

11. Violates important regulatory principles

The proposed flavour ban violates key European Union regulatory principles. Though the justification for the vaping flavour ban argues that its proposed approach is consistent with European Union regulation and regulatory principles, it does not provide a convincing case. The measure violates four important principles of good regulation generally and as applied in the European Union.

I. Violates the principle of proportionality. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.¹ There is no justification for prohibiting *all non-tobacco flavours*. The government has provided no evidence to suggest that any specific flavours are targeted at adolescents or disproportionately successful in attracting youth that would not otherwise vape. It is disproportionate to ban an entire category of products widely enjoyed by adults with a view to protecting youth rather than devise measures targeted at achieving the desired outcome. The ban on flavours represents a disproportionate barrier to competition and innovation and protects a much more harmful product from much safer novel products. It will damage multiple businesses (notably vape shops) that sell their products to adults as alternatives to smoking and provide a valuable support network. This sweeping measure is likely to cause net detriment to both adolescents and adults health by perpetuating smoking.

II. Violates the principle of non-discrimination or ‘equal treatment’. European Union policymaking is supposed to follow the principle of non-discrimination. The European Court of Justice has articulated this principle as follows:²

... the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

There is a major difference between cigarettes and e-cigarettes in their respective risk to health. They should be treated differently for this reason. Though the European Union bans flavoured cigarettes, there is no justification for extending that ban to e-cigarettes simply because they sounds the same. This is because flavour additives are intrinsic to the design of e-cigarettes and almost all final consumer vaping products, including tobacco flavoured products, are artificially flavoured. By contrast, cigarettes are flavoured by the products of combustion of tobacco, and these aromatic agents in cigarette smoke are not subject to any meaningful controls. The proportion of the cigarette market that has ever had an artificial characterising flavour is far lower than the e-cigarette market, so a ban on characterising flavours has a much greater impact on the e-cigarette market than on the cigarette market. There is no justification for imposing greater and discriminatory impediments on the far less dangerous category.

¹ Treaty on European Union Article 5.4. [[link](#)]

² [Case 304/01 Sept 2004 Spain v European Commission](#) para 31 [[link](#)]

III. Violates the precautionary principle. The precautionary principle is widely misapplied and misunderstood. It requires careful consideration of “the benefits and costs of action or lack of action” and, therefore, an assessment of likely perverse consequences of regulatory intervention.³ In this case, that would mean careful regulation of safer alternatives that potentially leads to more smoking. The case for the ban on flavours has a completely inadequate assessment of the likely and plausible perverse consequences that may arise from the proposed measures. Even a small increase in smoking – whether by adults or adolescents – would completely overwhelm any benefits arising from reduced vaping. Other harmful effects arising from black markets, home mixing and cross border trade have not been incorporated into the justification for precautionary action.

IV. Violates a foundational concept of the internal market. The underlying principle of the European Union internal market is to develop competition but qualified with regard for broader objectives:

Article 114 TFEU. [Proposals for development of the internal market] 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.⁴

In proposing a ban on all non-tobacco e-cigarette flavours, the government is taking an anti-competitive action against a much less dangerous product than the dominant nicotine product in both the European Union and the Netherlands. The likely effect is to strengthen the cigarette oligopoly or to delay its decline. It is likely to weaken health protection by preventing three million Dutch citizens from taking measures to protect their own health, on their own initiative and at their own expense. It fails to recognise the importance of the internal market’s innovating functioning in developing alternatives to the most dangerous products.

³ European Union, Communication (COM(2000) 1final) on the precautionary principle, 2000 – summary [\[link\]](#)

⁴ Treaty on the Functioning of the European Union Article 114 [\[link\]](#)