHO defines prevalence as “[t]he percentage of the population aged 15 years and over who currently use any smoked tobacco product, as estimated using the method described in the Method of Estimation below.

⁶² Treaty on the Functioning of the European Union (consolidated version, adopted 13 December 2007, entered into force 1 December 2009) [2008] OJ C 115/47.

⁶³ Bulgaria, Denmark, Estonia, Finland, Ireland, Italy, Romania and Slovenia are not parties to the Protocol

⁶⁴ World Health Organization, *Protocol to Eliminate Illicit Trade in Tobacco Products* (adopted 12 November 2012) https://www.who.int/tobacco/framework/illicit_trade/en/ accessed 19 November 2024.

⁶⁵ World Health Organization Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166.; Article 2.1

⁶⁶ World Health Organization, *MPOWER Principles to Combat Tobacco Use* (World Health Organization, 2008) <https://www.who.int/tobacco/mpower/en/> accessed 1 October 2024.

⁶⁷ European Commission, *Eurobarometer: Attitudes of Europeans Towards Tobacco and Related Products* (Special Eurobarometer 523, European Commission, 2023) <https://europa.eu/eurobarometer/surveys/detail/2237> accessed 13 December 2024.

⁶⁸ *ibid*; page 9

“Current” means either daily or non-daily.”⁶⁹ The Eurobarometer surveys people from 15 years of age, whereas other national and multi-national surveys use different definitions. How smoking usage is defined can impact upon the accuracy of the data and therefore could lead to misleading trends appearing, either positive or negative, if the approach used for monitoring is altered or cherry-picked to create certain results. It is therefore important to ensure that there is consistency in comparisons over time, and between countries.

2. Protect People from Tobacco Smoke (P)

This principle aims to safeguard individuals from the harmful effects of second-hand smoke through comprehensive smoke-free policies. This includes not only enacting and enforcing legislation, but also educating the public about the dangers of second-hand smoke.

Within the EU, the Council Recommendation on Smoke- and Aerosol-Free Environments⁷⁰ was recently updated. It recognises that competency for implementation and enforcement lies with the Member States, and recommends the provision of effective protection from exposure to tobacco smoke and second-hand emissions from other products, such as heated tobacco products and electronic cigarettes. The Recommendation includes that protection is recommended for a wide range of areas such as indoor workplaces, indoor public places and public transport, as well as outdoor recreational areas where children, young people and vulnerable people may often be present. The Recommendation also addresses national strategies and programmes, educational and awareness-raising campaigns, and enforcement structures. The 2024 Recommendation replaces the 2009 Recommendation, which had formed the basis for Member States enacting their own legislation to create smoke-free environments, and reflects the emergence of new tobacco and nicotine products on the market, as well as the developing scientific knowledge base. Finland, for example, had updated its Tobacco Act in 2022 to prohibit smoking and the use of e-cigarettes on public beaches from the beginning of May until the end of September each year, designed particularly to protect young children from the harm caused by second-hand smoke and to reduce environmental harm.⁷¹ Similarly, England (2015) and Scotland (2016) banned smoking in cars carrying children to reduce exposure to second-hand smoke.⁷²

3. Offer Help to Quit Tobacco Use (O)

This principle focuses on providing support and resources to help individuals quit smoking and other forms of tobacco use. Given the highly addictive nature of nicotine quit attempts often require professional support, counselling and pharmacological interventions. Evidence suggests that the chances of long-term smoking cessation increase when using evidence-based smoking cessation interventions, with combining pharmacotherapy and behavioural support interventions being most effective as these actions complement each other.⁷³

⁶⁹ World Health Organization, *The Global Health Observatory: Current Smoking of Any Tobacco Product (Age-Standardized Rate)* <https://www.who.int/data/gho/data/indicators/indicator-details/GHO/current-smoking-of-any-tobacco-product-age-standardized-rate> accessed 10 February 2025.

“Smoked tobacco products include cigarettes, pipes, cigars, cigarillos, waterpipes (hookah, shisha), bidis, kretek, heated tobacco products, and any other form of smoked tobacco. Smoked tobacco products exclude smokeless (oral and nasal) tobacco products and products that do not contain tobacco, such as electronic nicotine delivery system (ENDS) of which e-cigarettes are a common type, as well as “e-cigars”, “e-hookahs”, JUUL and “e-pipes”.”

⁷⁰ Council of the European Union, *Council Recommendation on Smoke- and Aerosol-Free Environments* 15059/24 [2024] replacing Council Recommendation 2009/C 296/02.

⁷¹ Ministry of Social Affairs and Health, *Development of Tobacco and Nicotine Policy: Proposals for Action by the Working Group* (Reports and Memorandums of the Ministry of Social Affairs and Health 2023:14).

⁷² Anthony A Lavery et al, ‘Smoke-Free Vehicles: Impact of Legislation on Child Smoke Exposure Across Three Countries’ (2021) 58(6) *European Respiratory Journal* 2004600 <https://doi.org/10.1183/13993003.04600-2020> accessed 18 March 2025.

⁷³ European Network for Smoking and Tobacco Prevention (ENSP), *European Smoking Cessation Guidelines: Learning from Real-Life Practice* (2012) https://ensp.network/wp-content/uploads/2016/12/ENSP-ESCG_FINAL.pdf accessed 17 March 2025.; page 147

Examples of this in the EU include:

- Denmark which has achieved good results through its model in which reimbursement or pharmacotherapy is offered free of charge, in connection with participation with in a public service provider's cessation counselling.⁷⁴
- France which provides pharmaceutical interventions to stop smoking at no cost, becoming in 2019 the first country where smoking cessation medications are covered by national health insurance, which has led to an increase in the use of cessation medications and a decline in smoking rates.⁷⁵
- Spain which introduced free-pharmacotherapy, with a prescription, in 2020.⁷⁶

There is no consistent EU-wide approach towards cessation treatment, as the results of the Tobacco Control Scale demonstrate⁷⁷.

4. Warn About the Dangers of Tobacco (W)

This principle stresses the importance of raising public awareness about the harmful effects of tobacco use through effective warnings and education campaigns. This can both motivate people to quit and prevent other people from starting.

As an example, the Netherlands holds an annual 'Stoptober' smoking abstinence campaign, which encourages people not to smoke during October, warning about the dangers of smoking and using traditional and new mass media channels to create a trigger to quit.⁷⁸ After the first 10 years of the campaign, it has been estimated that more than 600,000 people had given up smoking because of the campaign.⁷⁹ The TPD also proscribes that all cigarette packages contain warnings about the dangers of smoking and a corresponding colour photograph covering 65% of the front and back surface, as well as cessation information.⁸⁰ Several Member States have also introduced plain (or standardised) packaging, a measure which has as one of its objectives an increase in the noticeability and effectiveness of health warnings.⁸¹ Plain packaging is defined by the WHO as "*measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style*"⁸². Plain packaging within the EU is discussed further below.

5. Enforce Bans on Tobacco Advertising, Promotion, and Sponsorship (E)

⁷⁴ Ministry of Social Affairs and Health, *Development of Tobacco and Nicotine Policy: Proposals for Action by the Working Group* (Reports and Memorandums of the Ministry of Social Affairs and Health 2023:14).; page 51

⁷⁵ Bertrand Dautzenberg and Marie-Dominique Dautzenberg, 'Smoking Cessation Drugs in France: First Effects of Reimbursement under the General Regime' (2019) 5 *Tobacco Prevention & Cessation* A65, doi: [10.18332/tpc/105207](https://doi.org/10.18332/tpc/105207).

⁷⁶ 'If you're thinking about quitting smoking, 2020 is your year.' *COPE* (Mallorca, 30 December 2019) https://www.cope.es/emisoras/illes-balears/baleares/mallorca/noticias/estas-pensando-dejar-fumar-este-2020-ano-20191230_583709 accessed 17 March 2020. (in Spanish)

⁷⁷ European Cancer Research Network, *The Tobacco Control Scale 2021 in Europe* (2021) <https://www.europeancancer.org/tobacco-control-scale-2021> accessed 16 January 2025.; page 31

⁷⁸ Sigrid A. Troelstra, Janneke Harting and Anton E. Kunst, 'Effectiveness of a Large, Nation-Wide Smoking Abstinence Campaign in the Netherlands: A Longitudinal Study' (2019) 16(3) *International Journal of Environmental Research and Public Health* 378, doi: [10.3390/ijerph16030378](https://doi.org/10.3390/ijerph16030378).

⁷⁹ *I Am Expat*, '10 Years of Stoptober: More Than 600,000 Dutch Smokers Have Quit' <https://www.iamexpat.nl/expat-info/dutch-expat-news/10-years-stoptober-more-600000-dutch-smokers-have-quit> accessed 12 February 2025.

⁸⁰ Tobacco Products Directive (EU) 2014/40/EU of the European Parliament and of the Council of 3 April 2014 [2014] OJ L 127/1.; Article 10(1)(a)

⁸¹ World Health Organization, *Tobacco Plain Packaging: Global Status 2021 Update* (World Health Organization, 2021) <https://www.who.int/publications/i/item/9789240065997> accessed 10 February 2025.; Executive summary, page v

⁸² World Health Organization (WHO), *Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control* (WHO, 2013) <https://fctc.who.int/resources/publications/m/item/packaging-and-labelling-of-tobacco-products> accessed 17 March 2025.; page 11

This principle targets the pervasive influence of tobacco marketing, which encourages tobacco use and normalises it in society. As the youth are most susceptible to advertising, this can be particularly effective. Implementing and enforcing legislation banning all forms of tobacco advertising is required, as well as closing loopholes that allow for covert advertising such as through social media.

The TAD bans cross-border tobacco advertising, tobacco sponsorship, and product placement and indirect advertising, with Member States introducing their own legislation to give effect to this. In addition, the Audiovisual Media Services Directive⁸³, contains provisions which prohibit all forms of cigarette and other tobacco product advertising, including indirect forms of audiovisual commercial communication. These prohibitions also apply to electronic cigarettes and refill containers.⁸⁴ For example, in 2005 Italy banned all tobacco sponsorship in sports. The Marlboro brand, long associated with the Ferrari Formula 1 team, was consequently removed from its cars.⁸⁵ Other Member States have taken longer to fully implement bans on tobacco advertising, for example in Germany the ban on advertising traditional tobacco products in public spaces came into force on 1 January 2022, being the last Member State to implement such a ban.⁸⁶ Whilst advertising of tobacco products on social media is banned in Germany, just as it is for TV, radio and print⁸⁷, enforcement of the law regarding social media is poor which particularly exposes young people to advertising of the harmful products.⁸⁸ This problem of enforcement is prevalent across the world due to the global nature of social media. This is particularly concerning where social media use is associated with an increased risk of cigarette and electronic cigarette use by young people.⁸⁹

6. Raise Taxes on Tobacco (R)

This principle advocates for increasing taxes on tobacco products to make them less affordable and discourage consumption. Higher prices are one of the most effective ways to reduce tobacco use, especially among low-income populations and youth. Tobacco tax revenues can then be used for health promotion and tobacco control programmes.

The EU applies a mixed specific and ad valorem excise with a minimum specific excise tax system, with different rules applicable to cigarettes and the other tobacco products. Only the European Region, of which the EU is part, has an average tax burden that meets the 75% tax benchmark, in line with WHO recommendations⁹⁰. However, within the EU there is significant variance in the price of combustible tobacco products as a result of varying tax burdens. The variance can be seen between Member States but also within Member States, as different combustible tobacco products are taxed differently. For example, manufactured cigarettes are subject to different tax requirements to roll-your-own tobacco and cigarillos. Additionally, due to the TTD not having been updated since 2011, the minimum excise rate

⁸³ Audiovisual Media Services Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 [2010] OJ L 95/1.

⁸⁴ Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 [2018] OJ L 303/69.

⁸⁵ Expose Tobacco, *Tobacco Sponsorship in Formula One* <https://exposetobacco.org/wp-content/uploads/Tobacco-Sponsorship-in-Formula-One.pdf> accessed 11 February 2025.

⁸⁶ DW, 'Germany to Curb Tobacco Advertising' <https://www.dw.com/en/germany-to-curb-tobacco-advertising/a-54036004#:~:text=Distribution%20of%20free%20tobacco%20samples,%2C%202024%20for%20e%2Dcigarettes> accessed 11 February 2025.

⁸⁷ Tobacco Control Laws, *Germany - Tobacco Products Act 2016* <https://assets.tobaccocontrolaws.org/uploads/legislation/Germany/Germany-Tobacco-Products-Act-2016-native.pdf> accessed 11 February 2025.

⁸⁸ Christopher Heidt, Amelie Wüllner, Jana Seiler, Nobila Ouédraogo, and Katrin Schaller, 'Advertising of Tobacco and Related Products on Social Media in Germany' (2024) 10 *Tobacco Prevention & Cessation* 59, doi: [10.18332/tpc/195499](https://doi.org/10.18332/tpc/195499).

⁸⁹ Nicholas S Hopkinson et al, 'Association of Time Spent on Social Media with Youth Cigarette Smoking and E-Cigarette Use in the UK: A National Longitudinal Study' (2024) 79 *Thorax* 662-669 <https://doi.org/10.1136/thorax-2023-220569> accessed 18 March 2025.

⁹⁰ World Health Organization, *2023 Global Progress Report on Implementation of the WHO Framework Convention on Tobacco Control* (World Health Organization, 2023) <https://www.who.int/publications/i/item/9789240065423> accessed 12 November 2024.; page 9

does not account for inflation and therefore combustible tobacco has become more affordable in some Member States, which does not discourage consumption.

Implementation of MPOWER within the EU Member States is variable. This includes that even Member States who have set their own targets for achieving tobacco endgame have not implemented all of the key requirements and recommendations from the WHO FCTC or MPOWER.⁹¹

FCTC and the TPD

Just as the FCTC provides a floor, not a ceiling, for tobacco control, the TPD does not prevent Member States from introducing further legislation on aspects which are not harmonised by the TPD. The TPD lays down rules governing the manufacture, presentation and sale of tobacco and related products, including cigarettes, roll your own tobacco, pipe tobacco, cigars, cigarillos, smokeless tobacco, electronic cigarettes and herbal products for smoking. This includes regulating the maximum emission levels for tar, nicotine and carbon monoxide yields in cigarettes, as well as the nicotine concentration in nicotine-containing electronic cigarettes. The overall objective of the TPD is to facilitate the smooth functioning of the internal market for tobacco and related products, to ensure high level of human health protection, especially for young people, and to meet the obligations of the EU under the FCTC. Matters including the rules on smoke-free environments, age of sale, domestic sales arrangements or packaging are not harmonised by the TPD due to the separation of competencies within the TFEU.⁹²

The example of plain packaging

Whether to implement plain packaging for cigarettes is a choice for Member States and is viewed as the 'gold standard', promoted by the WHO and the FCTC. *"Research indicates that plain packaging increases the salience of health warnings, reduces consumer demand, and minimizes opportunities for the tobacco industry to market its products to youth. This is because plain packaging is associated with a less attractive brand imagery or smoker identity, and thereby reduces the industry's ability to target children or other specific groups."*⁹³ It has also been upheld as being consistent with international trade law by the WTO⁹⁴ when it addressed a legal challenge to Australia's introduction of plain packaging. Evidence from Australia shows that since plain packaging was introduced in 2012 there has been a substantial decline in smoking prevalence in children and adults, and that it has exceeded expectations in changing smoking-related attitudes and behaviours.⁹⁵

In the EU, France (2016), (pre-2021) the UK (2016), Ireland (2017), Slovenia (2020), Belgium (2020), the Netherlands (2020), Denmark (2021), Hungary (2022) and Finland (2023) have introduced plain packaging. Reference to Australia's measure was made, for example, in France's notification to the Commission of its proposed legislation, which also referred to its tobacco endgame target *"to ensure that 95% of children born in 2014 will be non-smokers when they turn 18."*⁹⁶ Reference to the Member States

⁹¹ Adrián González-Marrón et al, 'Tobacco Endgame in the WHO European Region: Feasibility in Light of Current Tobacco Control Status' (2023) 21 *Tobacco Induced Diseases* 151, doi: [10.18332/tid/174360](https://doi.org/10.18332/tid/174360); pages 13-14

⁹² Treaty on the Functioning of the European Union (consolidated version, adopted 13 December 2007, entered into force 1 December 2009) [2008] OJ C 115/47.

⁹³ WHO Tobacco Control Playbook (World Health Organization Regional Office for Europe 2020).; page 12

⁹⁴ World Trade Organization, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (AB-2018-4, AB-2018-6) *Reports of the Appellate Body* (2018) https://www.wto.org/english/tratop_e/dispu_e/435_441abr_e.pdf accessed 8 January 2025.

⁹⁵ WHO Tobacco Control Playbook (World Health Organization Regional Office for Europe 2020).; page 12

⁹⁶ European Commission, 'Government amendment relating to the introduction of neutral packets for tobacco products' (Notification 2015/0109/F, 5 March 2015) <https://technical-regulation-information-system.ec.europa.eu/en/notification/19954/> accessed 20 February 2025.

being contracting parties to the WHO FCTC were also made by the UK⁹⁷, Ireland,⁹⁸ Slovenia⁹⁹, and Denmark¹⁰⁰ demonstrating the importance of the FCTC in supporting and evidencing countries' public health policies for tobacco control. Further, Belgium relied on the adoption by the UK and France of plain packaging and the success in those Member States in its notification¹⁰¹, and Finland identified legislation from other Member States, particularly Denmark,¹⁰² indicating the significant impact tobacco control policies which benefit citizens in one Member State can have on other Member States, contributing to improving public health across the EU. More recently, outside of the EU, Nepal introduced legislation requiring pictorial health warnings to cover 100% of the packaging (front and back) for all tobacco products.¹⁰³

Not all Member States have introduced plain packaging, but the different approaches adopted show that in matters not harmonised by the TPD, Member States are able to introduce different measures.

Examples of prohibiting or restricting the placing on the market in accordance with Article 24 of the TPD

Where the TPD regulates and harmonises many aspects of combustible tobacco products, it provides in Article 24(1) that Member States may not prohibit or restrict the placing on the market¹⁰⁴ of tobacco or related products which comply with the TPD. However, Article 24(3) identifies that “[a] Member State may prohibit a certain category of tobacco or related products, on grounds related to the specific situation in that Member State and provided the provisions are justified by the need to protect public health, taking into account the high level of protection of human health achieved through this Directive.”¹⁰⁵

A further demonstration that the TPD provides a floor, not a ceiling, for Member States' tobacco control policies, can be seen in recently enacted legislation where, to date two Member States have taken action pursuant to Article 24(3) of the TPD to regulate disposable e-cigarettes (also known as ‘puffs’).

⁹⁷ European Commission, 'Draft Statutory Instrument: The Standardised Packaging of Tobacco Products Regulations 2015' (Notification 2015/0200/UK, 29 June 2015) <https://technical-regulation-information-system.ec.europa.eu/en/notification/20654/> accessed 20 February 2025.

⁹⁸ European Commission, 'Draft Public Health (Standardised Packaging of Tobacco) Regulations 2016' (Notification 2015/0650/IRL, 20 November 2015) <https://technical-regulation-information-system.ec.europa.eu/en/notification/21718> accessed 20 February 2025.

⁹⁹ European Commission, 'Rules on plain packaging of tobacco products' (Notification 2018/0372/SI, 19 July 2018) <https://technical-regulation-information-system.ec.europa.eu/en/notification/17219> accessed 20 February 2025.

¹⁰⁰ European Commission, 'Draft Order on standardisation of tobacco packets and herb-based smoking products' (Notification 2020/0606/DK, 30 September 2020) <https://technical-regulation-information-system.ec.europa.eu/en/notification/18555> accessed 20 February 2025.

¹⁰¹ European Commission, 'Royal Decree on standardised packets of cigarettes, rolling tobacco and waterpipe tobacco' (Notification 2018/0446/B, 10 September 2018) <https://technical-regulation-information-system.ec.europa.eu/en/notification/19729> accessed 20 February 2025.

¹⁰² European Commission, 'Decree of the Ministry of Social Affairs and Health amending the Decree of the Ministry of Social Affairs and Health on the warning marking of retail packaging of tobacco and related products' (Notification 2021/0618/FIN, 24 September 2021) <https://technical-regulation-information-system.ec.europa.eu/en/notification/16787> accessed 20 February 2025.

¹⁰³ Shobha Shukla and Bobby Ramakant, 'Nepal Leads the World with Largest Pictorial Health Warnings on All Tobacco Products' (Eurasia Review, 6 February 2025) <https://www.eurasiareview.com/06022025-nepal-leads-the-world-with-largest-pictorial-health-warnings-on-all-tobacco-products-oped/> accessed 10 February 2025.

¹⁰⁴ Per the Court of Justice of the European Union, Case C-356/22, *Pro Rauchfrei eV v JS eK* (ECLI:EU:C:2023:174), paragraph 20 “[a]ccording to the usual meaning of the words ‘make ... available’, a tobacco product must be regarded as having been ‘placed on the market’ within the meaning of the first sentence of Article 8(3) of Directive 2014/40 when consumers can acquire it. Accordingly, where a tobacco product is made available for sale, it must be regarded as having been placed on the market, even before it has been purchased and payment has been made.”

¹⁰⁵ Tobacco Products Directive (EU) 2014/40/EU of the European Parliament and of the Council of 3 April 2014 [2014] OJ L 127/1.

Belgium¹⁰⁶ and France¹⁰⁷ both submitted notifications of the proposed legislation in 2024, with Belgium's legislation becoming effective from 1 January 2025 and France approving the implementation of its legislation on 13 February 2025. The UK is also in the process of introducing a ban on sales of single-use vapes, which will take effect from 1 June 2025.¹⁰⁸

In the Belgium government's notification, which was approved by the Commission¹⁰⁹, they explained that the prohibition of the placing on the market of disposable electronic cigarettes was based on public health grounds. They underlined that the urgency and complexity of the problem presented a clear risk to public health, specifically to the young generation and non-smokers in Belgium. Consequently, they considered that it was necessary to introduce a total ban on the placing on the market of these products for public health reasons. The submission included reference to the decision of FCTC COP6(9) which:

2. INVITES Parties, when addressing the challenge posed by ENDS/ENNDS, to consider taking measures such as those referred to in document FCTC/COP/6/10 Rev.1 in order to achieve at least the following objectives, in accordance with national law: (a) prevent the initiation of ENDS/ENNDS by non-smokers and youth with special attention to vulnerable groups; (b) minimize as far as possible potential health risks to ENDS/ENNDS users and protect non-users from exposure to their emissions;

*3. INVITES Parties to consider prohibiting or regulating ENDS/ENNDS, including as tobacco products, medicinal products, consumer products, or other categories, as appropriate, taking into account a high level of protection for human health.*¹¹⁰

The notification also cited the environmental risk associated with the waste from disposable electronic cigarettes and regarded the health and environmental risks as being inextricably linked, with a polluted environment being an obstacle to public health.

The Commission accepted that Belgium's proposed legislation was necessary in respect of the objective pursued and could not be attained by a less restrictive alternative measure. This included that anything less than a preventative measure, which the legislation is, "*would be less effective since it is manifestly much more difficult to diminish or cease addiction after dependence has been formed*"¹¹¹. The Commission also agreed that it was more effective to regulate the market than to ban possession or use of disposable electronic cigarettes, due to enforcement problems with a ban.¹¹²

The French government's notification to the Commission on the prohibition of the manufacture, possession with a view to sale, distribution or offer free of charge, and of the sale of disposable e-

¹⁰⁶ Notification Number: 2022/0851/B (Belgium) <https://technical-regulation-information-system.ec.europa.eu/en/notification/25714> accessed 2 October 2024

¹⁰⁷ Notification Number: 2024/0164/FR (France) <https://technical-regulation-information-system.ec.europa.eu/en/notification/25714> accessed 1 October 2024

¹⁰⁸ UK Government, 'Single-Use Vapes Ban' (Gov.uk, 2024) <https://www.gov.uk/guidance/single-use-vapes-ban> accessed 19 March 2025.

¹⁰⁹ European Commission, *Commission Implementing Decision of 18.3.2024 Concerning National Provisions Notified by Belgium Prohibiting the Placing on the Market of Disposable Electronic Cigarettes* (C(2024) 1673 final) https://health.ec.europa.eu/document/download/2c0e24a7-8ea5-4464-9bf6-eec2f45c42b_en?filename=tobacco_c_2024_1673_en.pdf accessed 2 October 2024.

¹¹⁰ World Health Organisation, 'Electronic Nicotine Delivery Systems and Electronic Non-Nicotine Delivery Systems: Decision FCTC/COP6(9)' (18 October 2014).

¹¹¹ European Commission, *Commission Implementing Decision of 18.3.2024 Concerning National Provisions Notified by Belgium Prohibiting the Placing on the Market of Disposable Electronic Cigarettes* (C(2024) 1673 final) https://health.ec.europa.eu/document/download/2c0e24a7-8ea5-4464-9bf6-eec2f45c42b_en?filename=tobacco_c_2024_1673_en.pdf accessed 2 October 2024.; para 46

¹¹² *ibid.*; para 48

cigarettes was justified “by the need to ensure a high level of protection of public health, particularly for young people”¹¹³ Such an increase has also been seen across the EU¹¹⁴, with use of electronic cigarettes becoming more prevalent, including an increase in current use by students in Italy in 2014 of 8.4% to 19.3% in 2022¹¹⁵, in Bulgaria from 10.8% in 2015 to 23.3% in 2023¹¹⁶ and in Czechia from 11.2% in 2016 to 21.4% in 2022¹¹⁷. Special Eurobarometer 539 also identified that disposable devices are used more by those aged 15-24.¹¹⁸ The notification identified that protecting young people from smoking was one of the five major commitments under the French National Tobacco Control Programme for 2023-2027 and essential for achieving a ‘smoke-free generation’ by 2032. The notification also identified the environmental risk posed by these products, as a result of the microplastics and chemicals released into the soil from discarded products.¹¹⁹

FCTC Article 5.3

As there is a fundamental conflict between the tobacco industry and public health, Article 5.3 of the FCTC records: “[i]n setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”¹²⁰ Article 5.3 is supported by Guidelines for implementation whose purpose “is to ensure that efforts to protect tobacco control from commercial and other vested interests of the tobacco industry are comprehensive and effective.”¹²¹ The four principles established within the guidelines are:

Principle 1: There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests. The tobacco industry produces and promotes a product that has been proven scientifically to be addictive, to cause disease and death and to give rise to a variety of social ills, including increased poverty. Therefore, Parties should protect the formulation and implementation of public health policies for tobacco control from the tobacco industry to the greatest extent possible.

Principle 2: Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent. Parties should ensure that any interaction with the tobacco industry on matters related to tobacco control or public health is accountable and transparent.

¹¹³ European Commission, *Commission Implementing Decision of 25.9.2024 Concerning National Provisions Notified by France Prohibiting Certain Electronic Cigarettes* (C(2024) 6680 final) https://health.ec.europa.eu/document/download/7dfc1451-89e8-41bc-84b7-6ad9ada9027d_en?filename=tobacco_c_2024_6680_en.pdf&prefLang=fr accessed 1 October 2024.; para 16

¹¹⁴ *ibid.*; para 18

¹¹⁵ World Health Organization (WHO), ‘Italy: Noncommunicable Diseases Country Profile’ (WHO) <https://www.who.int/teams/noncommunicable-diseases/surveillance/data/italy> accessed 17 March 2025.

¹¹⁶ World Health Organization (WHO), ‘Bulgaria: Noncommunicable Diseases Country Profile’ (WHO) <https://www.who.int/teams/noncommunicable-diseases/surveillance/data/bulgaria> accessed 17 March 2025.

¹¹⁷ World Health Organization (WHO), ‘Czechia: Noncommunicable Diseases Country Profile’ (WHO) <https://www.who.int/teams/noncommunicable-diseases/surveillance/data/czechia> accessed 17 March 2025.

¹¹⁸ European Commission, *Eurobarometer: Attitudes of Europeans Towards Tobacco and Related Products* (Special Eurobarometer 523, European Commission, 2023) <https://europa.eu/eurobarometer/surveys/detail/2237> accessed 13 December 2024.

¹¹⁹ European Commission, *Commission Implementing Decision of 25.9.2024 Concerning National Provisions Notified by France Prohibiting Certain Electronic Cigarettes* (C(2024) 6680 final) https://health.ec.europa.eu/document/download/7dfc1451-89e8-41bc-84b7-6ad9ada9027d_en?filename=tobacco_c_2024_6680_en.pdf&prefLang=fr accessed 1 October 2024.; para 19

¹²⁰ World Health Organization Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166.

¹²¹ World Health Organization, *Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control* (WHO, 2013); page 6

Principle 3: Parties should require the tobacco industry and those working to further its interests to operate and act in a manner that is accountable and transparent. The tobacco industry should be required to provide Parties with information for effective implementation of these guidelines.

Principle 4: Because their products are lethal, the tobacco industry should not be granted incentives to establish or run their businesses. Any preferential treatment of the tobacco industry would be in conflict with tobacco control policy.¹²²

The EU and its Member States are all required to adhere to Article 5.3. This is an essential requirement within tobacco control, but how this operates in practice varies within the European Union institutions and across Member States. The Protocol to Eliminate Illicit Trade in Tobacco Products supports Article 5.3, recording at Article 4.2 “[i]n implementing their obligations under this Protocol, Parties shall ensure the maximum possible transparency with respect to any interactions they may have with the tobacco industry.”¹²³

Transparency regarding interactions between the tobacco industry, EU officials and Member State officials is lacking, something which the European Ombudsman has addressed in respect of industry interactions with the Commission, with the failure of the Commission to comply with its obligations being assessed to constitute maladministration.¹²⁴ Another example of the problematic operation of Article 5.3 within the EU is Track and Trace system which “is controversial because it is based on a solution provided by Philip Morris”¹²⁵. An effective track and trace system is necessary to address illicit trade, but concerns have been raised about the close links between the industry and the organisation contracted to provide the service within the EU.¹²⁶

Proper implementation of Article 5.3 is crucial to achieving highly effective tobacco control, but inadequate policies and insufficient enforcement of policies can undermine progress in tobacco control, and consequently tobacco endgame being achieved.

Protecting young people and moving towards tobacco endgame

In accordance with Article 114(3) TFEU the EU is required to take a high level of health protection as a base for legislative proposals and, in particular, any new developments based on scientific facts should be taken into account. As identified within the TPD, “[t]obacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco on human health, health protection should be given high importance, in particular, to reduce smoking prevalence among young people.”¹²⁷

The FCTC and TPD both focus on protecting future generations, as well as existing generations. Whilst the legal age to begin smoking is at minimum 18 in all EU Member States, with Member States

¹²² *ibid.*; page 7

¹²³ World Health Organisation, *Protocol to Eliminate Illicit Trade in Tobacco Products* (adopted 12 November 2012, entered into force 25 September 2018) https://iris.who.int/bitstream/handle/10665/80873/9789241505246_eng.pdf?sequence=1 accessed 1 October 2024.

¹²⁴ European Ombudsman. *Decision on the European Commission's interactions with interest representatives of the tobacco industry (case OI/6/2021/KR)* (15 June 2023) <https://www.ombudsman.europa.eu/en/decision/en/179448> accessed 6 November 2024.; para 29

¹²⁵ European Parliament, *White Paper/Legacy Book: European Parliament Working Group on Tobacco, MEP's Working Group on Tobacco 2019-2024* (2024). <https://www.scribd.com/document/741941387/MEP-WG-TPD-Tabac-LB-en-310524-Rivasi-Pelletier-Larrourou-Final-Txt> accessed 1 October 2024; page 18

¹²⁶ OCCRP, ‘The EU's Track & Trace Smokescreen’ (Organized Crime and Corruption Reporting Project, 11 March 2020) <https://www.occrp.org/en/project/without-a-trace/the-eus-track-trace-smokescreen> accessed 19 November 2024.

¹²⁷ Tobacco Products Directive (EU) 2014/40/EU of the European Parliament and of the Council of 3 April 2014 [2014] OJ L 127/1.; page 2

determining the age of sale within their borders, 54% of current and past smokers start smoking before the age of 19 and 14% start before the age of 15.¹²⁸ It is evident that the laws in place regarding age of sale are not adequately protecting children and young people from the risks of combustible tobacco use.

In March 2022, the Danish health ministry publicised its plans to ban the sale of cigarettes and other nicotine products to anyone born after 2010,¹²⁹ although this ultimately did not progress to legislation being formally introduced. In May 2022, Linea Søgård-Lidell, Member of the European Parliament for Renew, submitted a written question concerning this proposal¹³⁰. The then-Health Commissioner, Stella Kyriakides, provided her written answer confirming that “*primary responsibility for health protection remains with the Member States and that the Tobacco Products Directive 2014/40/EU does not regulate domestic sales arrangements nor applicable age limits.*”¹³¹

Whilst there should be no doubt from Ms Kyriakides’ written answer that domestic sales arrangement and applicable age limits are not regulated by the TPD, Recitals 21¹³² and 48¹³³, together with Articles 2(36)¹³⁴ and 18(4)¹³⁵ provide certainty of this. Further, whilst most Member States set the legal age for purchase of tobacco products at 18, Latvia¹³⁶ (20) and Ireland¹³⁷ (21) have recently introduced higher age limits, demonstrating beyond doubt that the competency lies with Member States.¹³⁸ That there was no legal obstacle to Member States setting domestic policy on legal age of sale was identified in *Statement on Tobacco 21 from the European Respiratory Society Tobacco Control Committee*¹³⁹ and has been demonstrated in these recent increases in the age of sale. **As a generational sales ban concerns the age limit at which combustible tobacco products can be sold to an individual, it is a competency which resides with individual Member States.**

The written answer from Ms Kyriakides’ also explained that “*a ban on tobacco and nicotine products, could constitute a measure equivalent to a quantitative restriction within the meaning of Article 34 of the Treaty on the Functioning of the EU (TFEU). However, under EC law, restrictive measures can be justified on one of the grounds of public interest laid down in Article 36 TFEU, which includes the protection of health and life of humans. In such a situation, it is for the Member State to prove that its restrictive measure is appropriate and necessary to meet such a legitimate objective.*”¹⁴⁰

¹²⁸ Council of the European Union, *Council Recommendation on Smoke- and Aerosol-Free Environments* 15059/24 [2024] replacing Council Recommendation 2009/C 296/02.; page 2

¹²⁹ 'Denmark considers ban on cigarette sales to anyone born after 2010' *The Guardian* (15 March 2022) <https://www.theguardian.com/society/2022/mar/15/denmark-considers-ban-on-cigarette-sales-to-anyone-born-after-2010> accessed 21 November 2024.

¹³⁰ European Parliament, 'Parliamentary Question P-9-2022-001318' (2022) https://www.europarl.europa.eu/doceo/document/P-9-2022-001318_EN.html accessed 11 October 2024.

¹³¹ European Parliament, 'Answer to Parliamentary Question P-9-2022-001318' (2022) https://www.europarl.europa.eu/doceo/document/P-9-2022-001318-ASW_EN.html accessed 11 October 2024.

¹³² Tobacco Products Directive (EU) 2014/40/EU of the European Parliament and of the Council of 3 April 2014 [2014] OJ L 127/1.; page 4

¹³³ *ibid.*; page 8

¹³⁴ *ibid.*; page 12

¹³⁵ *ibid.*; page 25

¹³⁶ European Commission, 'Notification 2023/23978' (2023) <https://technical-regulation-information-system.ec.europa.eu/en/notification/23978> accessed 24 October 2024.

¹³⁷ European Commission, 'Notification 2023/26010' (2023) <https://technical-regulation-information-system.ec.europa.eu/en/notification/26010> accessed 24 October 2024.

¹³⁸ The increase in age of sale in Ireland is planned to take effect from 1 February 2028

¹³⁹ European Respiratory Society Tobacco Control Committee, 'Statement on Tobacco 21' (2023) <https://doi.org/10.1183/13993003.00134-2023>.

¹⁴⁰ European Parliament, 'Answer to Parliamentary Question P-9-2022-001318' (2022) https://www.europarl.europa.eu/doceo/document/P-9-2022-001318-ASW_EN.html accessed 11 October 2024.

Here it is important to understand that the answer to the question was positioned within Articles 34 and 36 TFEU and not Article 24 of the TPD. This distinction must be understood, as Ms Kyriakides' answer on behalf of the Commission was not suggesting that the introduction of a generational sales ban would constitute a prohibition or restriction on the placing on the market of combustible tobacco or nicotine products, but a reduction in the size of the market based on the age of sale within the Member State. This was the effect when all Member States increased their age of sale to 18, or more recently when Latvia and Ireland increased their respective age of sales. The number of people legally able to be sold combustible tobacco products decreased with the increase in the age of sale, but did not affect the product being placed on the market.

Given that the effect of a generational sales ban would be an annual reduction in the size of the market – a consequence of the tobacco industry's products killing its customers and the absence of annual influx of new legal customers into the market each year – a generational sales ban **would** be a measure having equivalent effect to a quantitative restriction. This is a stronger conclusion than Ms Kyriakides' written answer and is based on consideration of relevant case law. To better understand this it is necessary to examine how the court approaches questions concerning the freedom of movement of goods, measures having equivalent effect to a quantitative restriction and public health justifications.

Key points:

- Implementation of FCTC and MPOWER is crucial for tobacco control and therefore consequently for tobacco endgame being achieved;
- The FCTC and TPD provide a floor, not a ceiling, for tobacco control measures;
- There is a fundamental conflict between public health and the tobacco industry, such that the tobacco industry must not be able to influence tobacco control policies.

European Court of Justice caselaw

The potential introduction of a generational sales ban in Denmark, which was the subject of the written question, did not progress further within Denmark and therefore no notification was provided to the Commission. It is therefore not known how a fully worked-up legislative proposal creating a generational sales ban would have been viewed by the Commission, national courts or the Court of Justice of the European Union ('CJEU'). Likewise, as there is no other product for which a generational sales ban is in place there is no direct comparator for such a policy. To understand the most relevant arguments that could apply in support, or against, such legislation it is necessary to take lessons from existing case law and apply these to the theoretical legislation.

This is an academic exercise at this point, but historically almost all tobacco control measures taken either by the European Union or Member States have been subject to legal challenge, particularly by the tobacco industry,¹⁴¹ mostly without success¹⁴². Given the frequency at which the tobacco industry challenges countries' tobacco control measures, within the EU and across all jurisdictions, it is reasonable to assume that any Member State introducing a generational sales ban would face legal challenge. Additionally, it would in any event need to seek the Commission's position, which would be informed by the approach the Commission would expect a court to adopt. Consequently, it is necessary to consider the approach that the CJEU takes when determining cases concerning the free movement of goods, measures having equivalent effect to quantitative restrictions and justifications on the grounds of public interest, specifically the protection of health and life of humans.

Freedom of movement of goods

The principle of the free movement of goods within the EU's single market means that goods that are legally marketed in one Member State should also be marketed in other Member States. Article 34 TFEU prohibits quantitative restrictions on imports and all measures having an equivalent effect.¹⁴³ This is unless these are justified in accordance with Article 36 TFEU, which states:

*The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*¹⁴⁴

Tobacco product sales are cross-border in nature¹⁴⁵ and within any Member State a generational sales ban would affect products coming from other Member States, as well as any potentially manufactured within the Member State. The policy would therefore affect internally and externally produced products. Any policy which created a generational sales ban would be a trading rule that is capable of hindering,

¹⁴¹ See for example Case C-491/01 *British American Tobacco v Secretary of State for Health* [2002] ECR I-11453, Case C-574/14 *Philip Morris Brands SARL v Secretary of State for Health* [2016] ECLI:EU:C:2016:325, and Case C-210/03 *Swedish Match AB v Secretary of State for Health* [2004] ECR I-11893.

¹⁴² See Case C-376/98 *Germany v European Parliament and Council of the European Union* (Tobacco Advertising) [2000] ECR I-8419.

¹⁴³ Treaty on the Functioning of the European Union (consolidated version, adopted 13 December 2007, entered into force 1 December 2009) [2008] OJ C 115/47.

¹⁴⁴ *Ibid.*

¹⁴⁵ See preamble (6) which describes cross-border trade as 'significant'; Tobacco Products Directive (EU) 2014/40/EU of the European Parliament and of the Council of 3 April 2014 [2014] OJ L 127/1.

directly or indirectly, actually or potentially, trade within the EU, given that it would reduce the size of the market, and would be considered to be a measure having an equivalent effect to a quantitative restriction. This is clear from settled case law.¹⁴⁶

Given the established case law, there is debate amongst tobacco control advocates as to whether a generational sales ban should instead be presented as an annual increase in the age of sale. However, this question misses the point in two ways.

Firstly, the question of an annually increasing age of sale or a generational sales ban have the same effect. This can be demonstrated by the following example where a person attaining 18 years of age in 2030 could never legally be sold combustible tobacco products with either of the formulations below:

1. **It is an offence to sell any combustible tobacco products to a person born on or after 1 January 2012¹⁴⁷; or**
2. **On or after 1 January 2030 it is an offence to sell any combustible tobacco products to a person who has not attained 18 years of age by 31 December 2029. The age of sale will increase by one calendar year on 1 January of each subsequent year.**

The effect of the wording in both of the above examples is the same and both concern the age of sale. It is the effect of the legislation with which the Commission or any court should be concerned.

Secondly, neither of the above constructions constitute a ban or restriction of the placing on the market of combustible tobacco products within the meaning of Article 24(1) TPD.¹⁴⁸ As addressed in the previous chapter, a generational sales ban concerns the size of the market, which will be determined by age. This is the same as the current position where people under the legal age of sale for tobacco products cannot lawfully constitute consumers, but the product is not considered to not be banned or restricted from the market where it cannot be purchased by those under 18, 20 or 21 (Member State dependent).

Given that a generational sales ban or annually increasing age of sale are both grounded in the Member State competency to determine the age of sale of combustible tobacco products within its borders, and the effect of either formulation would ultimately be the same, the terminology generational sales ban is used within this report to mean the first formulation, the second formulation not being advised. The reasoning for this will be addressed further below.

Assessing the proportionality of Member State legislation

With the effect of a generational sales ban being considered to be a measure having equivalent effect to a quantitative restriction, it is necessary to identify the legal test that the court would need to apply. This

¹⁴⁶ see, for example, Case C-8/74 *Dassonville v Belgische Staat* [1974] ECR 837, para 5; Case C-110/05 *Commission v Italy* [2009] ECR I-519, para 33; Case C-389/96 *Aher-Waggon GmbH v Bundesrepublik Deutschland* [1998] ECR I-4473, para 17; and Case C-333/14 *Scotch Whisky Association and Others v The Lord Advocate* [2015] ECLI:EU:C:2015:845, para 31.

¹⁴⁷ Note that this is based on the UK's proposed wording and consistent with NZ approach but follows the Khan Review which recommended **"2. Increase the age of sale The government must stop young people starting to smoke, which is why I recommend increasing the age of sale from 18, by one year, every year until no one can buy a tobacco product in this country."** Dr Javed Khan OBE, *The Khan Review, Making smoking obsolete Independent review into smokefree 2030* (Published 9 June 2022).; page 10

¹⁴⁸ Tobacco Products Directive (EU) 2014/40/EU of the European Parliament and of the Council of 3 April 2014 [2014] OJ L 127/1.; Article 2(40) *"placing on the market" means to make products, irrespective of their place of manufacturer, available to consumers located in the Union...*

concerns the legal principle of proportionality. This requires consideration of essentially two main questions:

1. **First, whether the measure in question is suitable or appropriate to achieve the objective pursued (the Appropriateness test).**
2. **Second, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (the Necessity test).¹⁴⁹**

As Mr Justice Green explained, “*the first question necessarily involves identifying the objective pursued and determining that it is a legitimate objective in and of itself to pursue ... any Court ruling upon the issue must in fact consider (i) the aims of the measure and its legitimacy; (ii) whether the measure in question is suitable or appropriate to achieve the (legitimate) aims pursued; and (iii) whether the measure is necessary to achieve that objective, i.e. determining whether if there is a choice of equally effective alternative measures which would achieve the aim that the least restrictive measure has been adopted.*”¹⁵⁰

A generational sales ban would involve political, economic and social choices to be made by a Member State. The legal test that is applied by the courts to Member State decisions of this type is a stricter test than is applied where the Union enacts legislation which address these factors.

For Union legislation which entails political, economic and social choices, and therefore requires complex assessments to be undertaken, these decisions will only be affected if the measure is **manifestly inappropriate** to the objective.

For Member State measures the CJEU will consider whether the Member State’s legislation is **appropriate** and **necessary** to meet its legitimate objective. Whilst a proportionality review in EU law usually constitutes three elements of the test - appropriate (or suitable), necessary and proportionality *stricto sensu* (in the strict sense) - in practice “*the proportionality test for national measures restricting free movement is almost always limited to its two first indents.*”¹⁵¹

It is also worth noting here that the CJEU legal test set out above is comparable to WTO Appellate Body decisions where the WTO Dispute Settlement Body is required to establish whether there is a legitimate objective to a ‘technical regulation’ and whether that technical regulation is more trade-restrictive than necessary to fulfil the legitimate objective.

The CJEU would also consider whether the Member State’s legislation constituted a means of arbitrary discrimination or a disguised restriction on trade between Member States. Given the cross-border nature of tobacco products and that any legislation would have to affect domestic and imported products equally, to be effective legislation, it is assumed for this report that the legislation would not be of particular benefit to national producers or distributors, and therefore would not constitute a means of arbitrary discrimination or a disguised restriction on trade. The recent Commission implementing

¹⁴⁹ *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin).; para 428

¹⁵⁰ *Ibid.*

¹⁵¹ Vincent Delhomme, *Regulating lifestyle risks in EU law: Promoting health in a diverse market* (14 May 2023).; page 186

decisions in respect of Belgium¹⁵² and France's¹⁵³ bans of puffs include this conclusion within each decision. This aspect of the analysis of proposed legislation for a generational sales ban is therefore not addressed further within this report.

Learning from Scotch Whisky

The approach taken by the CJEU is clearly illustrated in *Scotch Whisky*¹⁵⁴, which draws on established CJEU caselaw and whose approach is evident in subsequent case law. Whilst that case concerned alcohol, not tobacco products, it provides a framework for the assessment of the appropriateness and necessity of Member States' legislation which enacts a measure having equivalent effect as a quantitative restriction.

From *Scotch Whisky* it can be seen that:

- the CJEU recognises that a Member State may rely on the objective of the protection of human life and health in order to justify a measure. It is recorded that *"the measure must be appropriate for attaining the objective pursued, and must not go beyond what is necessary to attain that objective"* (paragraph 28). At paragraph 35 of the judgment it is recorded that *"the objective of the protection of the health and life of humans that ranks foremost among the assets or interests protected by Article 36 TFEU. It is for the Member States, within the limits imposed by the Treaty, to decide what degree of protection they wish to assure"*¹⁵⁵;
- the court states that *"a restrictive measure can be considered to be an appropriate means of securing the achievement of the objective pursued only if it genuinely reflects a concern to secure the attainment of that objective in a consistent and systematic manner"* (paragraph 37).¹⁵⁶ In this case, the measure in question was *"one of 40 measures whose objective is to reduce, in a consistent and systematic manner, the consumption of alcohol by the Scottish population as a whole"* (paragraph 38); and
- the court also made it clear that *"national legislation or practice cannot benefit from the derogation laid down in Article 36 TFEU if human life and health can be as effectively protected by measures that are less restrictive of trade within the European Union"* (paragraph 41).

In respect of the evidence that a Member State needs to provide, the court stated:

- *"it is for the national authorities to demonstrate that that legislation is consistent with the principle of proportionality, that is to say, that it is necessary in order to achieve the declared objective,*

¹⁵² European Commission, *Commission Implementing Decision of 18.3.2024 Concerning National Provisions Notified by Belgium Prohibiting the Placing on the Market of Disposable Electronic Cigarettes* (C(2024) 1673 final) https://health.ec.europa.eu/document/download/2c0e24a7-8ea5-4464-9bf6-eecc2f45c42b_en?filename=tobacco_c_2024_1673_en.pdf accessed 2 October 2024.; para 54

¹⁵³ European Commission, *Commission Implementing Decision of 25.9.2024 Concerning National Provisions Notified by France Prohibiting Certain Electronic Cigarettes* (C(2024) 6680 final) https://health.ec.europa.eu/document/download/7dfc1451-89e8-41bc-84b7-6ad9ada9027d_en?filename=tobacco_c_2024_6680_en.pdf&prefLang=fr accessed 1 October 2024.; para 57

¹⁵⁴ Case C-333/14 *Scotch Whisky Association and Others v The Lord Advocate* [2015] ECLI:EU:C:2015:845

¹⁵⁵ See also Case C-128/22 *Nordic Info BV v Belgische Staat* [2023] EU:C:2023:951, paras 78 and 79; Case C-141/07 *Commission v Germany* [2008] ECR I-6935, para 51; Case C-110/05 *Commission of the European Communities v Italian Republic* [2009] ECR I-519, para 65 and C-262/02 *Commission v France* [2004] ECR I-6569, para 106 for case law confirming that just because one Member State imposes less strict rules than another Member State does, it does not mean that the latter's rules are disproportionate

¹⁵⁶ Relevant here to note the consistency with World Trade Organization, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (AB-2018-4, AB-2018-6) *Reports of the Appellate Body* (2018) at para 6.17: *"Throughout its analysis, the Panel emphasized that the operation of the TPP measures, including their contribution to Australia's objective, must be viewed in the broader context of other tobacco control measures maintained by Australia. The Panel explained that, while this broader context does not remove or reduce the need "to identify the contribution that the challenged measures themselves make to Australia's objective", it was a relevant consideration in the Panel's assessment, to the extent that "it informs and affects the manner in which the measures are applied and operate, as a component of a broader suite of complementary tobacco control measures."*

and that that objective could not be achieved by prohibitions or restrictions that are less extensive, or that are less disruptive of trade within the European Union” (paragraph 53) and that the “justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and specific evidence substantiating its arguments” (paragraph 54);

- however, the court made clear that the burden of proof for a Member State does not require that *“they must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions”* (paragraph 55);
- accordingly, it is required that *“[o]n the basis of that evidence, that court must, in particular, examine objectively whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods”* (paragraph 56);
- importantly, the judgment also notes that a court examining such a measure *“may take into consideration the possible existence of scientific uncertainty”* and the existence of a sunset clause (paragraph 57); and
- further, it is established that the *“court is bound to assess the compatibility of that legislation with EU law on the date on which it gives its ruling”* (paragraph 63) and in that assessment it *“must take into consideration any relevant information, evidence or other material of which it has knowledge under the conditions laid down by its national law”*, with this being *“all the more necessary ... where there appears to be scientific uncertainty as to the actual effects of the measures”* (paragraph 64) and the assessment *“is not to be confined to examining only information, evidence or other material available to the national legislature when it adopted that measure”* (paragraph 65).¹⁵⁷

Applying *Scotch Whisky*, the following framework can therefore be established:

1. A Member State must establish a legitimate objective for the legislation, which can be founded in the protection of the life and health of humans. It is for Member States to establish the degree of protection they seek in respect of the life and health of humans;
2. The legislation must be appropriate for enabling the Member State to seek to achieve that objective;
3. For the legislation to be necessary:
 - a. it must be the option which is the least restrictive upon European Union trade. If there is an option available which is less restrictive on trade and which would enable the Member State to achieve its legitimate objective, the legislation cannot be considered necessary; and
 - b. it must be adopted in a consistent and systematic way, so a Member State cannot enact other legislation or pursue other practices which are at cross-purposes with the legislation under challenge;

¹⁵⁷ See also World Trade Organisation investment tribunal, *Philip Morris v Uruguay*, WTO Appellate Body, Report AB-2016-3, WT/DS399/AB/R (2016). paragraph 135 “[t]he Parties are in agreement on two issues relating to the evaluation of tobacco consumption. First, they agree that any correlation between one individual tobacco control measure and overall consumer behaviour is difficult to establish. Particular control policies cannot be taken in isolation from other strategies which form the basis of a State’s control program, or from general socio-economic conditions. Second, the impact of tobacco control policies takes time before they are clearly visible.”

4. The Member State must have evidence in support of the legislation being appropriate and necessary which it can produce, but is not required to prove positively that there is no other measure which could achieve the legitimate objective, under the same conditions;
5. A Member State can rely on evidence created in advance of the measure being implemented and post-implementation evidence; and
6. A Member State can rely on scientific uncertainty, especially in respect of novel approaches, and sunset clauses or other processes of review can be relevant in the analysis of the proportionality of a measure.

Discrimination and Fundamental Rights

It is notable that the written question from Ms Søgaaard-Lidell, referred to in the previous chapter, addressed the potential for age discrimination, whereas the written answer did not answer this point. Certain fundamental rights, such as the freedom of expression¹⁵⁸ and protection from discrimination may be subject to certain limitations justified by objectives in the public interest and being proportionate to the legitimate aim pursued.

Pursuant to Article 6 of the TEU, the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties, and fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitute general principles of the Union's law. The TPD recognises the need to balance the protection of health with other fundamental rights, proportionality and international law.

Article 20 of the Charter provides that everyone is equal before the law; Article 21 states that any discrimination based on any ground such as age shall be prohibited; Article 24 gives children the right to such protection and care as is necessary for their wellbeing and that in all actions relating to children, their best interests must be a primary consideration; and Article 52 recognises that the exercise of rights and freedoms may be limited subject to the principle of proportionality, only if they are necessary and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others.

The CJEU has consistently held that *"the principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified"*¹⁵⁹ and *"a difference in treatment between comparable situations is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question and is proportionate to the aim pursued by the treatment"*.¹⁶⁰

¹⁵⁸ See Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECLI:EU:C:2016:324, paragraph 152: *"the interference with the freedom of expression and information that has been found to exist meets an objective of general interest recognised by the European Union, namely, the protection of health. Given that it is undisputed that tobacco consumption and exposure to tobacco smoke are causes of death, disease and disability, the prohibition laid down in Article 13(1) of Directive 2014/40 contributes to the achievement of that objective in that it is intended to prevent the promotion of tobacco products and incitements to use them."*

¹⁵⁹ Case C-477/14, *Pillbox 38 (UK) Ltd v The Secretary of State for Health* [2016] ECLI:EU:C:2016:324.; para 35

¹⁶⁰ Case C-220/17 *Planta Tabak GmbH v Bundesrepublik Deutschland* [2018] ECLI:EU:C:2018:971.; para 43

When considering the legal framework for the European Court of Human Rights ('ECtHR'), the court considers the approach set out at paragraph 233 of *British American Tobacco v Secretary of State for Health*¹⁶¹ to be:

- (i) *whether its objective is sufficiently important to justify the limitation of a fundamental right;*
- (ii) *whether it is rationally connected to the objective;*
- (iii) *whether a less intrusive measure could have been used; and*
- (iv) *whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.*

In the same judgment the court identified at paragraph 432 that the ECHR test is strongly reflective of the test in EU law concerning fundamental rights "*if (a) it is accepted that the first part of the EU test does involve an analysis of the objective being pursued and its legitimacy and (b) the so-called proportionality stricto sensu component of the test is applied and amounts in practice to the ECHR "fair balance" test.*"¹⁶² At paragraph 440 of the judgment the court records that measures to promote public health are important obligations and can take precedence over other fundamental rights.¹⁶³ Further, the ECtHR has also established that Contracting States have a 'margin of appreciation' (a degree of discretion when balancing rights or justifying interference with rights) in their assessment of differential treatment.¹⁶⁴ Recently in a case concerning age discrimination¹⁶⁵, the ECtHR has closely followed CJEU case law when approaching the question of proportionality.

Consequently it can be seen that the framework identified above at the end of the previous section has applicability to questions that might come before a court which concern fundamental rights. The additional part of the test at this stage is the *stricto sensu* or fair balance aspect, which requires an additional balancing exercise, for which the protection of the life and health of humans can be seen to carry substantial weight.

Key points:

- Age of sale is a Member State competency and whether formulated on the basis of a generational sales ban or an annual increase in the age of sale is irrelevant as to whether it falls within this competency;
- A generational sales ban would reduce the size of the market on an annual basis and would therefore be a measure having equivalent effect as a quantitative restriction, so would therefore need to be justified as being a proportionate measure; and
- The question of proportionality requires analysis as to whether the legislation in question is appropriate and necessary to achieve a legitimate objective.

¹⁶¹ *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin).; para 233

¹⁶² *ibid.*; para 432

¹⁶³ *ibid.*; para 440

¹⁶⁴ See also for in Brookline, Massachusetts, a generational sales ban was introduced and was challenged in the courts. The court identified that "*line drawing*" as the generational sales ban requires is "*a legislative necessity*" (*SIX BROTHERS, INC., & others vs. TOWN OF BROOKLINE & another.*; page 31). It also found that it was "*rationally related to the town's legitimate interest in mitigating tobacco use overall and in particular by minors*" and was "*a rational alternative to an immediate and outright ban on sales of all tobacco products, preserving in-town sales to those in group one who may already suffer from addiction. And it provides sellers time to adjust to revenue losses that stem from shrinking tobacco product sales.*" (*SIX BROTHERS, INC., & others vs. TOWN OF BROOKLINE & another.*; pages 31-3) Whilst the jurisdiction is the USA, not EU, it demonstrates how a court can approach the question.

¹⁶⁵ *Ferrero Quintana v Spain*, App no. 2669/19 (European Court of Human Rights, 26 November 2024).

Tobacco endgame policies

As identified by the Truth Initiative, tobacco endgame policies “are not prohibitionist policies that call for the immediate removal of commercial tobacco product sales. Instead, strategies are aimed at manufacturers, distributors, and retailers without targeting or criminalizing consumer use or purchase.”¹⁶⁶ This is consistent with the UK’s approach where the Explanatory Notes explicitly state: “The age of sale restriction does not make it an offence for someone born on or after 1 January 2009 to possess or use tobacco products, herbal smoking products or cigarette papers.”¹⁶⁷

This is an important consideration as Barrett and Hannah identified in ‘Human rights and tobacco control: lessons from illicit drugs in Human Rights and Tobacco Control’: “People who use drugs have, through criminalization and zero tolerance approaches, been ‘tainted with a moral stigma’ with serious consequences for the protection of their health and rights. Another concern about this threat-based framing is its ability to justify heavy-handed laws, policies and interventions”.¹⁶⁸ Such an approach is not intended within tobacco endgame discussions, but instead grounded in human rights considerations. However, as Barrett and Hannah identify, “the drugs conventions are considered by these bodies to fulfil a direct human rights role by aiming to free people from addiction and to protect children from drugs, which mirrors the human rights rationale for protecting people, especially children, from tobacco addiction”.¹⁶⁹ Subsequent enforcement of illicit drug legislation criminalises individuals and affects human rights and such a possibility must be avoided within enforcement of tobacco endgame policies.

Whilst this report focuses on a generational sales ban, it is just one of the tobacco endgame policies that are available for consideration. In Work Package 9 of the Joint Action on Tobacco Control (‘JATC2’) policies were grouped into four broad categories: product-focused, user-focused, market/supply-focused, and institutional structure-focused.¹⁷⁰ A generational sales ban is classified within the user-focused category. This report does not consider the legal feasibility of other policies, but it does encourage any Member State investigating a generational sales ban to not confine itself to this option alone within the initial phases of policy development.

For any Member State considering introducing a generational sales ban, the framework established through consideration of the CJEU’s case law is important and useful for seeking to demonstrate the proportionality of the policy. A Member State should ensure that it has considered the relevant factors and established whether it is in a position to move forward with such legislation. This framework should also assist advocates in ensuring that they maintain the Member State’s focus on the relevant factors and the detail required.

It is important to recognise that, as identified in JATC2 WP9 “[e]ven the countries that have established official tobacco endgame goals have not implemented yet all the key WHO FCTC measures.”¹⁷¹ This could present a possible challenge to tobacco endgame policies being introduced and should be

¹⁶⁶ Truth Initiative, ‘What Does a Tobacco “Endgame” Mean?’ (2 November 2023) <https://truthinitiative.org/research-resources/tobacco-endgame> accessed 12 November 2024

¹⁶⁷ Tobacco and Vapes Bill, *Explanatory Notes* (HC Bill 121, introduced in the House of Commons on 5 November 2024).; para 63, page 13

¹⁶⁸ Damon Barrett and Julie Hannah, ‘Human Rights and Tobacco Control: Lessons from Illicit Drugs’ in M E Gispen and B Toebe (eds), *Human Rights and Tobacco Control* (Edward Elgar Publishing 2020) 112..; page 197

¹⁶⁹ *ibid.*; page 198

¹⁷⁰ Otto Ruokolainen et al, ‘Tobacco Endgame Measures and Their Adaptation in Selected European Countries: A Narrative Review Synthesis’ (*Tobacco Prevention & Cessation* 2024 10(April):18) <https://doi.org/10.18332/tpc/186402>.; page 4

¹⁷¹ Joint Action on Tobacco Control 2, *D9.1 Report of Tobacco Endgame Strategies for the European Region* (June 2024) <https://jaotc.eu/wp-content/uploads/2024/06/D-9.1-Report-of-tobacco-endgame-strategies-for-the-European-Region.pdf> accessed 18 November 2024; page 4

considered at the outset by any Member State investigating introducing a generational sales ban. As stated in JATC2 WP9, “[t]o achieve tobacco endgame goals, countries need to adopt and implement comprehensive tobacco control policies. The first step should be full implementation of the obligatory and recommended measures from WHO Framework Convention on Tobacco Control (FCTC) and related guidelines.”¹⁷² This report endorses that approach whilst recognising that no country in the world has yet fully implemented the FCTC, as some measures do not apply to some countries. However, the report considers that arguments in favour of proportionality can be strengthened by comprehensive tobacco control policies being in place.

If, by undertaking the analysis and exercise set out below, a Member State identifies that, in its view, it is not immediately in a position to move forward with a generational sales ban, it can consider other tobacco control measures to put in place first. Where a Member State is satisfied that it has sufficient justification, supported by evidence, to show that a generational sales ban is a proportionate measure to introduce, it can move forward with introducing such legislation.

Establishing a legitimate objective

The starting point for any Member State considering introducing a tobacco endgame policy is to establish whether it is ‘endgame ready’. For this a Member State could take the rebuttable presumption, established by Tamil Selvan, Xin Yeo and van der Eijk that a country is endgame ready when it has <15% prevalence and >68% FCTC compliance.¹⁷³ The approach of viewing this as a rebuttable presumption takes into account that some countries, including Member States within the EU, may rank highly in FCTC compliance but despite this tobacco use prevalence remains over 15%, suggesting that strong FCTC measures alone are not sufficient to enable a country to reach the point of tobacco endgame. In such circumstances the introduction of a tobacco endgame policy may therefore be required to decrease prevalence, being perhaps the only untested option available. The rebuttable nature of this presumption also aligns with the conclusion by Tamil Selvan, Xin Yeo and van der Eijk that “the 15% smoking prevalence cutoff might be too narrow, and more weight should be given to the strength of existing measures, political will, public support, and rate of smoking prevalence decline when determining whether a country is ready to pursue a tobacco endgame”.¹⁷⁴ This report focuses on the legal feasibility, not political will or public support, but those factors should not be ignored within the evidence matrix, when justification of the proportionality of a tobacco endgame policy is required.

The presence of the 15% prevalence threshold appears in other literature including Estimated impact of a tobacco-elimination strategy on lung-cancer mortality in 185 countries: a population-based birth-cohort simulation study¹⁷⁵ in which Rey Brandariz et al. concluded “[t]he implementation of a tobacco-free generation could be more successful in countries with strong tobacco-control policies, where smoking prevalence is less than 15%, or where there has been a rapid decline in prevalence.”¹⁷⁶ Likewise, Thomson et al. state “[t]he level at which tobacco use prevalence is low enough to stimulate real endgame planning will differ with context. We suggest that less than 15% adult tobacco use will provide

¹⁷² Joint Action on Tobacco Control 2, WP9 Indicator Compendium (28 April 2023) <https://jaotc.eu/wp-content/uploads/2023/12/M.9.1-Indicator-compendium-28-April-2023.pdf> accessed 28 November 2024.; page 104

¹⁷³ Sahaana Tamil Selvan, Xue Xin Yeo and Yvette van der Eijk, 'Which countries are ready for a tobacco endgame? A scoping review and cluster analysis' (2024) 12(6) *Lancet Global Health* e1049–e1058. <https://www.thelancet.com/action/showPdf?pii=S2214-109X%2824%2900085-8> accessed 18 October 2024; page e1051

¹⁷⁴ Sahaana Tamil Selvan, Xue Xin Yeo and Yvette van der Eijk, 'Which countries are ready for a tobacco endgame? A scoping review and cluster analysis' (2024) 12(6) *Lancet Global Health* e1049–e1058. <https://www.thelancet.com/action/showPdf?pii=S2214-109X%2824%2900085-8> accessed 18 October 2024; page 1056

¹⁷⁵ Julia Rey Brandariz et al, 'Estimated Impact of a Tobacco-Elimination Strategy on Lung Cancer Mortality in 185 Countries: A Population-Based Birth Cohort Simulation Study' (2024) 9 *The Lancet Public Health* [745-754].;

¹⁷⁶ *ibid.*; page 752

situations where it is sufficiently non-normal for governments to plan for a predicted end to tobacco use.”¹⁷⁷ The prevalence rate is consistent with the approach taken in the UK, which had an 11.9% prevalence rate at the time that the Tobacco and Vapes Bill was introduced.

Consistent with the need for tobacco endgame policies to not exist in isolation (as above), Rey Brandariz et al. also concluded “[t]he implementation of a tobacco-free generation needs to occur alongside other tobacco-control measures, such as setting a nicotine cap, increasing taxes, or reducing the number of retail outlets that sell tobacco products.”¹⁷⁸ These are examples of policies that could exist alongside a generational sales ban, but this is not an exhaustive or exclusive list.

Where a Member State identifies that it is endgame ready, it should then establish its legitimate objective. Arguably, the most straightforward legitimate objective within the EU would be to protect young people from the harmful effects of tobacco and related products by reducing combustible tobacco prevalence to <5% of the population by 2040, consistent with the EBCP. This target was set despite tobacco prevalence in the EU being around 24%.¹⁷⁹ This is above the rebuttable presumption threshold identified above, but this does not mean that this aim and target do not constitute a legitimate objective. Should a Member State adopt this approach, aligning its objective with the tobacco endgame target established by the EU the court may view this favourably, as suggested in *Nordic Info*, paragraph 83.¹⁸⁰

However, a Member State does not need to adopt the same target as the EU, and some of the existing tobacco endgame targets established by Member States take a different approach. For example, France, in seeking to protect young people from the harmful effects of combustible tobacco has established a specific target of prevalence of <5% for people born after 2014, who would attain 18 years of age from 2032.¹⁸¹ That is a target which varies from the EU’s position, recognising the specific circumstances within France, where the prevalence rate for people aged 18-75 was 23%, but it should be considered a legitimate objective equal to that which follows the EBCP. The recognition of the circumstances within the Member State, as France has, and therefore the development of a tobacco endgame position informed by this, should be appreciated by the court.

Based on case law, it can be reasonably assumed that any Member State’s objective which is designed to protect human health from the proven harmfulness of tobacco consumption, the addictive effects and serious diseases caused as a result of the compounds within combustible tobacco products, would be seen as a legitimate objective. Indeed, it would be counterintuitive for any tobacco control or tobacco endgame objectives to not seek a reduction in the prevalence and consumption of combustible tobacco, given the known harm. The purpose of the FCTC and all measures which flow from this is the reduction in supply and demand for combustible tobacco and related products, which should correspond with a reduction in prevalence.

Further, according to settled case law, where a “measure is within the field of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is for the Member States to determine the level of protection

¹⁷⁷ George Thomson, Richard Edwards, Nick Wilson, and Tony Blakely, 'What are the elements of the tobacco endgame?' (2012) 21 *Tobacco Control* 293–295, doi:10.1136/tc.2010.040881.; page 294

¹⁷⁸ Julia Rey Brandariz et al, 'Estimated Impact of a Tobacco-Elimination Strategy on Lung Cancer Mortality in 185 Countries: A Population-Based Birth Cohort Simulation Study' (2024) 9 *The Lancet Public Health* [745-754].; page 752

¹⁷⁹ European Commission, 'Proposal for a Council Recommendation on Strengthening Tobacco Control' COM(2024) 55 final (17 September 2024).; page 10

¹⁸⁰ Case C-128/22 *Nordic Info BV v Belgische Staat* [2023] EU:C:2023:951

¹⁸¹ Joint Action on Tobacco Control 2, *D9.1 Report of Tobacco Endgame Strategies for the European Region* (June 2024) <https://jaotc.eu/wp-content/uploads/2024/06/D-9.1-Report-of-tobacco-endgame-strategies-for-the-European-Region.pdf> accessed 18 November 2024; page 11

which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a measure of discretion”.¹⁸² This demonstrates that it is possible for Member States to set different public health protection levels and the way in which those are to be achieved¹⁸³. This means that one Member State could establish a population prevalence target of <5% consistent with the EU, and another a <5% prevalence target for people born after a certain date, with policies designed to achieve these targets, and both approaches would be considered to fall within the discretion afforded to Member States. A clear prevalence level and timeframe for achieving this will need to be set by Member States against which the proportionality of the generational sales ban can be assessed.

Likewise, the achievement of tobacco endgame is not necessarily required to be a stand-alone target. It could be part of a series of measures addressing inequalities within a Member State. For example, a Member State could, as New Zealand did¹⁸⁴, seek to reduce inequities within and across the population. Addressing inequalities also appeared within the US Surgeon General’s 2024 report Eliminating Tobacco-Related Disease and Death: Addressing Disparities¹⁸⁵. The achievement of tobacco endgame could theoretically be one target, within a number of targets, which the Member State could identify as being required to be achieved. This could also be linked with, or separate to, a Member State seeking to reduce addictions or positively address the Commercial Determinants of Health within the Member State, with nicotine addiction being one aspect targeted alongside gambling, alcohol and other addictions prevalent within the Member State. Alternatively, given the impact on the environment caused by combustible tobacco products, consistent with Article 18 of the FCTC and the inclusion of a tobacco reduction target as part of UN Sustainable Development Goals (Target 3A), which makes clear the extent of the problem of usage of the product on sustainable global development, a legitimate objective for which tobacco endgame policies could be introduced could be based on environmental health, which connects also with human health.

The purpose of the preceding paragraph is to demonstrate that whilst a Member State could set a legitimate objective of attaining tobacco endgame in isolation and employ tobacco control and tobacco endgame policies separately from other objectives and policies, it could also take a holistic approach to public health. In such an approach, the achievement of tobacco endgame could be one factor amongst a number of others which the Member State is seeking to achieve and would be consistent with the discretion which Member States enjoy according to the case law.

As demonstrated in the previous chapter with two possible constructions of a generational sales ban, however the wording of legislation is formulated, the effect would be the same. Despite the effect in law being the same, it is important for Member States to bear in mind that the second construction, raising the age of sale each year, suggests that there is an age at which it is safe to begin using combustible tobacco. As explained in ‘Guidance for Introducing the Tobacco-Free Generation Policy’, an “*unfortunate*

¹⁸² Case C-108/09 *Ker-Optika bt v ÁNTSZ Dél-dunántúli Regionális Intézete* [2010] ECLI:EU:C:2010:725.; para 58

¹⁸³ See also *The Hague District Court Case number C/09/646505 / HA ZA 23-367*: “4.17 ... it is particularly important that, even if the flavour ban were to lead to a number of smokers who quit relapsing, it is within the political discretion of the State to give greater weight, in the context of public health, to the interests of young people and of a future smoke-free generation than to give predominant weight to improving public health in the future, by (attempting to) prevent more (young) people from starting to smoke.”

¹⁸⁴ New Zealand Ministry of Health, *Smokefree Aotearoa 2025 Action Plan* (2021) <https://www.health.govt.nz/system/files/2021-12/hp7801-smoke-free-action-plan-v15-web.pdf> accessed 3 December 2024; “Outcome 1 – Eliminate inequities in smoking rates and smoking-related illnesses To reverse inequity and improve health and wellbeing for all, we need to end the unequal distribution of the harm smoking causes.” page 10

¹⁸⁵ Office of the Surgeon General, US Department of Health and Human Services, *Eliminating Tobacco-Related Disease and Death: Addressing Disparities – A Report of the Surgeon General* (US Department of Health and Human Services 2024) <https://www.hhs.gov/sites/default/files/2024-sgr-tobacco-related-health-disparities-full-report.pdf> accessed 19 December 2024.; pages 34-5 - Major Conclusions 3 and 5 and 9

media misrepresentation refers to TFG not as birthdate-based but as a minimum age law changing annually (the relevant age actually changes daily); emphasis on age risks dilution of the policy's important messaging discussed above."¹⁸⁶ The first formulation, specific to people born on or after a certain date, could assist with denormalising smoking. It is not intended to create prejudice against those who smoke, but by signifying that it is no longer socially acceptable it could influence those who can already legally purchase combustible tobacco, alongside those who would not legally be able to. This could be a factor in the objective which the Member State is seeking to achieve, considering whether it is seeking to indicate through its policy that there is never a safe age at which to use commercial combustible tobacco. Whether a Member State is seeking to present this as part of its objective should also fall within the discretion afforded to Member States.

Approaching the appropriateness test

The next question for the Member State is to consider whether it would be able to demonstrate that a generational sales ban is appropriate to enable it to achieve its legitimate objective. Whilst this is potentially the most straightforward aspect of the proportionality test, it must be given the necessary attention.

Were a Member State to align itself with the EBCP target and realisation date, it would need to consider amongst other matters; the effectiveness of its existing tobacco control measures in place, the extant combustible tobacco prevalence within its population, the projections of prevalence where the policy is introduced, and an analysis as to whether a generational sales ban may be too slow to be effective in achieving the legitimate objective.

A Member State with a high prevalence and period of time in which it could achieve its target should reasonably ask itself whether the policy, which would not be introduced immediately, would be an appropriate policy to enable it to achieve its target. Whilst modelling of the effectiveness of a generational sales ban shows positive results, there will be an inevitable delay in the results of such a policy being seen within the population. As a result of the work conducted in JATC2 WP9, it was identified that with a generational sales ban "*implementation of this policy alone in a simulation model is unlikely to achieve a 5% smoking prevalence in 10 years.*"¹⁸⁷ It is therefore critical to be fully cognisant of the relevant timescales and synthesis of this policy with other tobacco control or tobacco endgame policies.

If modelling of the anticipated results shows that tobacco endgame would be unlikely to be achieved through the policy, the Member State should reasonably ask itself whether the policy is appropriate for the legitimate objective which it has established and if not, what alternative policies it should consider prior to the introduction of a generational sales ban or in conjunction with it. Alternatively, it could reconsider whether its objective is, within its circumstances, the most applicable objective that it is seeking to realise at that time through the introduction of a generational sales ban. If the Member State maintains both its legitimate objective and the generational sales ban designed to achieve that, it must be prepared to explain how it considers that the policy is appropriate to enable it to achieve its target. For this, it will require evidence to support its position. It cannot make this claim unevidenced.

Were a Member State to establish a tobacco endgame position as part of a holistic, wider strategy, such

¹⁸⁶ A J Berrick, 'The Tobacco-Free Generation Proposal' (2013) 22 *Tob Control* i22 doi:10.1136/tobaccocontrol-2012-050865 accessed 31 October 2024.; page 3

¹⁸⁷ Otto Ruokolainen et al, 'Tobacco Endgame Measures and Their Adaptation in Selected European Countries: A Narrative Review Synthesis' (*Tobacco Prevention & Cessation* 2024 10(April):18) <https://doi.org/10.18332/tpc/186402>.; page 5

as the examples given above, the breadth of analysis required is likely to be greater. Simultaneously, the uncertainty about the specific outcome from any one policy might also be greater. As such, there may be more scientific uncertainty and it could therefore be harder for anybody seeking to challenge the Member State to argue that a generational sales ban would not be an appropriate approach in seeking to achieve the objective, because it would be one part of a wider legislative agenda for which the impact of any one aspect of the legislation is more difficult to demonstrate or disprove.

Approaching the necessity (suitability) test

Where a Member State has satisfied itself that a generational sales ban is an appropriate policy to enable it to achieve its legitimate objective, it must then consider whether it can demonstrate that it is necessary to introduce this legislation. In answering this question, the Member State effectively needs to ensure that the measure is the least restrictive option on trade whilst allowing it to achieve its set objective, and that it is adopting the legislation in a consistent and systemic manner.

The demonstration of necessity is evidence-based and therefore the Member State must establish that it has the evidence to satisfy the court that the action it is taking is proportionate. A fundamental requirement for the first part of the necessity test is for the Member State to show that it has considered alternative, potentially less restrictive measures. This needs to be done at the outset of the process, with the Member State properly considering and consulting on available options. One option must include maintaining its existing tobacco control measures to act as a baseline. For example, in Ireland's notification to the Commission to raise the age of sale to 21¹⁸⁸, an impact assessment was included identifying four potential options, of which 'do nothing' was one. Clear modelling of the range of potential measures must be available, in order to ensure that there is evidence of the need for the chosen measure. This must also be available to demonstrate why the alternatives have been discounted. Ireland's impact assessment concluded "*To do nothing will mean that the disease burden and death from tobacco use will continue*" and:

"Although much progress has been made in reducing smoking prevalence we are not near the target set in our national tobacco control policy, Tobacco Free Ireland, of less than 5% of the population smoking by 2025. Changing the legal age of sale of tobacco products to 21 will contribute to speeding up progress toward that goal and will align with the two overarching principles of that policy:

- The protection of children must be prioritised in all of the initiatives outlined in the policy.*
- Denormalisation must be a complementary underpinning theme for all of the initiatives within the policy."*¹⁸⁹

The opposite end of the spectrum to 'do nothing' could be to consider banning the product from the market entirely, relying on Article 24(3) of the TPD. Whilst this report is not advocating for or presenting relevant considerations for such a policy, Member States can consider the range of possible options when consulting and modelling, to establish a broad evidence base.

With Latvia and Ireland having introduced increased ages of sale for tobacco products, whilst some Member States are considering generational sales bans, there are already age-based measures intended to reduce tobacco prevalence available for consideration within the EU.¹⁹⁰ There are also

¹⁸⁸ European Commission, 'Notification 2023/26010' (2023) <https://technical-regulation-information-system.ec.europa.eu/en/notification/26010> accessed 24 October 2024.

¹⁸⁹ *ibid.*; page 4

¹⁹⁰ The effect of Ireland's policy will not be visible until after 2028, as currently proposed

examples outside of the EU, such as the USA's federal limit of 21 years of age for the purchase of tobacco for which the evidence base on the efficacy of this policy is starting to expand. In Tobacco-21 laws and young adult smoking: quasi-experimental evidence it was found *"that tobacco-21 restrictions are associated with a 39% reduction in the odds of smoking among 18–20 year-olds who ever-tried a combustible or electronic cigarette. Moreover, this relationship is strongest among those whose close friends smoked or vaped at age-16, consistent with a social multiplier effect wherein tobacco-21 restrictions influence young adult smoking both directly and indirectly, via peer responses to the policy. These results provide support for efforts to implement tobacco-21 laws as a means to reduce young adult smoking, producing long-term benefits for public health."*¹⁹¹

There are therefore already examples of different measures which could be available for a Member State and which it should be mindful of when considering alternatives. Indeed, it is considered that *"[i]ncreasing the legal age-of-sale to 21 may be able to optimize the effect of age-of-sale laws by limiting access to cigarettes via proxy buyers between 18 and 20 years old. It is likely to have the largest effect among adolescents aged 15–17 as they are least likely to have friends or acquaintances above the age of 21. This is the age group in which most people start smoking."*¹⁹² Whether these measures would be actual options that could result in the same outcome for the Member State in seeking to achieve its tobacco endgame objective would need to be established through its modelling.

However, whilst increasing the age of sales is an obvious comparison to a generational sales ban, as they both concern a limitation based on age, it does not need to be, and should not be, the only alternative considered (see below). Indeed, as the CJEU observed in Case C-547/14 (Philip Morris) at paragraph 181 *"any prohibition on sale resulting from an increase in that age limit can, in any event, be easily circumvented when the products concerned are marketed."*¹⁹³ Further, tobacco use in young people has been identified to typically reflect overall population trends, so population-wide approaches can have a large impact on youth tobacco use. With a generational sales ban, the percentage of the population who cannot legally be sold combustible tobacco increases each year, so does not just affect the youth but an increasing proportion of the population each year. Children and young people who might seek to circumvent 'ordinary' age of sales legislation, because of the proximity in age to those who can legally be sold combustible tobacco products, will find it increasingly difficult to do so as the gap between those who can legally be sold combustible tobacco and those who cannot increases annually, therefore reducing the social sources of supply.

A generational sales ban, rather than an increased age of sale, addresses a psychological factor of combustible tobacco use. As explained in Guidance for Introducing the Tobacco-Free Generation Policy¹⁹⁴: *"[s]ince initiation is overwhelmingly confined to adolescents, awareness of their psychology is needed. Current age-based laws (encouraged by the tobacco industry) risk driving initiation by signalling an acceptable age for tobacco and nicotine use, and also signifying cigarettes as "a badge of coming of age"."* This is also addressed in JATC2 WP9: *"uncertainty around minimum-age laws was due to the fact that they are advocated by tobacco industries that are well aware of adolescent psychology and their reaction to age-restricted laws. This is exemplified by three aspects. First, being that tobacco use is legal and thus safe for adults, then presumably, the real aim of the law could be considered as youth control*

¹⁹¹ Abigail S. Friedman, John Buckell, and Jody L. Sindelar, 'Tobacco-21 Laws and Young Adult Smoking: Quasi-Experimental Evidence' (2019) 114 *Addiction* 1816 <https://doi.org/10.1111/add.14653> accessed 11 December 2024.; page 1820

¹⁹² Paulien A.W. Nuyts, Mirte A.G. Kuipers, Marc C. Willemsen, and Anton E. Kunst, 'An Increase in the Tobacco Age-of-Sale to 21: For Debate in Europe' (2020) 22 *Nicotine & Tobacco Research* 1247-1249 <https://doi.org/10.1093/ntr/ntz135> accessed 22 October 2024.; page 1247

¹⁹³ Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECLI:EU:C:2016:325.; para 181

¹⁹⁴ A J Berrick, 'The Tobacco-Free Generation Proposal' (2013) 22 *Tob Control* i22 [doi:10.1136/tobaccocontrol-2012-050865](https://doi.org/10.1136/tobaccocontrol-2012-050865) accessed 31 October 2024.; page 23

rather than tobacco control. Second, reactance theory predicts that youth who are legally excluded from the product will find it more desirable. Finally, in the presence of underage laws, cigarettes become a symbol of the onset of maturity.”¹⁹⁵ Over time, there should be fewer parents and carers who use combustible tobacco, which should provide positive reinforcement to future generations. This should protect children, unborn children and young people from the harms of combustible tobacco use.

A generational sales ban signifies that there is no safe age to begin smoking, something which even the tobacco industry now publicly acknowledges. An increased age of sale does not provide the same message and therefore does not necessarily contribute equally to the attainment of the Member State’s target, depending upon how it has formulated its tobacco endgame target.

As Berrick identifies *“There are two important drawbacks to an ‘underage’ restriction. First, it creates a rite-of-passage effect: 16- or 17-year-olds may think that by smoking they appear 18, as reflected in the tobacco industry’s ‘Kids don’t smoke’ campaigns. Second, it has an adverse signalling effect: If the government says that smoking is acceptable for an 18-year-old, then can it really be dangerous for a 16- or 17-year-old? Thus, the tobacco industry’s frequent boast is: ‘It’s a legal product.’ Moreover, its counterintuitive position undermines governmental authority.”*¹⁹⁶ The generational sales ban written in that formulation, rather than an annually increasing age of sale, *“addresses the rite-of-passage effect and enables peer influence to work in its favour: public health campaigns (especially where tobacco marketing is prohibited) are able to present smoking as a ‘last-century’ phenomenon. Over time, the age gap between teenagers and the visible smoking population steadily widens, facilitating a favourable ‘norm cascade’ of ever-lower smoking prevalence among late-teenage cohorts benignly influencing subsequent cohorts”*¹⁹⁷ which can make enforcement easier. This is a complex political and social decision, which concerns public health, which it is the responsibility of Member States to make.

The question of an increase in the age of sale, rather than a generational sales ban, was considered within The Khan Review ahead of the introduction of the Tobacco and Vapes Bill in the UK. In that Dr Javed Khan OBE addressed this question. He stated:

*“I have considered various options for raising the age of sale. Should the government raise it from the current age of 18 to 21 in one go? Why not jump to 25? Will this be the ‘nanny state’ or ‘big government’ in action? How would this sit alongside the legal age to buy alcohol, to get married, to vote? Note none of the others are likely to kill you! ... My considered view is that raising the age of sale over time, one year at a time, presents a significant longer term signal, leading to a genuine smokefree generation. The gradual impact will be less pronounced than one single leap to either 21 or 25.”*¹⁹⁸

This report does not rule out the possibility that modelling of raising the age of sale to 21 or 25, or any other age chosen by the Member State, may demonstrate the same effect for achieving a percentage target. The question of whether it has the same social effect through a paradigm shift in the perception of combustible tobacco products may though be different, as Dr Khan addresses. Further, even if a raised age of sale instead of a generational sales ban has the same effect for achieving the target in respect of percentage prevalence by a specific date, it does not necessarily mean that this is a less restrictive

¹⁹⁵ Otto Ruokolainen et al, ‘Tobacco Endgame Measures and Their Adaptation in Selected European Countries: A Narrative Review Synthesis’ (*Tobacco Prevention & Cessation* 2024 10(April):18) <https://doi.org/10.18332/tpc/186402>; page 7

¹⁹⁶ A J Berrick, ‘The Tobacco-Free Generation Proposal’ (2013) 22 *Tob Control* i22 [doi:10.1136/tobaccocontrol-2012-050865](https://doi.org/10.1136/tobaccocontrol-2012-050865) accessed 31 October 2024.; page 22

¹⁹⁷ *ibid.*; page 23

¹⁹⁸ Dr Javed Khan OBE, *The Khan Review, Making smoking obsolete Independent review into smokefree 2030* (Published 9 June 2022).; page 22

option on trade. If the same effect could be achieved from either approach, it should follow that the effect on trade at the date in question would be the same.

Taken a step further, even if one Member State adopted a higher age of sale and another Member State adopted a generational sales ban, both of which could achieve the same percentage target by the specified date then, as the CJEU has established, where one Member State takes a course of action that is stricter than another Member State, it does not mean that the Member State with the stricter action is acting disproportionately. The decision of one Member State not to implement a generational sales ban should therefore not be taken to mean that no Member State is able to do so, or that in doing so it would necessarily be acting in a disproportionate manner. The necessity of the measure should be considered against the legitimate objective which the Member State has set, and as Member States can set different levels of protection which they wish to afford to public health, the assessment should be against that objective and not in comparison with approaches that different Member States have taken to achieve their own objectives.

A consistent and systematic approach

A Member State would also need to show that it is taking a consistent and systematic approach to tobacco control, in order to support the achievement of its tobacco endgame position.

Consistency does not need to mean perfection, but a Member State would want to be able to show that it has put in place all of the core FCTC measures, together with as many of the advanced measures as possible, before moving towards introducing tobacco endgame policies. This report relies upon the core and advanced measures identified within JATC2 WP9¹⁹⁹, which establishes within each relevant article of the FCTC and its Guidelines, the measures to meet each article and guideline, and whether these are considered to be core or advanced. Whilst it may not be possible for some of the measures, particularly advanced measures, to be implemented within a Member State for particular reasons, with financial resources or projected limited effects perhaps being the most obvious reasons, it is reasonable for any Member State considering introducing a generational sales ban to establish whether the absence of any of these measures could be used to demonstrate that it has not been consistent and systematic regarding tobacco control. This report does not seek to establish an absolute threshold for implementation of these measures, as to do so would require the individual circumstances of each Member State to be overlooked. Where there are legitimate reasons for not introducing certain measures, these should be clearly identifiable to mitigate against the risk of this being successfully raised in any challenge to a generational sales ban.

In assessing whether it is adopting a consistent and systematic approach, a Member State should therefore be considering its approaches to:

- Cessation – whether it offers free/low-cost cessation and what effect it would have to do so, if it is not already. The WHO clinical treatment guideline for tobacco cessation in adults “provides recommendations on the use of behavioural support, delivered in both clinical and community settings, including: digital tobacco cessation interventions, pharmacological interventions, and system-level interventions and policies to enhance the adoption and implementation of tobacco cessation interventions.”²⁰⁰ This is consistent with the European Smoking Cessation Guidelines:

¹⁹⁹ Joint Action on Tobacco Control 2, WP9 Indicator Compendium (28 April 2023) <https://jaotc.eu/wp-content/uploads/2023/12/M.9.1-Indicator-compendium-28-April-2023.pdf> accessed 28 November 2024.; *Classification of the regulatory measures of the WHO FCTC* pages 10-63

²⁰⁰ World Health Organization, *WHO clinical treatment guideline for tobacco cessation in adults*. (2024).; page 16

Learning from Real-Life Practice report by the European Network for Smoking and Tobacco Prevention.²⁰¹ The WHO's guidance does not recommend the sale of electronic cigarettes as consumer products when pursuing a cessation objective, which is different to the approach currently being taken within the UK legislation. Consideration should be given to the risk that allowing electronic cigarettes to remain as consumer products could undermine cessation, given that these are often used in dual-use with combustible tobacco. Such a risk would need to be managed and it may be necessary for Member States to have recourse to the precautionary principle, given that there is scientific uncertainty about whether electronic cigarettes are appropriate for cessation, and may contribute to continuing use of combustible tobacco products. It is identified in Will the Government's new Smokefree Plan achieve Aotearoa's smokefree goal? "[w]hile an important element of tobacco control, studies such as Wilson et al. demonstrate that cessation services are not very effective at reducing smoking prevalence at the population level. This is because, only a small portion of people who smoke access cessation services during quit attempts and, of these, only a minority (12% is cited in the plan) successfully quit long term"²⁰². However, as different countries take different approaches to electronic cigarettes, the adoption of one position over the other should not be fatal. Whichever approach is adopted, the absence of a satisfactory cessation programme risks undermining the Member State's argument of necessity, considering the consistent and systematic requirement, particularly where achievement of a particular quantifiable prevalence within the country may be dependent upon existing users ceasing use.

- Taxation – this is an important aspect in a Member State's tobacco control armoury. Taxation is presented as the most effective tobacco control measure. As mentioned above, only the WHO European Region (which includes the EU) has an average tax burden that meets the WHO's recommended 75% tax benchmark²⁰³. It is established that "[h]igher taxes and prices are particularly effective in reducing tobacco use in more vulnerable populations, including youth and lower-income people, given that these groups are particularly sensitive to price."²⁰⁴ If a Member State is not approaching taxation and therefore pricing of tobacco products in a way that deters initiation or maintenance of use, then this could undermine its argument that a tobacco endgame policy is necessary, as there could potentially be significant reduction in prevalence by higher taxation. The absence of high taxation could indicate that the Member State is not consistent and systematic in its approach to tobacco control. Whilst taxation in the EU is dependent upon the TTD, there are still significant disparities in pricing across, and within, Member States, not all of which can be accounted for based upon the differential purchasing power of Member States.
- Education – consistent with Article 12 FCTC, effective mass-media campaigns that educate the public about tobacco use, second-hand and third-hand smoke should be used. Whilst the impact of these may be difficult to measure, they contribute to the overall approach that a Member State takes, being part of Member State conduct aimed at denormalising tobacco smoking, and therefore contribute to the impression of a consistent and systematic approach.

²⁰¹ European Network for Smoking and Tobacco Prevention (ENSP), *European Smoking Cessation Guidelines: Learning from Real-Life Practice* (2012) https://ensp.network/wp-content/uploads/2016/12/ENSP-ESCG_FINAL.pdf accessed 17 March 2025.; page 147

²⁰² Public Health Communication Council, 'Will the Government's New Smokefree Plan Achieve Aotearoa's Smokefree Goal?' (Public Health Communication Council) <https://www.phcc.org.nz/briefing/will-governments-new-smokefree-plan-achieve-aotearoas-smokefree-goal> accessed 13 December 2024.

²⁰³ World Health Organization, 2023 *Global Progress Report on Implementation of the WHO Framework Convention on Tobacco Control* (World Health Organization, 2023) <https://www.who.int/publications/i/item/9789240065423> accessed 12 November 2024.; page 9

²⁰⁴ Tobacco Atlas, 'Taxes' (Tobacco Atlas) <https://tobaccoatlas.org/solutions/taxes/> accessed 16 November 2024.

- Smoke-free (and aerosol-free) environments – in line with the recently updated Council Recommendation²⁰⁵, exposure to second-hand tobacco smoke (and aerosol emissions) needs to be reduced or eliminated consistent with the denormalisation of combustible tobacco use.
- Enforcement – where legislation is in place, it follows that the enforcement of existing legislation should be effective. If the existing legislation is consistently not being enforced, this could make it more difficult for a country to argue that it is necessary to introduce further legislation. In such circumstances, it could be argued that enforcing existing legislation could achieve the same objective, which could be a fundamental flaw in any Member State's argument in support of its legislation. Further, if existing legislation cannot be enforced, it would be reasonable to consider whether the Member State could demonstrate that the new legislation would be enforced. These factors would inform whether the legislation could be considered necessary (and arguably appropriate to achieving the legitimate objective, as per the above section). Enforcement here applies to illicit trade and to enforcement of legal trade by retailers, ensuring compliance with existing age of sale limits, as well as other aspects of legislation such as smokefree environments. For example, in Denmark the use of 'mystery shoppers' has been permitted since 1 July 2024 and it identified that approximately one third of the shops violated age restrictions.²⁰⁶ Further, as the Finnish working group identified in its report, "*violations of smoking bans are rarely punished with a fine, and even less often is a procedure initiated concerning an administrative prohibition decision and periodic penalty payment. The situation is similar as regards the failure to take protective measures against exposure to tobacco smoke. However, the low rate of use of the sanctions is not due to the fact that smoking bans are not violated. It is rather that because of the scarce resources available to the supervisory authorities, it is considered that smoking offences are, as a rule, too minor to be sanctioned.*"²⁰⁷ Enforcement agencies must be properly resourced and enforcement measures should also include appropriate sanctions for those not complying with legislation.

Possible alternative comparators to the generational sales ban

As stated above, because an increased age of sale instead of a generational sales ban both apply Member States' competency on determining age of sales, it serves as an obvious comparator. However, it is not the only comparator. Comparisons to other tobacco endgame policies, which could be classified within the product-focused, user-focused, market/supply-focused, and institutional structure-focused categories could also be considered. It is not required that these all be considered, but where the attainment of tobacco endgame is the Member State's legitimate objective, it could also consider within its analysis of policy options alternative tobacco endgame policies, such as:

- Reduced nicotine-content within products – the concept of Very Low Nicotine Content (VLNC) cigarettes was established in the study Randomized Trial of Reduced-Nicotine Standards for Cigarettes²⁰⁸ conducted between June 2013 and July 2014. VLNC cigarettes are generally

²⁰⁵ Council of the European Union, *Council Recommendation on Smoke- and Aerosol-Free Environments* 15059/24 [2024] replacing Council Recommendation 2009/C 296/02.

²⁰⁶ Nordic Alcohol and Drug Policy Network, 'Denmark: More Than One-Third of Shops Sold Illegally to Minors' (*Nordic Alcohol and Drug Policy Network*) <https://www.nordicalcohol.org/post/denmark-more-than-one-third-of-shops-sold-illegally-to-minors> accessed 17 February 2025

²⁰⁷ Ministry of Social Affairs and Health, *Development of Tobacco and Nicotine Policy: Proposals for Action by the Working Group* (Reports and Memorandums of the Ministry of Social Affairs and Health 2023:14).; pages 70-1

²⁰⁸ Eric C. Donny et al, 'Randomized Trial of Reduced-Nicotine Standards for Cigarettes' (2015) 373 *New England Journal of Medicine* 1340 <https://doi.org/10.1056/NEJMoa1512602>.

defined as having 0.4mg or less of nicotine per gram of tobacco or per cigarette. This is the level at which it is considered that the nicotine content is at a non-addictive level. The current maximum in the EU is 1mg per cigarette.²⁰⁹ Recital 12 of the TPD²¹⁰ recognises the possibility that a reduction in the emission levels could be necessary and appropriate. The main goal of such a policy is to create less-addictive products with the aim of reducing tobacco use. In the New Zealand report *Modelling the impacts of tobacco denicotinisation on achieving the Smokefree 2025 goal in Aotearoa* the authors reported that the “*preliminary high-level modelling results suggest that a tobacco denicotinisation law could come close to achieving, or potentially achieve, the New Zealand Government’s Smokefree 2025 goal.*”²¹¹ The report also states “[t]he probability of success would further increase if it were supplemented with other interventions, such as mass-media campaigns and Quitline support”²¹² and advised of the need for more sophisticated modelling. In JATC2, it was concluded that “[d]espite VLNC being the most studied policy, there are still several evidence gaps. First, the feasibility of VLNC is unknown. Moreover, there is no evidence of its potential effects in terms of mental and physical health outcomes, possible transition to other tobacco or nicotine products or other substance use, and priority populations. Then, industry and illicit market responses are unknown. Finally, the threshold for developing dependence is currently unknown.”²¹³ However, in another study it was identified that “*All evidence syntheses on this topic concluded that the policy is likely to result in a notable reduction in cigarette smoking. The modelling studies also concluded that mandating a VLNC standard for cigarettes would likely significantly reduce smoking prevalence and related harm.*”²¹⁴

- Reduced points of sale – this is a policy which has been addressed previously within the EU, including in Hungary when it reduced the number of outlets permitted to sell tobacco from 42,000 to 7,000.²¹⁵ It also currently forms part of the Netherlands’ legislative approach.²¹⁶ The principle behind this is that reduced points of sale can create a friction for obtaining and therefore consuming the products, and consequently decrease prevalence.
- Introducing licences with fees – this is part of the UK’s legislative approach, consistent with the Khan Report. This could be separate to, or in conjunction with, reduced points of sale. It would reduce where tobacco is sold and would reduce underage and illicit sales, protecting businesses. The consequence for businesses that did not comply with the terms of their licence could include substantial fines or revocation of that licence and therefore a loss of their business. Knowledge of licensed premises would also limit the number of establishments which would require enforcement and therefore could help compliance and enforcement with the age of sale. However, it is important to be mindful of the potential for unintended consequences, such as reducing the availability of tobacco products in rural communities, these being communities which may already be affected by inequality. Consequently, any licensing system should consider the

²⁰⁹ Tobacco Products Directive (EU) 2014/40/EU of the European Parliament and of the Council of 3 April 2014 [2014] OJ L 127/1.; Article 3(1)(b)

²¹⁰ *ibid.* page 2

²¹¹ Nick Wilson, Janet Hoek, Nhung Nghiem, Jennifer Summers, Leah Grout, and Richard Edwards, ‘Modelling the Impacts of Tobacco Denicotinisation on Achieving the Smokefree 2025 Goal in Aotearoa New Zealand’ (2022) 135(1548) *New Zealand Medical Journal* <https://www.nzma.org.nz/journal>.; page 4

²¹² *ibid.*; page 8

²¹³ Otto Ruokolainen et al, ‘Tobacco Endgame Measures and Their Adaptation in Selected European Countries: A Narrative Review Synthesis’ (*Tobacco Prevention & Cessation* 2024 10(April):18) <https://doi.org/10.18332/tpc/186402>.; page 4

²¹⁴ Puljević C, Morphet K, Hefler M, et al, ‘Tobacco Control’ (2022) 31 *Tobacco Control* 365–375.; page 367

²¹⁵ Kuijpers TG, *Tobacco Control Policymaking in Europe: A Tug of War* (PhD Thesis, Maastricht University 2020) <https://doi.org/10.26481/dis.20200417tk>.; page 31

²¹⁶ The Ministry of Health, Welfare and Sport, *The National Prevention Agreement: A Healthier Netherlands* (June 2019) <https://www.government.nl/topics/prevention-agreement>.; page 21

number of licensed tobacco retailers based on geography or population so as not to penalise existing users in certain areas.

Member States considering introducing a generational sales ban should consider whether they would be introducing this as stand-alone legislation, or as one part of a comprehensive package of legislation aimed at seeking to achieve the tobacco endgame target. Where a Member State introduces the legislation on a stand-alone basis, the analysis of existing legislation and its effectiveness would likely be more detailed. Where the measure is part of a series of measures introduced at the same time to seek to achieve the tobacco endgame target, the effectiveness of any particular aspect of the legislation would be harder to demonstrate and this may be apparent in the forecasting. Whilst this may lessen the degree of scrutiny that could be applied to the particular tobacco endgame policy, it may give rise to questions about the need for this particular policy where introduction of the other aspects of the legislation could potentially achieve the same result. This would all need to be fully established within the modelling evidence as part of the preparatory process.

A fixed decision?

Member States should consider whether a generational sales ban would be a permanent measure, or one subject to review. As can be seen from *Scotch Whisky*, the existence of a sunset clause is a factor which is taken into account within the proportionality analysis. This can also be seen in *British American Tobacco v Secretary of State for Health* “the willingness of the State to review the efficacy of a measure against the posited objectives has been recognised by the Courts as a factor militating in favour of the proportionality of an impugned measure. Logic dictates that the margin of appreciation of a State that is committed to reviewing efficacy should be greater than for one that intends resolutely to lay down a rigid and immutable policy within no acknowledged possibility of future review.”²¹⁷ Therefore, it is conceivable that a generational sales ban which annually increased the age of sale could be subject to review at a specified date, for example in 2040 to ascertain whether the <5% target had been achieved and whether it would be necessary to continue with the legislation as in force, or to amend this. That decision would be subject to the legislature of the Member State at that time, based upon the evidence available to it at that point. That any legislation introducing a generational sales ban includes an established review point could be a positive weighting in the proportionality analysis.

Stricto sensu/fair balance

The above analysis is necessary within both the free movement of goods and any fundamental rights challenge. This section addresses a supplementary consideration in respect of any challenge that might be based on fundamental rights. It is intended to provide a snapshot of the points that would be relevant to consider, but is not presented as exhaustive.

It is first necessary to recognise that whilst discrimination based on age is prohibited, the exercise of rights and freedoms may be limited subject to the principle of proportionality, where they are necessary and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others. As Berrick identifies, cohort discrimination already occurs widely.²¹⁸ In conjunction with this acknowledgement, it must also be recalled that, pursuant to ICESCR Article 12²¹⁹, everyone is entitled to

²¹⁷ *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin).; para 457

²¹⁸ A J Berrick, ‘The Tobacco-Free Generation Proposal’ (2013) 22 *Tob Control* i22 doi:10.1136/tobaccocontrol-2012-050865 accessed 31 October 2024.; page 25

²¹⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

“the enjoyment of the highest attainable standard of physical and mental health”, including the “prevention, treatment and control of epidemic, endemic, occupational and other diseases”. This should be recalled alongside the rights of the child set out above, where it must be understood that most people who smoke start before adulthood, when capacity for long-term decision-making is not yet fully developed, and nicotine addiction can significantly impact an individual's liberty, health and mental wellbeing²²⁰. Governments have a responsibility to protect the rights of children and the public more widely. The objective of the FCTC itself, as provided for in Article 3, is *“to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke”.*²²¹

Further, smoking by an individual does not just affect that individual, it has health consequences for others, including those who do not smoke, both adults and children, and unborn children. The consequences are not purely health related, but also environmental and socio-economic, the costs of which are borne by the public purse, a factor not addressed in detail in this report, but economic considerations are relevant within the balancing exercise for governments. Such an analysis would need to consider the impact of lost productivity and the low multiplier effect of spending on tobacco products which does not contribute significantly to job creation, income generation or economic growth except for the tobacco industry itself. For example, as detailed in the Commission Staff Working Document Review of Europe's Beating Cancer Plan *“per capita health expenditure on cancer care is expected to grow by 59% on average in the EU between 2023 and 2050. On average, health expenditure in the EU is estimated to be 4.7% higher in 2050 in real terms than in 2023 due to the fight against cancer.”*²²² Further, *“it is estimated that Member States lose the equivalent of 1.1 million full-time workers per year from cancer.”*²²³ These costs are only in respect of cancer. It is notable that in the Commission's proposal for a Council Recommendation, it is recorded that *“the economic impacts are overridden by the public health benefits and the expected savings for healthcare systems and reduced environmental costs”*²²⁴, a position supported by the majority of Member States in their consultation responses.²²⁵

Whilst respect for private and family life²²⁶ does not include a ‘right to smoke’, it does require public authorities to abstain from unjustified interference in people's private sphere. The use of combustible tobacco does not just affect the individual, but the wider public, and therefore impacts upon non-users' right to health. Within the balancing exercise, reliance on Article 168(1) and Article 35 of the Charter could be used to justify such interference. It would be within the Member State's discretion / margin of appreciation to balance those rights and determine the approach which it considers provides the appropriate level of protection for its citizens' health.

In Annex C of the Explanatory Notes of the Tobacco and Vapes Bill the UK government addresses the question of rights and discrimination. Its position is:

²²⁰ Yvette van der Eijk and Gerard Porter, 'Human Rights and Ethical Considerations for a Tobacco-Free Generation' (2015) 24 *Tobacco Control* 238-242 <https://doi.org/10.1136/tobaccocontrol-2013-051125>; page 239

²²¹ World Health Organization Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166.

²²² European Commission, *Commission Staff Working Document: Review of Europe's Beating Cancer Plan* SWD(2025) 39 final (4 February 2025) https://ec.europa.eu/health/system/files/2025-02/cancer_plan_review_en.pdf accessed 14 February 2025.; page 3

²²³ Ibid.

²²⁴ European Commission, 'Proposal for a Council Recommendation on Strengthening Tobacco Control' COM(2024) 55 final (17 September 2024).; page 6

²²⁵ Ibid.; page 7

²²⁶ Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) [2000] OJ C 364/1.; Article 7 and European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.; Article 8

3. *The progressive smoking ban which will apply to a cohort of the UK population born on or after 1 January 2009 may engage the right of peaceful enjoyment to the possessions of those businesses affected by an expected reduction in sales of tobacco products to the UK market. If, or to the extent that, Article 1 Protocol 1 (A1P1) is engaged then the Department considers that any interference can be justified and is proportionate.*

4. *The progressive smoking ban is provided for by law as it is contained in primary legislation subject to significant parliamentary scrutiny. The provisions pursue legitimate aims including preventing young people from becoming addicted to tobacco and protecting public health by gradually eliminating use of tobacco products. The Department considers that the measures are a proportionate means to achieve these aims with no less restrictive measure achieving the same effect, and do not impose an undue burden on affected businesses.*

5. *Individuals born before 1 January 2009 will be able to be sold tobacco products from age 18 as now. Someone born on 31 December 2008 will be in a different position from someone born on 1 January 2009. This difference in treatment could potentially engage the right to enjoy ECHR rights without discrimination (Article 14) if this measure is within the ambit of a substantive ECHR right such as Article 8: right to respect for family and private life.*

6. *The Department's view is that these measures which control the sale of tobacco products without otherwise prohibiting or limiting what individuals can do would not engage the right to private and family life. The legislation would not criminalise individuals in the affected cohort for possessing tobacco products or smoking.*

7. *Alternatively, if these measures are within the ambit of Article 8, the Department considers that any interference (Article 8) and any differential treatment (Article 14) can be justified and is proportionate. The only practical way for the measure to be introduced is with a cut-off date after which individuals cannot be sold tobacco; this prohibition is limited in that it will apply to a subset of individuals only (those born on or after 1 January 2009). The justification for any difference of treatment is that this is necessary in order to introduce the measure to achieve the legitimate aim of the protection of public health. There is no less restrictive way to achieve the aim of ultimately making smoking and use of tobacco obsolete. Any interference with Article 8 is justified under Article 8(2) for being in accordance with the law and necessary and proportionate in a democratic society in pursuit of a legitimate aim to protect public health.²²⁷*

A generational sales ban balances the rights of those who are already legally able to be sold combustible tobacco by ensuring that the product remains available on the market for them, rather being removed from the market and falling within Article 24 TPD. Whilst there is no 'right to smoke', this approach acknowledges that it would be unduly burdensome upon individuals whose nicotine addiction is met through use of commercial combustible tobacco to prevent them from continuing to meet this addiction through maintaining the legal sale of the products to those already able to be legally sold the products.

Finally, it is necessary to emphasise that a generational sales ban is designed as a method to prevent the uptake of smoking by making it legally impossible for retailers to sell combustible tobacco to those under the legal purchase age. As point 6 of the Explanatory Notes above also addresses, an individual

²²⁷ Tobacco and Vapes Bill, *Explanatory Notes* (HC Bill 121, introduced in the House of Commons on 5 November 2024).; Annex C paras 106-7

who cannot legally be sold combustible tobacco as a result of a generational sales ban is not criminalised for smoking or possessing tobacco products. This point echoes the position of the Truth Initiative and takes into account the concerns of Barrett and Hannah set out at the beginning of this chapter. This would therefore limit the extent of the government's interference.

Support for tobacco endgame policies

A Member State's readiness to implement tobacco endgame policies is influenced by various factors that shape political will, with public support being a key determinant. Therefore, monitoring public opinion, particularly among those most affected: those who smoke, is crucial when considering these measures.²²⁸

A recent systematic review found high levels of public support for tobacco endgame policies. The measure with the highest support amongst the general population is mandating a very low nicotine content (VLNC) standard to make cigarettes less addictive (median: 76%, IQR: 47%–86%), followed by restricting tobacco sales by birth year (median: 74%, IQR: 56%–79%). While support among people who smoke is generally lower, evidence suggests that it remains moderate for most strategies.²²⁹

Another particularly relevant population are adolescents and young adults, especially when discussing a generational sales ban. In general, this population group showed lower support for all policies compared to the general public; however, evidence shows that almost seven out of 10 adolescents and young adults are in favour of a tobacco-free generation policy.

Although research on public support for tobacco endgame policies in the EU is still limited, evidence from New Zealand, the United States, and the United Kingdom — countries at similar stages of the tobacco epidemic — suggests that such policies may also receive broad public acceptance in other high-income countries, including in EU Member States.

Whilst this report focuses on the legal feasibility of a generational sales ban, Member States should consider the extent to which public support can positively to their arguments in support of the policy. Public support is unlikely to be a determinative factor, but a positive response from the public could contribute to the overall impression that the measure is appropriate and necessary within the specific context of the Member State. Public support would also indicate that the tobacco industry, and its products, are being denormalised, which is an important factor in seeking to achieve tobacco endgame.

²²⁸ Sahaana Tamil Selvan, Xue Xin Yeo and Yvette van der Eijk, 'Which countries are ready for a tobacco endgame? A scoping review and cluster analysis' (2024) 12(6) *Lancet Global Health* e1049–e1058. <https://www.thelancet.com/action/showPdf?pii=S2214-109X%2824%2900085-8> accessed 18 October 2024; page e1051

²²⁹ Hana Kim et al, 'Public Support for Tobacco Endgame Policies: A Systematic Review and Meta-Analysis' (2024) *Nicotine & Tobacco Research* ntae149 <https://doi.org/10.1093/ntr/ntae149> accessed 17 March 2025.

Key points:

- Public health protection from the devastating consequences of commercial combustible tobacco use can be the basis for a legitimate objective;
- Member States could be guided in setting their objectives by the EU's EBCP and could align with that, which the court would be expected to be supportive of. However, that should not be taken to limit the public health protection which Member States wish to guarantee and there remains discretion with Member States to determine the level of protection they seek to ensure. This means that a different tobacco endgame target to the EBCP can also be a legitimate objective;
- Member States introducing a generational sales ban to seek to achieve their tobacco endgame target need to ensure that they have conducted sufficient analysis of the appropriateness of that policy to achieving their established objective and that they can demonstrate that the policy is necessary for achievement of that objective. This requires consideration of alternative options and an analysis of whether the other options could achieve the same objective whilst being less restrictive on trade. The analysis of appropriateness and necessity is to be conducted against the legitimate objective of the Member State and not against other Member State's objectives or policies; and
- Any balancing exercise which may be required should identify the rights which would be interfered with and consider how these are balanced against the protection of public health.

Industry interference

The continuous elephant in the room in any discussion about tobacco control or tobacco endgame policies is the tobacco industry itself. The tobacco industry knows that, in producing, manufacturing, selling and marketing combustible tobacco products, it is providing a product which is dangerous for human health.

In January 2018, Philip Morris International announced in its UK advertising campaign that it was “*trying to give up cigarettes*”²³⁰. In its *Unsmoke* campaign it stated “*If you don’t smoke, don’t start. If you smoke, quit. If you don’t quit, change.*”²³¹ In July 2021 it said it could stop selling cigarettes in the UK in 10 years’ time, stating it could “*see a world without cigarettes - the sooner it happens, the better it is for everyone*”²³². It is not alone in this position, British American Tobacco has articulated its vision to ‘*Build a Smokeless World*’,²³³ although has not committed to a timeline for ceasing cigarette sales, with Imperial Brands (formerly Imperial Tobacco) having its similar ‘*Beyond Smoke*’ initiative.²³⁴

These public positions are, at least in part, a marketing tool for the alternative nicotine delivery systems that these companies have developed and are developing. They aim to sell increasing quantities of these under the messaging that these are ‘reduced harm’ products, relying on and promoting their own research. Philip Morris International, for example, was trying to push its IQOS product, despite simultaneously claiming that its Heated Tobacco Product is not intended to help people quit smoking²³⁵. The narrative is not that these products are not harmful, just less so. Given that commercial combustible tobacco is the most harmful product on the market, one can fairly ask what product would not have a lower level of harm. Importantly, they have not stopped selling cigarettes, despite their messaging and that to do so is within their control.

As the focus of this report is on tobacco endgame, not alternative nicotine products, it is beyond the immediate scope of this report to analyse the harm which such newer products can cause. However, it is relevant to note the public positions of the tobacco industry and contrast that with its approach towards tobacco regulation. This is because, reading these statements and campaigns, the public could be forgiven for believing that tobacco industry is supportive of tobacco control and tobacco endgame, particularly as realisation of the latter would create the scenario that these companies claim they want to see. The reality is, of course, much different, with tobacco industry companies challenging any legislation which could promote public health, and therefore detrimentally impact their business model.

²³⁰ CNN, ‘Philip Morris Sets Out to Ditch Cigarettes as it Launches Anti-Smoking Campaign’ (CNN, 3 January 2018) <https://edition.cnn.com/2018/01/03/news/philip-morris-anti-smoking-uk/index.html> accessed 10 February 2025.

²³¹ Business Wire, ‘Philip Morris International Enters the “Year of Unsmoke”—Calls on All Those Who Can Empower a Smoke-Free Future’ (Business Wire, 7 April 2019) <https://www.businesswire.com/news/home/20190407005044/en/Philip-Morris-International-Enters-the-%E2%80%98Year-of-Unsmoke%E2%80%99%E2%80%94Calls-on-All-Those-Who-Can-Empower-a-Smoke-Free-Future> accessed 10 February 2025

²³² BBC News, ‘Philip Morris: Tobacco Giant Aims to Stop Selling Cigarettes in UK’ (BBC News, 26 July 2021) <https://www.bbc.com/news/business-57964253> accessed 10 February 2025

²³³ British American Tobacco, ‘BAT Launches Major Initiative to Make a Smokeless World a Reality’ (BAT, September 2024) <https://www.bat.com/media/press-releases/2024/september/bat-launches-major-initiative-to-make-a-smokeless-world-a-reality> accessed 10 February 2025.

²³⁴ Imperial Brands Science, ‘Beyond Smoke’ (Imperial Brands, 2024) <https://imperialbrandsscience.com/our-thoughts/beyond-smoke/> accessed 10 February 2025.

²³⁵ Philip Morris International, ‘FAQ’ (IQOS Netherlands) <https://nl.iqos.com/nl/myiqos/support/faq> accessed 10 February 2025.; **Will IQOS help me quit smoking?**

No. IQOS is not a device to help you quit smoking and it is not intended to be used as such. If you are concerned about the adverse effects of smoking, it is best to stop using tobacco altogether.

The tobacco industry also relies on the ‘reduced harm’ products as a way to present itself as part of the solution to the tobacco epidemic and therefore enter into discussions with governments. Allowing those that cause the harm to be part of the solution to the harm, via other harmful and addictive products, is illogical and irrational. Moreover, it is also in violation of Article 5.3 of the FCTC²³⁶ as solutions to the tobacco epidemic are public health matters, for which the tobacco industry with its corporate and vested interests, must not be a part. Further, as electronic cigarettes are leading to younger generations becoming addicted to nicotine and people who use electronic cigarettes are seven times more likely to become smokers one year later compared with people who have never used an electronic cigarette²³⁷, these products could undermine tobacco control.

In *Targeting the European Commission: The 7 Lobbying Techniques of Big Tobacco*, Corporate Europe Observatory summarised the tobacco industry’s main tactics as “1. *Promoting untruths* 2. *Postponing regulation* 3. *Playing the victim* 4. *Protesting against regulators* 5. *Preying on third countries* 6. *Pushing new technologies* 7. *Playing the EC [European Commission] off against member states*”.²³⁸ It explained that “[a]n approach that runs alongside many of the tactics used above is the attempt to use the EU, and particularly rules related to maintaining consistency across the single market, against member states. In this way tobacco lobbyists, as well as pro-vaping groups, argue that public health legislation in a particular member state distorts competition rules, or means that the EU single market is threatened as products are subject to different rules in different countries, and therefore cannot move freely.”²³⁹ Further, it explained “[r]eferences to the sanctity of the single market and the free movement of goods are widespread, suggesting lobbyists see this as an effective way to argue against legislation, and that they believe EU officials may be susceptible to this line of argument.”²⁴⁰

In the WHO report on the global tobacco epidemic 2023²⁴¹, it similarly detailed the nine main tactics which it identified the tobacco industry uses. These are:

TACTIC 1 Building increasingly elaborate alliances and front groups to represent its case-the “third party technique”

TACTIC 2 Attempting to fragment and weaken the public health community

TACTIC 3 Disputing and suppressing public health information

TACTIC 4 Producing and disseminating misleading research and information

TACTIC 5 Directly lobbying and influencing policymaking

TACTIC 6 Influencing “upstream” policies, including trade and investment agreements, to make it harder to pass public health regulations

²³⁶ World Health Organization Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166.

²³⁷ Truth Initiative, ‘Young People Who Vape Are Much More Likely to Become Daily Cigarette Smokers’ (Truth Initiative, [2020]) <https://truthinitiative.org/research-resources/emerging-tobacco-products/young-people-who-vape-are-much-more-likely-become> accessed 17 March 2025.

²³⁸ Corporate Europe Observatory, ‘Targeting the European Commission: The 7 Lobbying Techniques of Big Tobacco’ <https://corporateeurope.org/en/power-lobbies/2021/06/targeting-european-commission-7-lobbying-techniques-big-tobacco> accessed 16 December 2024.; page 4

²³⁹ *ibid.*; page 21

²⁴⁰ *ibid.*; page 22

²⁴¹ World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2023: Protect People from Tobacco Smoke* (World Health Organization, 2023) <https://www.who.int/publications/i/item/9789240065672> accessed 27 November 2024.

TACTIC 7 Litigating or threatening litigation

TACTIC 8 Facilitating and causing confusion around tobacco smuggling, and using this confusion to undermine tobacco control

*TACTIC 9 Seeking to manage and enhance its own reputation by rebranding themselves as environmentally and socially responsible to increase the ability to influence policy*²⁴²

It is tactic 7, with the references to the single market, which is apparent across most tobacco control-based litigation within the EU. However, that is not the only line of argument that the tobacco industry uses when challenging tobacco control measures, either in litigation or lobbying. It is therefore important to acknowledge these and address them at this stage, so that the potential counterarguments can be considered in the development phase of legislation which introduces a generational sales ban. The typical arguments advanced by the tobacco industry are:

- Legislation, particularly taxation, will lead to increased illicit trade – the argument used in response to almost every tobacco control measure introduced, the tobacco industry consistently argues that legislation which aims to reduce tobacco consumption, particularly through increased tax, will cause more people to purchase tobacco through illicit trade. Whilst the tobacco industry companies commission reports and have become the primary source of data on illicit trade, effectively setting the agenda, ensuring that the industry is presented as the victim²⁴³ (consistent with CEO's analysis), illicit trade in cigarettes costs governments an estimated \$40 billion per year in lost revenues.²⁴⁴ As detailed on *Tobacco Tactics* "diverse data covering the UK, the European Union (EU), and the world, consistently show that the single largest component of the illicit tobacco market is tobacco products that are actually manufactured legally by large tobacco companies before ending up on the illicit market"²⁴⁵. Tobacco industry reports on illicit tobacco "have often been criticised for lacking transparency and inadequate methodologies, producing inflated estimates of illicit tobacco trade and downplaying or concealing the presence of tobacco companies' product on the illicit market"²⁴⁶ and therefore any claims by the tobacco industry and reports produced to support this should be heavily scrutinised. As *Tobacco Tactics* summarises, "[i]n Europe, high levels of illicit tobacco trade are found in the countries with the lowest tobacco taxes."²⁴⁷ This is the inverse of the tobacco industry's claim. The tobacco industry's claims about illicit trade also illuminate their true motivations, which undermines their argument about use of combustible tobacco products being a 'free choice' (see below). The illicit market represents a lower cost option for some people who the tobacco industry has helped become addicted to nicotine, to meet their addiction. The tobacco industry's argument is effectively that, because it helped to create the addiction in people, it should continue to profit from this to the fullest extent possible. The tobacco industry knows that overcoming a nicotine addiction is extremely difficult

²⁴² *ibid.*; page 64

²⁴³ Corporate Europe Observatory, 'Targeting the European Commission: The 7 Lobbying Techniques of Big Tobacco' <https://corporateeurope.org/en/power-lobbies/2021/06/targeting-european-commission-7-lobbying-techniques-big-tobacco> accessed 16 December 2024.; page 6

²⁴⁴ OCCRP, 'The EU's Track & Trace Smokescreen' (Organized Crime and Corruption Reporting Project, 11 March 2020) <https://www.occrp.org/en/project/without-a-trace/the-eus-track-trace-smokescreen> accessed 19 November 2024.

²⁴⁵ *Tobacco Tactics*, *Tobacco Smuggling* (2024) <https://www.tobaccotactics.org/article/tobacco-smuggling/> accessed 11 February 2025.

²⁴⁶ Hird TR, Gallagher AWA, Evans-Reeves K, et al, 'Tobacco Control' (2022) 31:297–307 doi:10.1136/tobaccocontrol-2021-057030.; page 302

²⁴⁷ World Health Organization, *Tobacco Industry Tactics: Tax Policies* (WHO-EM/TFI/200/E, 2019) <https://extranet.who.int/fctcapps/sites/default/files/2023-05/FS-TFI-200-2019-EN.pdf> accessed 3 December 2024.; page 3

and in some circumstances that could lead people to seek out products on the illicit market when the legally sold products become more expensive. In countries with higher taxation, greater resources can be invested into enforcement to address illicit trade and aid in reducing prevalence.

- There will be a reduction in income for the treasury as fewer combustible tobacco products are purchased – an example of how this is presented is included in the WHO Technical Manual on Tobacco Tax Policy and Administration. In that it is explained that “[t]he tobacco industry and its allies argue that tobacco tax increases result in reduced tax revenues for the government. According to them, the reduction in revenues is caused either by substitution to cheaper, lower-taxed or smuggled tobacco products or by reductions in consumption overall.” It is further explained that “[t]he tobacco industry, in particular, frequently portrays this conflict as a false dichotomy between public health and the economy – as if prioritizing health comes at the expense of the economy. In fact, studies and real-world experiences have shown that increasing tobacco taxes not only improves public health but also has a net positive impact on the economy and development of a country – a true win-win scenario”. As the manual explains, “the price inelastic demand for tobacco and the relatively low tax share in prices in many countries explain the win-win for public health and finance, i.e. that declines in consumption and increases in revenues can occur simultaneously”.²⁴⁸ Additionally, countering this narrative, for the EU a “2021 evaluative study highlighted that any lost taxation revenue due to a decrease in smoking levels would be offset by the alternative investments and expenditures of the disposable income of households”, including that “[s]ome civil society organisations highlighted that the long-term reduction of mortality and morbidity from tobacco related diseases, the subsequent reduction of the cost to treat tobacco-related diseases and the substantial environmental benefits (such as reduction in waste and the reduction of deforestation as a result of tobacco growing) will outweigh any loss of income from tobacco taxation.”²⁴⁹ Having accurate financial calculations about the cost of implementing tobacco control and tobacco endgame policies is important to counter the industry’s narrative. It is also important to recognise within those calculations that whilst there may be a higher cost in the short-term of introducing certain measures, the long-term financial benefits as a result of improved public health offset the any loss in tax revenue.
- A price increase hurts people with the lowest income – this argument, based on the reality that people with lower incomes are more impacted by price rises, fails to recognise “the broader health and economic harms caused by tobacco use that exacerbate the impoverishment of lower-income smokers”²⁵⁰ and that these harms reduce when tobacco consumption decreases. This argument also does not address the behaviour change which can occur with higher tobacco taxes and prices, which is an intended consequence of the policy as part of tobacco control. Ultimately, it can be seen that increased tobacco taxation is “in fact, a progressive public health intervention that disproportionately benefits the poor.”²⁵¹
- Reduction in demand for products adversely impacting employment – for example in the consultation regarding the Council Recommendation, “the response from representatives of the

²⁴⁸ World Health Organization, *WHO Technical Manual on Tobacco Tax Policy and Administration* (2021) <https://www.who.int/publications/i/item/9789240062041>; page 236

²⁴⁹ European Commission, *Commission Staff Working Document: Accompanying the Document Proposal for Council Recommendation on Smoke- and Aerosol-Free Environments Replacing Council Recommendation 2009/C 296/02 SWD(2024) 55 final*, 17 September 2024.; page 12

²⁵⁰ World Health Organization, *WHO Technical Manual on Tobacco Tax Policy and Administration* (2021) <https://www.who.int/publications/i/item/9789240062041>; page 17

²⁵¹ Ibid.

tobacco industry was that the revision of the Recommendation and its extension of scope would result in a reduction of demand for both traditional tobacco products as well as emerging products such as electronic cigarettes which would also lead to reduced employment levels in the tobacco and emerging products sector. Nevertheless, no quantitative or factual estimation information was provided in support the mentioned negative effects and concerns. Throughout the consultation activities, particularly throughout the targeted survey, a common pattern of responding with ‘don’t know or can’t answer’ was observed for questions related to the economic impact of the initiative”.²⁵² This identifies immediately the absence of actual data to support these claims, which can be seen as unsubstantiated. An example of countering this narrative can be found in the UK’s Cost Benefit and Public Finance Model of Smoking study which reported “Across the 2024-29 parliament the package of tobacco control measures is estimated to increase employment by around 103,000 (summed across all years). Around three-quarters of this increase is due to the impact of consumers switching their expenditure out of tobacco products and into other goods and services, with the other one-quarter being due to the increase in employment arising from lower smoking prevalence (due to higher employment levels for non-smokers compared to smokers).”²⁵³ This shows how it is important to look beyond the unevidenced assertions made by the tobacco industry and establish the benefits of the policy; benefits which are not concentrated in the tobacco industry.

- A negative impact on the hospitality sector – an argument used against smoke- and aerosol-free restaurants and bars, this argument ignores that these are places of work for those in the hospitality sector and presents a fear of reduced income for business due to shorter or less frequent visits by customers. However, within the Commission’s Proposal for a Council Recommendation, it is recorded that “[n]o quantitative information or factual estimations were provided to support the negative economic impacts that were mentioned. In contrast, representatives of employees in the HORECA sector thought that the economic impact would be neutral and negligible.”²⁵⁴ The position of representatives of employees is consistent with the evidence presented by the WHO which records that “there is now ample and global evidence that counters these claims and clearly demonstrates that smoke-free policies cause no adverse economic outcomes for businesses, including restaurants and bars. In fact, smoke-free policies often have a positive economic impact on businesses.”²⁵⁵
- Free choice – as touched on above when considering fundamental rights, the tobacco industry seeks to portray use of combustible tobacco as an ‘adult choice’. However, as Berrick points out “a more accurate depiction of the present situation is ‘child choice, adult addiction’.”²⁵⁶ The tobacco industry seeks to portray government legislation aimed at reducing tobacco consumption with the cliché of it being part of a ‘nanny state’, despite such actions being in line with the responsibility of government “to limit the activities of commercial interests that might harm the

²⁵² European Commission, *Commission Staff Working Document: Accompanying the Document Proposal for Council Recommendation on Smoke- and Aerosol-Free Environments Replacing Council Recommendation 2009/C 296/02 SWD(2024) 55 final*, 17 September 2024.; page 13

²⁵³ Howard Reed, *Cost Benefit and Public Finance Model of Smoking, Version 2.2* (Landman Economics, May 2024).; page 37

²⁵⁴ European Commission, *Commission Staff Working Document: Accompanying the Document Proposal for Council Recommendation on Smoke- and Aerosol-Free Environments Replacing Council Recommendation 2009/C 296/02 SWD(2024) 55 final*, 17 September 2024.; page 8

²⁵⁵ World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2023: Protect People from Tobacco Smoke* (World Health Organization, 2023) <https://www.who.int/publications/i/item/9789240065672> accessed 27 November 2024.; page 50

²⁵⁶ A J Berrick, ‘The Tobacco-Free Generation Proposal’ (2013) 22 *Tob Control* i22 doi:10.1136/tobaccocontrol-2012-050865 accessed 31 October 2024.; page 25

individual or society and the economy."²⁵⁷ The tobacco industry also seeks to frame tobacco control as 'prohibition', which can be seen for example in Japan Tobacco International's submission²⁵⁸ in response to the Proposals for a Smokefree Aotearoa 2025 Action Plan, in which the company argued that 'prohibition' *"as demonstrated in the past, is ineffective in reducing the consumption of harmful products"*. It simultaneously argued that *"smoking behavior is complex and uniquely individual; it cannot be explained simply by the psychopharmacological effects of nicotine, including the amount of nicotine a smoker obtains"* and that *"smoking does not compromise a smoker's free will to undertake a quit attempt and pursue that effort. As a result, all smokers can stop smoking if they choose to."* Tobacco control advocates seek to reframe this as 'abolition', freeing people of the deleterious effects of nicotine addiction, given that it is well established that *"[s]moking is not an autonomous act. The effect of nicotine on brain circuits and its involvement in conditioning behaviour related to nicotine circumvents self-reflection of volitions in favour of strong internal biological preferences."*²⁵⁹ When thinking about tobacco control and tobacco endgame policies which protect children and young people, it is necessary to reframe the argument in the terms presented by Andreas Schmidt in Is there a human right to tobacco control in Human Rights and Tobacco Control in which he argues *"[i]f a person's freedom matters now, her future freedom should also matter. If a young person takes up smoking, she might develop a strong addiction and, as a result, her future health, life expectancy and expected disposable income will be drastically reduced. As a result, her expected future freedom is drastically reduced. Therefore, removing the option to smoke can sometimes increase a person's expected future freedom. Therefore, a concern with freedom of choice can speak for rather than against strict tobacco control."*²⁶⁰ Whilst not every tobacco control or endgame advocate may wish to use the terminology of abolition, itself being a word to which a lot of meaning and emotion can be attached, avoiding and countering the framing of prohibition is a necessity.

- The slippery slope argument – the tobacco industry argues that tobacco control or tobacco endgame policies are the beginning of a trend which will be applied to other products such as junk food and alcohol. Whilst it is not inconceivable that tobacco and nicotine products could be addressed as part of a Member State's overall approach towards improving the health of its citizens by addressing the commercial determinants of health²⁶¹, the differences between combustible tobacco products and other products must be part of public education to address this argument. For example, alcohol is far less addictive than nicotine, and when compared to food, which everybody requires to survive, it is important to emphasise that use of combustible tobacco does not have any benefits, other than to those already addicted to the nicotine contained within it. With tobacco control and tobacco endgame policies, the objective is to stop the use of that product. This same objective does not apply to alcohol or junk food. Therefore, messaging about tobacco control and tobacco endgame policies *"requires comprehending and developing*

²⁵⁷ National Institute for Health and Welfare (THL), 'Key Considerations and Common Myths' (THL, 2024) <https://thl.fi/en/research-and-development/research-and-projects/tobacco-endgame-toolkit/key-considerations-and-common-myths> accessed 17 November 2024.

²⁵⁸ Ministry of Health (New Zealand), 'Smokefree 2025 Action Plan Consultation' (Consultation Document, 2024) https://consult.health.govt.nz/tobacco-control/smokefree2025-actionplan/consultation/view_respondent?show_all_questions=0&sort=submitted&order=ascending&q_text=&q_question-2021-04-07-3672953629-checkboxsubquestion=Tobacco+manufacturer%2C+importer+or+distributor&uuld=418570873 accessed 22 November 2024.

²⁵⁹ Shazeea Mohamed Ali, 'Smoking & Autonomy: The Generational Tobacco Endgame' (2024) *Monash Bioethics Review*, doi:10.1007/s40592-024-00207-0 accessed 2 December 2024.; page 11

²⁶⁰ Andreas Schmidt, 'Is there a human right to tobacco control' in M E Gispen and B Toebe (eds), *Human Rights and Tobacco Control* (Edward Elgar Publishing 2020) 112.; page 52

²⁶¹ Indeed, it is identified above that this may be the public health objective for which tobacco endgame policies form one part of.

strategies for conveying to the public that the cigarette industry is an extreme outlier in the legal and regulatory landscape of consumer protection, rather than an ordinary business."²⁶²

- The 'it won't work' argument – the tobacco industry will claim that tobacco control or tobacco endgame policies will have a detrimental effect on matters such as their business or on government tax revenues, whilst simultaneously claiming that the tobacco control or tobacco endgame policies will not work. This argument lacks internal logical consistency. It must be remembered that scientific uncertainty is a recognised principle in the analysis of policies, and that new and novel policies which do not have an established evidence base cannot simply be dismissed because they have not been proven to work.

Particularly within legal proceedings, the tobacco industry or those operating on its behalf argue frequently on the basis of:

- The right to property – this argument rests on tobacco industry trademarks and other relevant intellectual property, and the claim that tobacco control policies unlawfully interfere with their use. Whilst the right to property appears in the Charter and the European Convention on Human Rights, as well as contained within WTO agreements, it is not an absolute right so the exercise of the right can be restricted where those restrictions correspond to objectives of general interests and are not a disproportionate and intolerable interference (a clear link with proportionality above). Where the restrictions pursue legitimate public health-based interests and the use of the rights remain with the companies, such claims do not usually succeed. When courts have been tasked with considering tobacco industry arguments about the right to property they have stated *"while that right forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function"*²⁶³ and held that a *"trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power"*²⁶⁴. When considering the question of compensation, they have concluded *"[t]obacco usage is classified as a health evil, albeit that it remains lawful. There is no precedent where the law has provided compensation for the suppression of a property right which facilitates and furthers, quite deliberately, a health epidemic. And moreover, a health epidemic which imposes vast negative health and other costs upon the very State that is then being expected to compensate the property right holder for ceasing to facilitate the epidemic."*²⁶⁵ Whilst the right to property is an example of the tobacco industry using fundamental or human rights arguments to challenge tobacco control measures, the balancing exercises identified in the previous chapter recognise the importance of public health within that analysis.
- The freedom to conduct a business – this argument is that tobacco control policies unlawfully impact tobacco industry companies' ability to conduct a business, a freedom contained within the Charter. The CJEU has held that *"the freedom to conduct a business does not constitute an unfettered prerogative, but must be examined in the light of its function in society"*²⁶⁶, it being a right which is subject to a variety of different laws such as tax, environmental, and health and

²⁶² Smith EA and Malone RE, 'An Argument for Phasing Out Sales of Cigarettes' (2020) 29 *Tobacco Control* 703-708, doi:10.1136/tobaccocontrol-2019-055079.; page 704

²⁶³ C-491/01 *British American Tobacco v Secretary of State for Health* [2002] ECR I-11453.; para 149

²⁶⁴ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award (8 July 2016).; para 271

²⁶⁵ *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin).; para 38

²⁶⁶ Case C-477/14, *Pillbox 38 (UK) Ltd v The Secretary of State for Health* [2016] ECLI:EU:C:2016:324.; para 157

safety, and “may thus be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest”²⁶⁷. Importantly when considering that a generational sales ban would reduce the size of the market over time, the CJEU has also held “[n]o economic operator can claim a right to property in a market share, even if he held it at a time before the introduction of a measure affecting that market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances. Nor can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power will be maintained.”²⁶⁸ WTO case law also contains comparable statements, such as in *Philip Morris v Uruguay* where the tribunal stated “in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products.”²⁶⁹ This is significant point, which should read in conjunction with court judgments on the damaging health consequences of combustible tobacco, and with tobacco industry companies’ own publicly stated positions about the need to decrease the sale of combustible tobacco.

Whilst the claims from the tobacco industry are often not quantified, the industry’s approach to evidence can also be seen as problematic. The two main ways in which this regularly presents are:

1. It commissions its own evidence to support its position, such as with illicit trade, but the reports lack transparency and methodology. British American Tobacco’s recently launched Omni™ is an example of tobacco industry funded research being used as resource aimed at promoting its own science.²⁷⁰ Courts have been critical of tobacco industry funded research when it has been presented as evidence within legal proceedings, for example: “[i]n my judgment the Government was entitled to conclude that the tobacco companies’ evidence did fall below acceptable standards during the consultation. The conclusions which have arisen from the US courts about the sharp discord between what the tobacco companies think inside their own four walls and what they then say to the outside world (especially through experts), are so damning and the evidence of the discord so compelling and far reaching that it is not at all surprising that the WHO concluded that there was an evidence base upon which to found their recommendations to contracting states to apply vigilance and demand accountability and transparency in their dealing with the tobacco companies.”²⁷¹ Further, the court in the same case stated “[a]s a generality, the Claimants’ evidence is largely: not peer reviewed; frequently not tendered with a statement of truth or declaration that complies with the CPR; almost universally prepared without any reference to the internal documentation or data of the tobacco companies themselves; either ignores or airily dismisses the worldwide research and literature base which contradicts evidence tendered by the tobacco industry; and, is frequently unverifiable.”²⁷² For instance, in response to Australia’s introduction of plain packaging, Philip Morris International funded and heavily publicised two studies into the impact of the measure on smoking prevalence, the conception and design of which were considered to be flawed.²⁷³

²⁶⁷ *ibid.*; para 158

²⁶⁸ Case C-210/03 *Swedish Match AB v. Secretary of State for Health* [2004] ECR I-11893.; para 73

²⁶⁹ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) Award (8 July 2016).; para 430

²⁷⁰ British American Tobacco, *A Smokeless World* (2024)

https://www.asokelessworld.com/gb/en?utm_source=bat_com&utm_medium=referral&utm_campaign=omni_launch_2024&utm_content=landing_page_txt_link accessed 18 February 2025.

²⁷¹ *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin).; para 21

²⁷² *ibid.*; para 23

²⁷³ Anthony A Laverty et al, ‘Use and Abuse of Statistics in Tobacco Industry-Funded Research on Standardised Packaging’ (2015) 24(5) *Tobacco Control* 422 <https://doi.org/10.1136/tobaccocontrol-2014-052051> accessed 18 March 2025.

2. Simultaneously, the industry claims to not have evidence of relevant information, such that its claims are not backed up by fact. This has also been criticised by the courts. An example of this was in response to the UK government's introduction of standardised packaging, which was challenged by tobacco industry companies, who claimed not to have evidence of minors' consumption of tobacco. In respect of Japan Tobacco International's claims the court stated "*I find this statement remarkable. The evidence from the Secretary of State (which is not disputed by the Claimants and indeed was reflected in the evidence of JTI's own experts) is that the vast majority of smokers take up smoking before they are in their early 20s and most before they are 18 years of age. Youth smoking is critical to the future of the tobacco companies.*" It further stated, "*How, rhetorically one asks, can JTI have "no interest" in information about consumption of tobacco by children? Growth in sales depends upon the advent of youth smoking which is an enormous social and future health problem. And what sort of Nelsonian knowledge²⁷⁴ is reflected in the global strategy of a company that is not only disinterested but also refuses to even "accept" (see paragraph (e) of the JTI position (supra)) marketing data about children and which has no interest in even learning about children?*"²⁷⁵. In the same case, Philip Morris International made a similar claim about not having detailed research or analysis about tobacco prevalence or consumption. The court stated "*I confess to also finding this statement perplexing. It amounts to a statement that in relation to fundamental aspects of PMI's business, which is one of the most highly regulated in the world, it does not conduct any 'detailed' (whatever that term means) research or analysis at all. If PMI did not perform this sort of work in-house in relation to Australia and the UK, the first two states worldwide to introduce legislation, then there has to be a reason why not. PMI objects elsewhere to the Regulations because they amount to an "... unprecedented and radical curtailment of [PMI's] intellectual property rights (and the billions of pounds of damage that will ensue)" – yet they say that they do not "generally" (again – whatever that term means) conduct any internal assessment of this unprecedented and radical threat to the business? It is hard to conceive of any international company turning quite so deliberately away from analysing this sort of fundamental threat, unless there was a compelling strategic justification, namely the fear that such internal analysis and evaluation might, in due course, in regulatory or judicial proceedings, be exposed to critical scrutiny.*"²⁷⁶ Whilst these extracts of the court's judgment are lengthy, they are included to demonstrate the scepticism with which courts view unfounded tobacco industry claims and why it is necessary that, within any legal proceedings which might challenge tobacco control or tobacco endgame policies, these claims are properly tested.

Analysis by the University of Bath of the tobacco industry's response to the UK government's Tobacco and Vapes Bill identified the framing strategies used in response to the proposed legislation.²⁷⁷ This identified how the tobacco industry portrayed itself as 'good' and others, including the public health community, as 'bad'; trivialised and individualised the problem; and presented the generational sales ban as 'bad' and its alternative solutions as 'good'. Its responses attacked policies and processes, as well as arguing that the policy would cause losses for businesses, economy and society. The consistency between these actions and the approaches detailed at the beginning of this chapter, and throughout it, are clear. This illustrates how the tobacco industry approaches challenging a generational sales ban

²⁷⁴ This means knowledge which is attributed to a person as a consequence of his 'wilful blindness' or commonly known as wilful ignorance.

²⁷⁵ *British American Tobacco v Secretary of State for Health* [2016] EWHC 1169 (Admin).; para 296

²⁷⁶ *ibid.*; para 299

²⁷⁷ B K Matthes et al, 'The UK Tobacco and Vapes Bill (2023/4): framing strategies used by tobacco and nicotine industry actors faced with an endgame policy (a generational sales ban of tobacco products) and nicotine product restrictions' (2025) *Tobacco Control* <https://doi.org/10.1136/tc-2024-059207> accessed 24 March 2025.

policy as it does other tobacco control policies. This analysis helps Member States considering introducing a generational sales ban with understanding the approaches that it is likely to encounter within the development of such a policy. It also underlines the necessity for Member States to consider the relevant factors within the proportionality analysis set out in the preceding chapter, as it is evident that the tobacco industry will seek to utilise as many different arguments as it can against the implementation of a generational sales ban, given the consequence it would have for them. Member States have to be prepared for this.

Given the frequency of legal challenge by the tobacco industry, it is particularly notable that when Beverly Hills and Manhattan Beach, California, ended the sale of cigarettes and other tobacco products from January 2021, the tobacco industry did not challenge this legislation.²⁷⁸ This notable exception perhaps demonstrates that the tobacco industry does not want to risk placing further attention through litigation, or a positive court judgment which other jurisdictions could point to as an example of what is possible within tobacco control and tobacco endgame.

Whilst this report presumes that Member States considering introducing a generational sales ban could reasonably expect challenge to the legislation which introduces such a tobacco endgame policy, the example of Beverly Hills and Manhattan Beach and the tobacco industry's reluctance to challenge a truly endgame policy, should not be ignored. This possible reluctance on behalf of the tobacco industry can also be seen in the University of Bath's analysis, which identified "[u]nlike during standardised packaging debates—the last major UK policy change—TTCs [transnational tobacco companies] have not launched an extensive media campaign. This may be because doing so would openly contradict their 'transformation' narratives or due to the widespread public, political and expert support for the GSB [generational sales ban]."²⁷⁹ Whether the tobacco industry ultimately decides to publicly argue against its own commercial strategy to challenge the legislation, should it become law in the UK, remains to be seen.

What should be of concern is that, despite the above tactics of the tobacco industry, through its 'reduced harm' products and claims to want to stop selling cigarettes, as well as co-opting terms such as 'smoke-free', the companies are presenting themselves as having 'transformed' and are therefore being invited to speak with governments as part of the solution for addressing tobacco consumption. This is in violation of Article 5.3 of the FCTC. Caution must therefore be exercised by Member States, and tobacco control advocates, to not allow the tobacco industry to also seek to define tobacco endgame.

Key points:

- The tobacco industry has a wide range of approaches it uses to seek to undermine, delay or prevent tobacco control legislation; and
- Member States and tobacco control advocates should be mindful of these approaches when developing tobacco endgame policies, such as the generational sales ban, and be prepared to counter the narratives of the tobacco industry, supported by robust evidence.

²⁷⁸ Action on Smoking & Health, 'Beverly Hills and Manhattan Beach, California Make History for Public Health' (ASH, 1 January 2021) <https://ash.org/california-jan1-2021/> accessed 24 March 2025.

²⁷⁹ B K Matthes et al, 'The UK Tobacco and Vapes Bill (2023/4): framing strategies used by tobacco and nicotine industry actors faced with an endgame policy (a generational sales ban of tobacco products) and nicotine product restrictions' (2025) *Tobacco Control* <https://doi.org/10.1136/tc-2024-059207> accessed 24 March 2025.

Pathway to proportionality

After considering the case law and extracting the relevant principles for assessment of proportionality, and having identified the approaches that the tobacco industry takes to undermine tobacco control and tobacco endgame policies, it is possible to propose a pathway which Member States could apply when introducing a generational sales ban, to create the best opportunity for this to be successful.

The proposed pathway is:

- 1 Establish a tobacco endgame target – e.g. a Member State could seek to reduce the harmful health consequences of combustible tobacco use, particularly by prioritising prevention to protect young people from the harmful effects of tobacco, and that it therefore aims to achieve <5% tobacco prevalence within its population by 2040, in line with Europe's Beating Cancer Plan;
- 2 Establish the Member State's current position against the target e.g. what is the prevalence within the total population, defined as 15+ consistent with the Eurobarometer, and including the prevalence and trends of combustible tobacco use in children and young people;
- 3 Assess the existing FCTC measures in place within the Member State and compliance with these²⁸⁰:
 - (1) When conducting this assessment, consider not only the measures in place but their effectiveness - is enforcement matching expectations of measures introduced and if not why not?;
 - (2) Further assess whether there are any available FCTC core and advanced measures which are not currently implemented, why not and whether they can be implemented?;
- 4 Model the existing measures to identify what the future position of prevalence would be against the target established in point 1;
- 5 Model the consequence of implementing any additional core and advanced measures from point 3(2);
- 6 Identify any alternative measures which could be introduced instead of a generational sales ban, such as raising the age of sale, and model the impact of all these identified different options, including the generational sales ban, to establish evidence base in support of measure ultimately chosen;
- 7 Assess whether any of the proposed measures in point 6 would also enable the target from point 1 to be achieved and, if so, whether any of the proposed measures could be considered to be less restrictive on trade than a generational sales ban when assessed at the relevant target date. Also consider whether it would be beneficial to include a built-in review point of the legislation;
- 8 Post-implementation] continually monitor the impact of the legislation to establish evidence of effectiveness (implementation science) which may be required within litigation. Suggest to monitor any unintended consequences, e.g. take up of alternative risky or harmful behaviours, or change in volume of illicit trade.

²⁸⁰ Joint Action on Tobacco Control 2, WP9 Indicator Compendium (28 April 2023)

<https://jaotc.eu/wp-content/uploads/2023/12/M.9.1-Indicator-compedium-28-April-2023.pdf> accessed 28 November 2024.; pages 68-73 checklist for core and advanced tobacco control measures

Areas for further research

A generational sales ban is not the only tobacco endgame policy available to Member States who seek to achieve tobacco endgame.

In the *Tobacco endgame policies; Legitimate objective* section above, the paper of Rey Brandariz et al.²⁸⁰ is referenced in respect of the tobacco control measures which should occur alongside the implementation of a tobacco-free generation. Further research and modelling could be conducted to identify tobacco control measures which can complement, or potentially be alternatives to, a generational sales ban within the EU. This will inform the evidence base for Member States in their analyses and also any courts which are tasked with considering the proportionality of a generational sales ban.

In this report the possibility of VLNC cigarettes has been raised. This is consistent with the suggestion of a nicotine cap in Rey Brandariz et al.'s paper. The evidence base for the policy benefits of this is not consistent. VLNC cigarettes are possible within the EU, as the emission levels set by Article 3(1) of the TPD are maximums, not minimums, for products placed on the market. However, this could itself be contrary to Article 24(1) of the TPD and would require justification under Article 24(3) of the TPD, so would require further consideration. How such a policy might interact with the use of alternative nicotine products would be a question that should be explored. As it appears possible for Member States to introduce lower maximum emission levels than specified by the TPD, where that provides an upper limit and not a lower limit, and where this could be justified on public health grounds, this could be researched by Member States and could be supported by the EU.

Given the question around fundamental rights and age discrimination, addressed above, another possible tobacco endgame policy would be to ban all combustible tobacco products with an exception granted for those born before a certain date. This would effectively remove the product from the market but provide a limited exception for any person who was legally able to buy the product at the date of the ban. This could be perceived as creating a 'licence to smoke'. As such an approach would need to be justified under Article 24(3) of the TPD, as well as introducing a higher level of government interference, the question of the proportionality of such a measure would require detailed analysis.

Whilst this report primarily focuses on prevalence levels, either a total-population or generational level, it also addresses denormalisation of the tobacco industry and its products. Ongoing research is required to monitor how public perception of the tobacco industry and its products changes. As identified in the *Tobacco endgame policies; Support for tobacco endgame policies* section above research on public support for tobacco endgame policies in the EU is still limited. Research which demonstrates that the tobacco industry and its products are increasingly being seen as 'not normal' within modern society could contribute positively to the EU's support of Member States, to political will within Member States, and lessen the impact which the tobacco industry has upon governments. Further research within the EU of the tobacco industry and its products, and how any tobacco control or tobacco endgame policies which could be introduced, or are introduced within the EU, affect public opinion is important to monitor.

The report has been written with a focus solely on the EU and explicitly identifies at the outset that it is not intended to be applicable to other jurisdictions. This report presents this pathway as a starting point in the discussion of the legal feasibility of a generational sales ban based on EU legislation. If it has any

²⁸⁰ Julia Rey Brandariz et al, 'Estimated Impact of a Tobacco-Elimination Strategy on Lung Cancer Mortality in 185 Countries: A Population-Based Birth Cohort Simulation Study' (2024) 9 *The Lancet Public Health* [745-754].; page 752

applicability, and if so how, within other jurisdictions is beyond the scope of this report. Should this report be considered by representatives from countries from other jurisdictions, and should it inform the processes which are then followed, then adaptations and developments of the pathway could be published to contribute to global knowledge within the tobacco control and public health community. This will inform how the implementation of a generational sales ban can be approached worldwide, not just within the EU.

The environmental harm caused by the use of tobacco and related products is gaining increased attention. The pollution caused by cigarette filters, which provide no health advantage for people who smoke but which cause substantial harm to the environment, is one example of this. In the submissions to the European Commission by Belgium²⁸¹ and France²⁸² on their proposed 'puffs' bans, the environmental consequences of use were raised and recognised by the Commission in its decisions. Given that cigarette filters are unnecessary from a use perspective, but damaging from an environmental perspective, consideration must be given to whether the EU should ban the use of cigarette filters during the TPD revision. In absence of action at EU level, Member States should then consider whether they should act to address this to protect their environments and public health. Whether such a measure could contribute towards achievement of tobacco endgame within the EU could be one part of the analysis.

²⁸¹ European Commission, *Commission Implementing Decision of 18.3.2024 Concerning National Provisions Notified by Belgium Prohibiting the Placing on the Market of Disposable Electronic Cigarettes* (C(2024) 1673 final) https://health.ec.europa.eu/document/download/2c0e24a7-8ea5-4464-9bf6-eecc2f45c42b_en?filename=tobacco_c_2024_1673_en.pdf accessed 2 October 2024.

²⁸² ²⁸² European Commission, *Commission Implementing Decision of 25.9.2024 Concerning National Provisions Notified by France Prohibiting Certain Electronic Cigarettes* (C(2024) 6680 final) https://health.ec.europa.eu/document/download/7dfc1451-89e8-41bc-84b7-6ad9ada9027d_en?filename=tobacco_c_2024_6680_en.pdf&prefLang=fr accessed 1 October 2024.

EU call to action

The EU has set its attention to achieve tobacco prevalence of less than 5% by 2040 and to create a Tobacco-Free Generation. Whilst it has provided an updated Council Recommendation on Smoke-free and Aerosol-free Environments, as it has not revised any of the Directives which address tobacco control within the EU since the announcement of those targets in 2021, it appears to be relying primarily on Member States.

In analysing the Europe's Beating Cancer Plan above this report criticises the conflation of two separate targets; a population-level target and a generational target. However, given that Member States have the competency to determine the age of sale of tobacco and related products, as this report has shown, a question arises as to whether the inclusion of the term 'Tobacco-Free Generation' could be seen as supportive of Member States who wish to create this through their own policies.

In absence of specific clarification by the EU that it supports Member States' action, a possible first test could be how the Commission responds to any legislation by a Member State notifying it of its intention to continuously raise the age of sale, preventing anybody born after a certain date from legally being sold commercial combustible tobacco products. The Commission previously registered a citizens' initiative entitled 'Call to achieve a tobacco-free environment and the first European tobacco-free generation by 2030' which included six objectives, the first of which was "*promote the first tobacco-free European generation by 2028, ending the sale of tobacco and nicotine products to citizens born since 2010*".²⁸³ The Commission's implementing decision confirms that "*the Commission has the power to present proposals for legal acts banning the sale ... of certain tobacco products on the basis of Article 114 of the Treaty*".²⁸⁴ This is in line with CJEU case law.²⁸⁵ Whilst the Commission has not taken such action, it does not need to in order to support attainment of the first objective. It can support the attainment of this objective by approving, or at least not blocking, Member State legislation which introduces a generational sales ban and allowing the Member States to exercise their competency without Union interference.

A similar request was issued in Smoke Free Partnership's position paper on the TPD revision, which stated "[t]he Tobacco Products Directive regularly emphasises its focus on young people. We believe that the revised Tobacco Products Directive should encourage Member States to phase out sales and the delivery of tobacco products to anyone born on or after January 1, 2012 and provide them with legal justification for implementing such measures at the national level."²⁸⁶ As this report demonstrates, where age of sale is for Member States to determine, the legal justification already exists. However, it would certainly be beneficial for any Member State which introduces such a policy to be able to point to specific wording within the (revised) TPD in support of its actions. This would be consistent with the EU's supporting role in health, and would be in line with how the revised Council Recommendation can be

²⁸³ European Commission, *Commission Implementing Decision (EU) 2022/1430 of 24 August 2022 on the request for registration of the European citizens' initiative entitled 'Call to achieve a tobacco-free environment and the first European tobacco-free generation by 2030', pursuant to Regulation (EU) 2019/788 of the European Parliament and of the Council* [2022] OJ L 223/32.; para 2

²⁸⁴ *ibid.*; para 3

²⁸⁵ Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECLI:EU:C:2016:325.; para 64 "*Depending on the circumstances, the measures referred to in Article 114(1) TFEU may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products* (judgments in *Arnold André*, C-434/02, EU:C:2004:800, paragraph 35; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 34; and *Germany v Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 43)."

²⁸⁶ Joossens L, Olefir L, Béguinot E, Byrkje K, and Gabriels S, *Smoke Free Partnership Position Paper on the Revision of the EU Tobacco Products Directive (TPD)* (2024).; page 22

relied upon by Member States which implement legislation creating smoke- and aerosol-free environments.

The EU must also consider the warning within JATC2 WP9 that “[t]he procedure of notification to the Commission about national measures is one example that might hinder the adaptation of advanced endgame measures at the national level.”²⁸⁷ The revised TPD can remove the need for notification of certain Member State actions, thereby increasing the speed at which these can be implemented and ensuring that the EU is able to support Member States with achieving their public health objectives, not creating a barrier to this.

The TPD revision should also address novel products, requiring prior marketing authorisation for any new products²⁸⁸, address the environmental impact of combustible tobacco products and novel nicotine and tobacco products²⁸⁹, and should examine options to increase tobacco manufacturers’ liability in line with Article 19 of the FCTC.²⁹⁰

Revision to the TTD must address the problem that the current minimum level of taxation has been reached by all Member States. Commercial combustible tobacco is becoming more affordable, which undermines attempts to reduce consumption and achieve tobacco endgame²⁹¹, and benefits the tobacco industry. Economics for Health produced a policy brief in November 2024 setting out three enhancements for the TTD, being to raise the fixed minimum tax rate on cigarettes, raise the fixed minimum tax rate and relative minimum clause for fine-cut tobacco, and to remove the relative minimum clause for all products.²⁹² In February 2025, 16 Member States collectively called for revision of the TTD to address the current gaps in the legislation which undermines national efforts to reduce smoking and to bolster public health initiatives by harmonising tax rates and modernising the framework.²⁹³ The TTD requires immediate attention by the EU, its revision having previously been delay.

The TAD must also be revised to reflect the ubiquitous presence of social media in our lives and the need to ensure that not only advertising, but covert advertising and promotion, of tobacco and related products, including nicotine and non-nicotine products, are covered and can be properly enforced.

²⁸⁷ Joint Action on Tobacco Control 2, *D9.2 Recommendations for Research on Forward-Looking Tobacco Control Policies and Tobacco Endgame Strategies* (2024) <https://jaotc.eu/wp-content/uploads/2024/06/D-9.2-Recommendations-for-research-on-forward-looking-tobacco-control-policies-and-tobacco-endgame-strategies.pdf> accessed 28 November 2024.; page 16

²⁸⁸ European Parliament, *White Paper/Legacy Book: European Parliament Working Group on Tobacco, MEP's Working Group on Tobacco 2019-2024* (2024). <https://www.scribd.com/document/741941387/MEP-WG-TPD-Tabac-LB-en-310524-Rivasi-Pelletier-Larrourou-Final-Txt> accessed 1 October 2024; page 36

²⁸⁹ *ibid.*; page 35

²⁹⁰ European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 2014/40/EU Concerning the Manufacture, Presentation and Sale of Tobacco and Related Products* (20 May 2021).; page 17

²⁹¹ European Commission, *Commission Staff Working Document: Review of Europe's Beating Cancer Plan SWD(2025) 39 final* (4 February 2025) https://ec.europa.eu/health/system/files/2025-02/cancer_plan_review_en.pdf accessed 14 February 2025.; Annex 2 page 6

²⁹² Economics for Health, *Policy Brief: Enhancing Europe's Tobacco Tax Directive for a Healthier Future* <https://www.economicsforhealth.org/files/research/961/enhanced-ttd-brief.pdf> accessed 17 December 2024.; pages 2-4

²⁹³ EU Reporter 'Majority of EU Member States Call for Updated Tobacco Taxation to Address Public Health and Revenue Concerns' (27 January 2025) <https://www.eureporter.co/health/tobacco-2/2025/01/27/majority-of-eu-member-states-call-for-updated-tobacco-taxation-to-address-public-health-and-revenue-concerns/> accessed 30 January 2025.

Key points:

- The EU can and must support, not hinder, Member States which are seeking to achieve tobacco endgame and help the EU realise its own target; and
- Revision of the Directives concerning tobacco and related products is substantially overdue and must be remedied within this term. The EU must ensure that tobacco industry interference is prevented by strong implementation of Article 5.3 across all EU institutions, and at all levels.

Conclusion

The tobacco industry should be extremely concerned about tobacco endgame. Whilst some companies present themselves as being in support of a future free from combustible tobacco, the reality across all companies is that they are not and that they continue to create substantial profits selling products which they know are harmful to human health. Whilst public statements advocate for a smoke free future, simultaneously the industry challenges governments which implement tobacco control measures which would enable this to be realised and continue the manufacture and sale of combustible tobacco. Despite the emergence of more tobacco endgame targets, as identified in JATC2 WP9, *“most worrying is the finding that a large number of countries in the region are not investing in their tobacco control infrastructure and do not sufficiently protect themselves from tobacco industry influence. This hampers both the implementation of the WHO FCTC, as well as adoption of innovative tobacco endgame measures.”*²⁹⁴

Tobacco control measures in the EU have significantly improved the health not only of millions of EU residents, but people across the world as the EU's tobacco control measures have served as inspiration for other jurisdictions. Despite this, still over 8 million people die each year as a result of commercial combustible tobacco, with 700,000 of these in the EU. Most concerning is that this figure continues to rise. Member States, in conjunction with EU institutions, must take steps to reverse this trend.

Given the highly addictive nature of nicotine within the combustible tobacco products, tobacco control needs to be strengthened and progressed towards tobacco endgame. At the heart of this must be a focus on prevention. Preventing children and young people from becoming the replacement smokers of tomorrow is vital. An EU with healthy citizens can set an example to the world and will contain more productive, happier citizens who can contribute to creating a competitive Europe. Whilst focus on competitiveness looks at deregulation to favour businesses, it fails to recognise the importance of healthy citizens who will work for these businesses and be their customers in the future. If people are continually spending their money on an addictive, deadly product and on meeting the severe health consequences that arise from using that product, and losing years of productivity as a result of smoking-related disabilities, they cannot contribute to their maximum potential. If Member States are required to use public finances to address preventable health conditions, this reduces their capacity to invest in the future. Ignoring or inadequately addressing public health is an anti-growth, anti-competitive approach. The EU, in conjunction with its Member States, needs to prioritise the health of its citizens if it wants to harness their potential. The EU therefore needs to support Member States who are seeking to introduce tobacco endgame policies which support the EU's endgame target established in the EBCP.

The introduction of a generational sales ban within Member States can be the start of this. To support this, the EU does not necessarily need to be proactive, although any support that it provides would naturally be appreciated given the barriers that Member States face when introducing legislation that tackles commercial combustible tobacco consumption. What the EU must do is not become a barrier to Member States. It must not rank the single market as more important than the health of the citizens within that market.

This report has demonstrated that the power to introduce a generational sales ban lies firmly within the competence of the Member States. It is therefore for Member States to take forward and put into action,

²⁹⁴ Joint Action on Tobacco Control 2, D9.1 Report of Tobacco Endgame Strategies for the European Region (June 2024) <https://jaotc.eu/wp-content/uploads/2024/06/D-9.1-Report-of-tobacco-endgame-strategies-for-the-European-Region.pdf> accessed 18 November 2024; page 4

and to test whether the EU is truly committed to its target of less than 5% tobacco prevalence by 2040, as articulated in Europe's Beating Cancer Plan, or whether the EU will succumb to tobacco industry pressure under the guise of protection of the single market.

This report has set out that because of the impact a generational sales ban would have upon the size of the market, it will be necessary for any Member State introducing it to demonstrate that it is taking a proportionate step. In the first place, that requires Member States to ensure that the core and advanced tobacco control measures identifiable from the FCTC are present.

As this report makes clear, achievement of a tobacco endgame does not necessarily require the introduction of a tobacco endgame policy; it can be achieved through properly enforced comprehensive tobacco control policies. Where this is not sufficient and will not address the prevalence of combustible tobacco, then tobacco endgame policies should be introduced. This report would encourage Member States to not delay in their actions, but also cautions against going too early in introducing tobacco endgame policies, as the consequences could be detrimental not just to that Member State, but also to other Member States who would need to overcome any adverse court judgment which the tobacco industry and its supporters could point to any time the question of tobacco endgame policies came forward. For whilst the tobacco industry publicly states its support of a smokefree future, with the end of combustible tobacco sales, its actions challenge and undermine the realisation of such a future scenario.

A tobacco-free future is in sight. Future generations can have the opportunity to grow up without the damaging health and environmental effects of combustible tobacco proliferating society. But this future is not guaranteed. It requires the hard work of governments, politicians, public health officials, tobacco control advocates and civil society to make it a reality, and to ensure those who want to continue the tobacco epidemic are not able to prevail. A generational sales ban is legally feasible; the question that remains is whether there is now the political will to actual realise a Tobacco-Free Generation.



ERS

EUROPEAN
RESPIRATORY
SOCIETY

every breath counts

www.ersnet.org