



Wes Streeting MP  
Secretary of State for Health and Social Care  
Ministerial Correspondence and Public Enquiries Unit  
Department of Health and Social Care  
39 Victoria Street  
London  
SW1A 0EU

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Dear Secretary of State,

### **Tobacco and Vapes Bill**

The Government last week announced plans for your department to re-introduce a Tobacco and Vapes Bill. Alongside other measures, this Bill will introduce a generational smoking ban, with the minimum age at which an adult can be sold tobacco products increasing at daily intervals, effective from 1 January 2027.

Notwithstanding our opposition to the illiberal and impractical proposal and the flawed consultation process undertaken by the previous Government, we have serious concerns about the legality of the proposed ban in Northern Ireland.

### **The legal framework**

Following the UK's exit from the European Union and pursuant to the "*Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*" ("the Withdrawal Agreement"), EU law continues to apply in certain respects to Northern Ireland. The detailed provisions of the Withdrawal Agreement governing the continued application of EU law in Northern Ireland are contained in the Protocol on Ireland/Northern Ireland ("the Protocol"), renamed the "*Windsor Framework*" ("WF") following an agreement of that name concluded by the UK and the EU on 27 February 2023.

Article 5(2) of the WF provides:

*"The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland."*

Amongst the provisions of Union law listed in Annex 2 is TPD2 (the EU's second Tobacco Products Directive, Directive 2014/40/EU). TPD2 entered into force on 19 May 2014 and became applicable in all EU Member States (which at that time included the UK) on 20 May 2016. TPD2 was implemented in the UK by the Tobacco and Related Products Regulations 2016 (SI 2016/507), which applied to Northern Ireland and, subject to certain modifications upon the UK's exit from the EU, continues to do so. Since Brexit, it has been updated in its application to Northern Ireland to reflect changes to TPD2.

Article 4 of the Withdrawal Agreement obliges the UK Government to give the same effect to provisions of EU law which are made applicable by the Withdrawal Agreement as they have in EU Member States.

### **JTI UK**

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Registered in England and Wales, Registration Number 01501573  
Registered office: 1 Werter Road, London, SW15 2LL, United Kingdom  
Telephone: +44 (0)1932 372 000  
[www.jti.com/europe/united-kingdom](http://www.jti.com/europe/united-kingdom)

## Compatibility of a generational smoking ban with TPD2

The purpose of TPD2 is to lay down various requirements which must be satisfied for tobacco products and vapes if they are to be marketed within the EU. Those requirements concern matters such as their ingredients, emission levels and packaging. TPD2 implements obligations undertaken by the EU by virtue of signing the World Health Organisation's Framework Convention on Tobacco Control, signed at Geneva on 21 May 2003 ("the FCTC").

The general rule under TPD2 is that there is to be free movement within the EU of products which satisfy those requirements. Article 24(1) TPD2 provides that:

*"Member States may not, for considerations relating to aspects regulated by this Directive, and subject to paragraphs 2 and 3 of this Article, prohibit or restrict the placing on the market of tobacco or related products which comply with this Directive."*

TPD2 also supports, but does not require, the setting of age limits for the sale of tobacco and related products in recital (21):

*"Member States should be encouraged to prevent sales of such products to children and adolescents, by adopting appropriate measures that lay down and enforce age limits"*

Such measures are, however, "*domestic sales arrangements*" and are excluded from the scope of TPD2.

A generational smoking ban is not an age limit or other form of sales arrangement because (a) it does not concern the packaging of tobacco products within Article 24(2) TPD2, and (b) if and insofar as it would "prohibit" tobacco products, it would prohibit all such products and not merely "a certain category" of tobacco products, as potentially permitted by Article 24(3) TPD2. A generational smoking ban is therefore incompatible with TPD2, being a restriction on the placing of tobacco products on the market.

First, unlike an age limit/sales arrangement, the intention of a generational smoking ban is to phase out the use of tobacco products entirely. This is equivalent to an absolute ban on the sale of tobacco products, albeit introduced slowly, in daily stages. If, instead of phasing in the ban, the Bill proposed the introduction in Northern Ireland of a complete ban on the sale of tobacco products, to take effect in, say, 80 years' time, there would be little doubt that that would constitute a restriction on placing tobacco products on the market, contrary to TPD2, and would therefore be unlawful. The fact that the Bill envisages the incremental introduction of a total ban does not change the essence of the measure.

Second, there can be little doubt that the framers of TPD2, and of the FCTC which it implements, did not contemplate that an age limit on the sale of tobacco products could take the form of a generational smoking ban. As the heading to Article 16 FCTC ("*Sales to and by minors*") indicates, the contemplated purpose of age limits was to prevent the sale of tobacco products to (and by) minors. By contrast, the critical feature of a generational smoking ban is that it prevents the sale of tobacco products to adults, and adults of an age which increases daily. Similarly, recital (21) to TPD2 makes clear that the contemplated purpose of an age limit is to prevent sales to "*children and adolescents*", not to adults.

Third, certain Member States of the EU which have investigated introducing a generational smoking ban have concluded that they are prevented by TPD2 from lawfully doing so based on legal advice and/or guidance from the European Commission.

On 15 March 2022, the Government of Denmark announced that it wished to introduce a generational smoking ban which would prevent the sale of tobacco products to anyone born from 2010 onwards. A few

weeks later, however, on 6 April 2022, the Danish Minister of Health informed the Danish Parliament that it considered that TPD2 prevented it from introducing a generational smoking ban.

Shortly afterwards, the EU Commission was asked a question in the European Parliament about the Danish generational smoking ban proposals. Its written answer (P-001318/2022, 23 May 2022) pointed out that TPD2 “*does not regulate domestic sales arrangements nor applicable age limits*” but that the Danish proposal “*will lead to a ban on tobacco and nicotine products*”.

On 15 May 2024, the Department of Health of the Government of the Republic of Ireland announced that it would introduce legislation to raise the minimum age for sale of tobacco to 21. It stated in its press release that “[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”.

We therefore surmise that the key concern in that advice, namely that a generational smoking ban would be treated as a ban on products which comply with the requirements of TPD2, is contrary to Article 24(1) TPD2.

In light of the above, a generational smoking ban in Northern Ireland would be incompatible with TPD2, and so liable to be disapplied in Northern Ireland by virtue of s. 7A of the European Union (Withdrawal) Act 2018.

When this issue was raised during a debate in the Northern Ireland Assembly on 21 May 2024, the Health Minister Robin Swann MLA explained “*I specifically raised that with Minister Leadsom yesterday, and she provided me with the reassurance that the work of her and my departmental officials and the legal advice that she has received indicates that that will not be an impediment*”<sup>1</sup>. We therefore encourage you to review the legal advice provided to the previous Government.

### **A simpler solution**

TPD2 does not prevent an increase in the age of sale to 21, as the Republic of Ireland intends to introduce. Your department’s own modelling in last year’s Impact Assessment shows various alternatives to a generational smoking ban. Crucially, the modelling shows that an increase in the legal purchase age to 21 would also “*eliminate smoking in the under 30s by 2050*”<sup>2</sup>.

An increase in the minimum legal purchase age to 21 has the same long-term impact as a generational smoking ban but has none of the associated impracticalities which have been highlighted by the Association of Convenience Stores<sup>3</sup>. For example, an age increase to 21 would fit within the current Challenge 25 policy in place at most retailers and would be a seamless change for retailers to make. This move would also significantly reduce the increase in the illegal trade of tobacco products which would naturally follow the prohibition of a product in demand. The WHO, in the resources that it recommends to Parties concerning the implementation of Article 16 FCTC, makes available the US Institute of Medicine Report on the public health implications of raising the minimum age of legal access to tobacco products<sup>4</sup>, indicating that it considers a rise in the age of sale to 21 as an appropriate means of addressing the concerns over youth smoking that Article 16 is intended to address.

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<sup>1</sup> [Official Reports \(niassembly.gov.uk\)](https://www.niassembly.gov.uk)

<sup>2</sup> [Modelling for the smokefree generation policy - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

<sup>3</sup> [Tobacco and Vapes Bill enforcement issues and retail disruption highlighted \(talkingretail.com\)](https://www.talkingretail.com)

<sup>4</sup> [Resources, Article 16 FCTC \(extranet.who.int\)](https://extranet.who.int)

This alternative proposal would help deliver the same outcome, remove serious challenges pertaining to the legality of a generational ban in Northern Ireland, be consistent with the UK's international obligations and ensure a consistent approach between Northern Ireland and the Republic of Ireland. Similarly, introducing an increase in the age of sale to 21 in Great Britain would ensure a UK-wide approach, removing any ambiguity and confusion for those who operate across Great Britain and Northern Ireland.

Yours sincerely,

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[Redacted contact information]