

10. Creates regulatory protection for the cigarette trade

Protecting the cigarette trade. Given the known harms of smoking, it is unclear why a government or public health authorities would wish to intervene to regulate e-cigarettes in a way that degrades the competitive advantage e-cigarettes relative to cigarettes. The Royal College of Physicians explained this issue with great clarity:¹

A risk-averse, precautionary approach to e-cigarette regulation can be proposed as a means of minimising the risk of avoidable harm, e.g. exposure to toxins in e-cigarette vapour, renormalisation, gateway progression to smoking, or other real or potential risks. However, if this approach also makes e-cigarettes less easily accessible, less palatable or acceptable, more expensive, less consumer friendly or pharmacologically less effective, or inhibits innovation and development of new and improved products, then it causes harm by perpetuating smoking. Getting this balance right is difficult. (Section 12.10 page 187)

The likely effect of the flavour ban is to perpetuate smoking. The justification fails because there is no evidence to support risk-averse, precautionary action based on avoidable harm arising from e-cigarette use. On the contrary, it is more likely there would be perverse consequences for youth from limiting the appeal to adolescents, such as more smoking. So there is nothing to put on the precautionary side of the balance set out by the Royal College of Physicians. On the other hand, there are already numerous ways in which the Netherlands and European Union regulation supported by the Netherlands “causes harm by perpetuating smoking”. These include Netherlands measures mentioned in the justification:

- Bans on vaping in public places equivalent to smoking bans
- Plain packaging
- Display bans.

This unjustified assistance to the cigarette trade builds on several counterproductive EU measures:

- Limits on e-cigarette nicotine strength give cigarettes a major advantage by ensuring e-cigarettes are less able to pull smokers away from cigarettes
- Excessively large, bold and misleading mandatory warnings
- Bans on most forms of advertising of vaping products
- Restrictions on e-commerce (optional)
- Multiple petty impositions (limits on tank and refill container size, leaflets).

The issue is not that there should be a “level playing field” for cigarettes and e-cigarettes or that they should be treated equally. E-cigarettes are different and should be treated *proportionately*, considering the health consequences. See the discussion of regulatory principles in the following section.

¹ Royal College of Physicians. Nicotine without smoke: tobacco harm reduction [Internet]. London: RCP; 2016. [\[link\]](#)

Rational regulation of tobacco and nicotine products would be ‘risk-proportionate’. It is unclear what regulatory philosophy the government has adopted. The appropriate approach is to be ‘risk-proportionate’. This approach applies fiscal and regulatory measures in proportion to risks. It aims to encourage smokers’ migration to low-risk products by creating incentives for both consumers and producers to transition. The following table provides an overview of risk-proportionate regulation:

Measure	Smoking products	Smokefree products
Taxation	Relatively high taxes	Low or zero tax (VAT or sales tax only)
Illicit trade	Track and trace (FCTC protocol)	Complaint-driven
Advertising	Prohibit other than within trade	Control themes and placement
Warnings	Graphic warnings depicting disease	Messages encouraging switching
Public places	Legally mandated controls	Up to the discretion of the owner
Plain packaging	Yes	No
Ingredients	Control reward-enhancing additives	Blacklist material health hazards
Flavours	Prohibit	Allow, restrict ingredients that could be hazardous for inhalation
Flavour descriptors	Not applicable if flavours banned	Control appeal to youth/trademarks
Age restrictions	No sales to under-21s	No sales to under-18s
Internet sales	Banned	Permitted with age controls
Product standards	Control risks and reduce the appeal	Control risks