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DESENSITISED VERSION

COMMISSION IMPLEMENTING DECISION

of 25.9.2024

**concerning national provisions notified by France prohibiting certain electronic
cigarettes**

(Only the French text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC¹, and in particular Article 24(3) thereof,

Whereas:

I. FACTS

- (1) On 26 March 2024, France notified the Commission under Article 24(3) of Directive 2014/40/EU of a draft law prohibiting the manufacture, possession with a view to sale, to distribution or to offer free of charge, the offer for sale, sale, distribution or offer free of charge of certain electronic cigarettes and amending the Public Health Code (Draft Law to Prohibit Single-Use Electronic Cigarettes of 21 March 2024, hereafter also referred to as the ‘notified measure’). The notification was accompanied by explanations and data justifying the proposed measure. Before, on 21 March, the French authorities also notified the above-mentioned draft law to the Commission under Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services² (notification 2024/0164/FR).
- (2) As the Commission considered that the notification was incomplete, on 8 July 2024, it sent to the French authorities a request for additional information concerning the grounds for introducing the measure in question. On 19 July 2024, the French authorities provided certain information.

1.1 Notification procedure under Article 24(3) of Directive 2014/40/EU

- (3) Pursuant to Article 24(3) of Directive 2014/40/EU, a Member State may prohibit a certain category of tobacco or related products provided that the conditions laid down in that Article are fulfilled. In particular, any such prohibition is to be based on grounds relating to the specific situation in the Member State concerned and must be justified by the need to protect public health, taking into account the high level of protection of human health achieved through Directive 2014/40/EU. Any Member

¹ OJ L 127, 29.4.2014, p. 1.

² OJ L 241, 17.9.2015, p. 1.

State wishing to introduce such a prohibition is required to notify the Commission of the relevant national provisions and the grounds for introducing them.

- (4) Article 24(3) of Directive 2014/40/EU further provides that, within a period of six months of the date of receiving the notification, accompanied by the required justification, the Commission is to either approve or reject the draft national provisions in question after having verified whether or not they are justified, necessary and proportionate and whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States.

1.2 Union legislation

- (5) Directive 2014/40/EU regulates the manufacture, presentation and sale of tobacco and related products placed on, or intended to be placed on, the Union market.
- (6) Pursuant to Article 20(1) of Directive 2014/40/EU, the Member States are to ensure that electronic cigarettes and refill containers are only placed on the market if they comply with that Directive and with all other relevant Union legislation.
- (7) Article 2(16) of Directive 2014/40/EU defines ‘electronic cigarette’ as a product that can be used for consumption of nicotine-containing vapour via a mouthpiece, or any component of that product, including a cartridge, a tank and the device without cartridge or tank. In accordance with that provision, electronic cigarettes can be either disposable, or refillable by means of a refill container and a tank, or rechargeable with single use cartridges.

1.3 National Provisions Notified

- (8) According to the notification, it is proposed to insert the following provision of Article L. 3513-5-1 in the French Public Health Code: *“The manufacture, possession with a view to sale, distribution or offer free of charge, the offer for sale, sale, distribution or offer free of charge of the electronic vaping devices referred to in point 1 of Article L. 3513-1 shall be prohibited, with the exception of cartridges, which have at least one of the following two characteristics:*

- ‘1. they are pre-filled with a liquid and cannot be filled again;*
- 2. they have a non-rechargeable battery.’*

- (9) According to point 1 of Article L. 3513-1 of the French Public Code, electronic vaping devices are “products, or any component of these products, including cartridges, tanks and devices without a cartridge or tank, which can be used, by means of a mouthpiece, for consuming vapor containing nicotine where appropriate. Electronic vaping devices may be disposable or refillable by means of a refill container and a tank or by means of single-use cartridges.”

This definition corresponds to the definition of ‘electronic cigarette’ in Article 2(16) of Directive 2014/40/EU. The French notification refers to ‘electronic cigarettes’ and ‘electronic vaping devices’ interchangeably. For the purposes of this decision, the term ‘electronic cigarettes’ will be used.

- (10) Electronic cigarettes that are pre-filled with a liquid and cannot be filled again, referred to in subparagraph 1 of Article 3513-5-1 of the notified measure, correspond to the description of disposable electronic cigarettes in Article 2(16) of Directive 2014/40/EU. For the purposes of this decision, ‘electronic cigarettes that are pre-filled with a liquid and cannot be filled again’ are hereafter referred to as ‘disposable

electronic cigarettes’, irrespective of whether they have a non-rechargeable battery or a rechargeable one.

- (11) Accordingly, the notified measure covers both disposable electronic cigarettes (irrespective of whether they have a non-rechargeable battery or a rechargeable one) and electronic cigarettes that can be filled again with a liquid and have a non-rechargeable battery.

II. ASSESSMENT

2.1. On the scope of the assessment

- (12) At the outset, it should be recalled that in Case C-547/14 *Philip Morris Brands and others*, the Court of Justice held that Directive 2014/40/EU is not intended to interfere with the policies of the Member States concerning the lawfulness of tobacco products as such. The Court clarified that Article 24(3) of Directive 2014/40/EU concerns an aspect of tobacco regulation that is not covered by the harmonisation measures in the Directive³. The Court ruled that Article 24(3) "*seeks to delineate the scope of the Directive by clarifying that tobacco and related products which comply with the requirements laid down by the Directive may move freely on the internal market, provided that those products belong to a category of tobacco products or related products which is, as such, lawful in the Member State in which they are marketed*"⁴.
- (13) In accordance with this case-law, the notified measure that provides for a prohibition of the manufacture, the offer for sale, sale, distribution or offer free of charge, and the possession with a view to sale, distribution or offer free of charge of disposable electronic cigarettes and electronic cigarettes with a non-rechargeable battery, concerns an aspect not harmonised by Directive 2014/40/EU.
- (14) As clarified by the French authorities, the proposed prohibition would cover electronic cigarettes both with and without nicotine. Given that only electronic cigarettes containing nicotine are subject to Directive 2014/40/EU, the scope of this Decision under Article 24(3) of Directive 2014/40/EU is limited to such electronic cigarettes.
- (15) To the extent that the proposed measure concerns electronic cigarettes without nicotine, it is subject to the procedure under Directive (EU) 2015/1535 (notification 2024/0164/FR).

2.2 The position of France

- (16) In their notification, the French authorities claim that the prohibition of the manufacture, possession with a view to sale, distribution or offer free of charge, and of the sale, distribution or offer free of charge of products referred to in Article L. 3513-5-1 of the notified national measure (hereafter referred to as the ‘notified products’)⁵ is based in particular on public health grounds. They underline that the proposed prohibition is justified by the need to ensure a high level of protection of public health, particularly for young people. In view of the health challenges posed by the introduction and distribution of disposable electronic cigarettes (in particular their easy accessibility, attractiveness, and aggressive marketing), they consider that a ban on the

³ Judgement in *Philip Morris Brands and others*, C-547/14, ECLI:EU:C:2016:325, paragraph 90.

⁴ *Idem*, paragraph 91.

⁵ In their notification, the French authorities use interchangeably the terms *puff*, disposable electronic cigarette, and single-use vaping device to refer to the products from Article L. 3513-5-1 of the notified national measure.

placing on the market of these products must be urgently introduced for public health reasons, without waiting for any future revision of the EU legislation.

- (17) The French authorities highlight that the use of notified products, which are composed of nicotine salts, increases the risk of developing an inflammation of the respiratory tract, and adversely affects cognitive development of adolescents and young people. In particular, they explain that nicotine leads to persistent changes in an adolescent's developing brain: it acts in several regions of the brain, including those that regulate emotions. Chronic nicotine consumption by adolescents also leads to epigenetic changes which sensitise the brain to other drugs and increase the probability of consumption of psychoactive substances. Furthermore, the level of nicotine in notified products is high enough to create heavy addiction and create a gateway to smoking.
- (18) The French authorities also underline that the notified products pose a serious health hazard compared with their refillable or rechargeable version especially due to their ease of use and appeal, and threaten to undo the achievements of several years of anti-smoking campaigns since they encourage new forms of addiction and offer a gateway to smoking for young people, who often underestimate the harmfulness of these products. Protecting young people from smoking is one of the five major commitments under the new French National Tobacco Control Programme for 2023-2027 and essential for achieving a 'smoke-free generation' by 2032.
- (19) As regards environmental concerns, the French authorities point to the risk associated with the waste from the notified products. In this regard, the French authorities underline that the environmental impact of notified products cannot be completely dissociated from the objectives of protecting human health. The microplastics and chemicals released from discarded products pollute soil, waterways, and flora and fauna, thus posing a threat to human health. Moreover, their lithium batteries cannot be removed and can cause fires when crushed in a waste collection vehicle or waste treatment plant. In addition, the production of these batteries can be detrimental to natural resources.
- (20) The French authorities highlight that banning nicotine-containing notified products is especially necessary to protect young people against the addictive and dangerous effects of these products. Their availability in a range of outlets and online, low price, ease of use, the attractive packaging and design, the variety of flavours, and the targeted marketing to young people, together lead to an alarming popularity of these products among young people and to their underestimation of the associated risks.
- (21) In particular, the French authorities explain that the design of notified products makes them particularly attractive, as they are easy to use and no technical manipulation or expertise is needed before their consumption. In addition, the packaging of many notified products targets young people by attractive colours, drawings deemed appealing to children, and eye-catching designs.
- (22) The French authorities also point out that, due to the low price of notified products, young people can afford them more easily. Their price varies between EUR 5 and EUR 20, depending on the battery life and the number of puffs (e.g., around 500 to 5000 puffs, which is equivalent to around 20 to 200 cigarettes), which is comparatively less than a pack of conventional cigarettes that costs EUR 12 on average. By comparison, the price of a refillable electronic cigarette (the device plus the liquid) ranges from EUR 10 to around EUR 30. This relatively low financial threshold, together with other factors mentioned above, makes the notified products popular entry-level recreational products.

- (23) The French authorities also underline that the notified products are widely available on the French market in many sales outlets and online. Moreover, the French authorities highlight the problematic circumvention and regular infringements of rules on prohibition of advertising for these products in France, leading to a renormalisation of smoking. At the points of sale, online, and on social media (used heavily by adolescents) advertising of the notified products is targeting primarily young people. On distributor websites, statements have been found such as '*perfect for starting*', '*fits discreetly into your pocket*' or '*sweet, mellow flavours*'. On social media, there are videos which spotlight very young children (under the age of 10) mimicking use or claiming to already be consumers of these products. This increased exposure of young people to advertising of the notified products minimises their perception of danger of these products.
- (24) The French authorities submit that the grounds underlying the proposed measure relate to the specific situation in France. In this regard, the French authorities point to a significant increase in market availability of the notified products in France. In this respect, the French authorities refer to the growing number of notifications for the notified products in the EU Common Entry Gate (EU-CEG)⁶. More specifically, the French authorities highlight that the number of notifications for the notified products exponentially rose by 4717% (from 30 to 1445) between November 2018 and November 2021, whereas for all electronic cigarettes together that increase was much lower, at 114% (from 32978 to 70556). By November 2022, the number of notifications for the notified products had risen further by 651% compared with November 2021 (from 1445 to 10852), whereas for all electronic cigarette products together, that increase was only 28% (from 70556 to 90131). By November 2022, there were around 10 800 notifications for the notified products submitted in the EU-CEG for France, representing 12% of all notifications (90 131) for electronic cigarette products.
- (25) Furthermore, the French authorities highlight that in 2020, the notified products accounted for less than 3% of products notified for the French market in the EU-CEG. By contrast, at the time of notification, notified products represented already 27% of products notified for the French market through the EU-CEG, while the share of electronic cigarette liquids (refill containers and cartridges) decreased from around 80% to 57%.
- (26) In their reply to the Commission's request for additional information, the French authorities clarify that electronic cigarettes that can be refilled with a liquid but have a non-rechargeable battery are also covered by the proposed measure but, to their knowledge, there are currently no such products on the French market. They also note that in the EU-CEG it is not possible to isolate data referring specifically to such electronic cigarettes.
- (27) In addition, the French authorities highlight a very significant increase in the share of notified products that manufacturers and importers notified pursuant to Article 20(2) of Directive 2014/40/EU as intended to be placed on the market: 17 % in 2021, 48 % in 2022, 55 % in 2023, 40 % by mid-2024.

⁶ Established by Commission Implementing Decision (EU) 2015/2186 of 25 November 2015 establishing a format for the submission and making available of information on tobacco products (OJ L 312, 27.11.2015, p. 5-18). The EU-CEG format, requires the notification of electronic cigarettes according to the categories described in Article 2(16) of Directive 2014/40/EU, i.e., disposable, refillable and rechargeable ones, while the indication of the type of the battery they have (a non-rechargeable or a rechargeable one) is currently not required or recommended.

- (28) Further, the French authorities stress a significant increase in the use and popularity of electronic cigarettes among adolescents in France. According to the French Observatory on Drugs and Addictive Tendencies (*Observatoire français des drogues et des tendances addictives*, OFDT) study published in March 2023, from 2017 to 2022, the daily use of electronic cigarettes among 17-year-olds tripled (from 1.9% to 6.2%). In this period also recent use of electronic cigarettes among 17-year-olds significantly increased (from 16,8% to 30,7%) and experimentation reached almost 57% (i.e., young people declaring they have already tried electronic cigarettes). In addition, experimentation with electronic cigarettes is starting earlier (the average age of the first use was at 15.0 years old in 2022, compared to 15.4 years old in 2017). For 17-year-old girls, the experimentation with electronic cigarettes largely surpasses experimentation with tobacco. For young people, smoking cigarettes and vaping continue to be associated: more than half of daily users of electronic cigarettes are also daily smokers of tobacco products. Between middle school (*college*, 11 to 14-year-old pupils) and high school (*lycée*, 15 to 18-year-old pupils), the percentage of those experimenting with both tobacco and electronic cigarettes triples.
- (29) Within this trend, the French authorities emphasise an alarming rise in the popularity and actual use of notified products, in particular among young people in France, as evident from the available surveys and reports. According to the study conducted at the request of the Alliance Against Tobacco (*Alliance Contre le Tabac*, ACT) in 2023, among 13 to 16-year-olds in France, 73% of those surveyed had already heard of the notified products (*puffs*) and 15% of those surveyed had already used them. Among those who use these products, 47% of them started their nicotine use through them (compared with 28% in 2022), and 23% subsequently turned to other tobacco and nicotine products. This confirms that notified products are increasingly becoming the primary gateway into tobacco consumption and nicotine addiction for teenagers.
- (30) In addition, the French authorities underline that the attractiveness of the notified products in France is also linked to their growing market availability and accessibility. According to the above referred study, more than one quarter of the young people between 13 and 16-year-olds interviewed (28%) consider it easy to obtain notified products. Of those who have already purchased a tobacco or nicotine product, one third state that it is easier to buy a *puff* in a tobacco shop, ahead of asking friends (27%) or looking online or on social media (17%). This worrying ease of access leads 34% of those asked to wrongly believe that a person under the age of 18 has the right to buy notified products, even though the sale of these products to minors is prohibited. Also, the proportion of 13 to 16-year-olds who declare that they had already purchased a *puff* remains stable compared to 2022 (9%), despite the ban on sales to minors.
- (31) The alarm about the growing popularity and use of notified products by young people in France, and their dangers, is also being sounded by the French National Academy of Medicine (*Académie nationale de médecine*, ANM), which concluded in its press release of 28 February 2023 that the notified products (*la puff*) should be removed from the French market. Similarly, on 30 April 2023, the Alliance Against Tobacco and Surfrider joined forces alongside 20 other environmental and public health associations to call for an urgent prohibition of the notified products (*puffs*) due to their health and environmental impact.
- (32) The French authorities additionally explain that, despite a ban on the sale of electronic cigarettes to minors and a comprehensive ban on advertising of electronic cigarettes, the problem of attractiveness and popularity of these products in France remains.

Targeted advertising of notified products is increasingly taking place online and on social media (mostly used by young people), which is particularly challenging to control, and products continue to circulate between young people, despite all enforcement efforts of the French authorities.

- (33) Finally, the French authorities argue that the prohibition on the manufacture, possession with a view to sale, distribution or offer free of charge, the offer for sale, sale, distribution or offer free of charge of the notified products is justified, necessary and proportionate to the pursued aim of protecting public health, particularly the health of young people. Furthermore, they highlight that this prohibition does not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States. Concerning proportionality, France also highlights that the proposed measure neither prohibits consumption nor importation of the notified products.
- (34) Regarding the necessity of the measure, the French authorities stress that the notified measure complements measures already implemented which have so far not proved to be effective. This applies in particular to the prohibition of direct or indirect advertising of electronic cigarettes (which the development of social networks in particular undermines), a ban on the sale or offering free of charge of electronic cigarettes to minors under the age of eighteen (for which checks will be stepped up); and a ban on using electronic cigarettes in certain areas, in particular educational establishments and those intended for the reception, training and accommodation of minors, closed means of public transport, and workplaces for collective use.
- (35) The French authorities explain in detail and illustrate various scenarios for alternative regulation that can be envisaged. However, they conclude that none of the scenarios is efficient to achieve better protection of health, or that it cannot achieve this result quickly enough.
- (36) Specifically, the French authorities outline alternative measures which were considered, such as those concerning the notification obligation, introduction of sanctions against users, stricter enforcement with respect to the ban on sales to minors and the ban on the advertising of electronic cigarettes, prohibition of flavourings, plain packaging and wrapping, limitations on the number of points of sale, and stricter regulation on batteries. However, France considers that these measures would not achieve the desired public health objective.
- (37) Regarding the expected impact of the proposed prohibition, the French authorities underline that the prohibition is to contribute to lower levels of initiation to nicotine consumption among young people and young adults, and to limit the possible risk of a gateway to traditional tobacco consumption. In addition, the prohibition of the notified products will have a positive impact not only on public health but also on the environment, and the environmental impact cannot be dissociated from the objectives of protecting human health.
- (38) Finally, the French authorities stress that the proposed measure is a measure to protect public health which will be applied in a non-discriminatory way to all economic operators.

2.3 Evaluation

A. EVALUATION CONCERNING ELECTRONIC CIGARETTES WITH THE CHARACTERISTICS REFERRED TO IN SUBPARAGRAPH 1° OR BOTH SUBPARAGRAPHS 1° AND 2° OF THE NOTIFIED ARTICLE L. 3513-5-1

(disposable cigarettes, i.e., electronic cigarettes that are pre-filled with a liquid and cannot be filled again, and have a non-rechargeable battery or a rechargeable one)

- (39) Pursuant to Article 24(3) of Directive 2014/40/EU, the Commission is to verify whether or not the proposed national provisions are justified, necessary and proportionate to their aim and whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between the Member States.
- (40) Having regard to the detailed information that France provided in its notification regarding disposable electronic cigarettes, the Commission accepts that the proposed measure is justified on public health grounds insofar as it concerns such electronic cigarettes. It is a measure to address the important health risks associated with the consumption of disposable electronic cigarettes containing nicotine, which is a highly addictive and toxic substance. Since a single disposable electronic cigarette can correspond to several packets of conventional cigarettes, young people can become heavily addicted to nicotine without even realising it. As highlighted by the French authorities, in addition to its addictive effect, nicotine can have a detrimental effect on brain development, especially for young people.⁷ The use of disposable electronic cigarettes also risks being a gateway to traditional tobacco consumption among young people and non-smokers (see recital (43) of Directive 2014/40/EU and recital (29) above). Yet, the available data and information submitted by the French authorities show significant increases in market share and consumption of disposable electronic cigarettes in France, particularly among young people (see recitals below).
- (41) According to Special Eurobarometer 539, the majority of electronic cigarette users in the Union prefer a refillable device. However, in this context, refillable and rechargeable electronic cigarettes are preferred by adults, while disposable electronic cigarettes are used more by younger people aged 15-24. This is the situation also in France, where the use of disposable electronic cigarettes is the highest particularly among 15 to 24-year-olds, where 36% of users reported the use of disposable electronic cigarettes, which is the highest percentage among all age groups.
- (42) The proposed measure would also address the environmental risk resulting from the use of disposable electronic cigarettes, which in turn represents a risk for public health (see also recital (19)). Unlike other categories of electronic cigarettes, disposable electronic cigarettes create plastic waste, e-waste (because of their circuitry and lithium-ion batteries) and hazardous waste (because they contain nicotine and other chemicals) after each full use of their liquid, leading to a significantly higher frequency and amount of such waste generation.
- (43) It is apparent from the notification that the proposed national provisions as regards disposable electronic cigarettes are based on grounds relating to the specific situation in France, where according to the Special Eurobarometer 539 the prevalence of the use of electronic cigarettes is among the highest in the Union (with only 2 Member States ahead), and the consumption of electronic cigarettes among (very) young people has been raising significantly in the last years (see recital (28) above).
- (44) In this situation, available data and information submitted by the French authorities in support of the notified measure reveal an important concurrent trend of a significant and lately rapidly increasing market share of disposable electronic cigarettes on the French market. From mid-2021 to mid-2024, the number of disposable electronic

⁷ See also Opinion on electronic cigarettes, adopted by Scientific Committee on Health, Environmental and Emerging Risks (SCHEER) on 16 April 2021, p. 52 et al.

cigarettes notified in EU-CEG for the French market exponentially rose by 2779%, increasing from 1 187 to 34 174 active products⁸, representing a multiplication by more than 28 times. Further, in that period the proportion of disposable electronic cigarettes increased from 2.6% to 28% of all electronic cigarette products notified for France. This positions France in the second place in the EU in terms of growth, and points to an alarming raise of the number of disposable electronic cigarettes entering the French market. Also according to Euromonitor data⁹, from 2017 to 2022, the disposable electronic cigarettes market in France in value exponentially increased by approximately [...]% (for refillable and rechargeable electronic cigarettes combined this increase was less than [...]%), and their share on the electronic cigarette products market increased by almost [...] percentage points. Such an increase shows that there has been a market development of the kind referred to in recital 54 of Directive 2014/40/EU, leading to important public health risks, and in particular an increased use of tobacco and related products, especially among young people and non-smokers.

- (45) The information submitted by the French authorities also points to a significant increase in consumption and popularity of electronic cigarettes and specifically disposable electronic cigarettes, particularly among young people in France (see recitals (28) to (31) above). This has been confirmed by Special Eurobarometer 539 data, according to which France continues to be among Member States where the electronic cigarettes use is the highest in the EU (at 7%, with only two Member States ahead). While the use of the disposable electronic cigarettes has been confirmed by 26% of electronic cigarette users in France, this use is the highest among young people in France, where 36.5% of 15 to 24-year-old electronic cigarette users reported the use of disposable electronic cigarettes, which is the highest percentage among all age-groups. In other age-groups in France, the usage of disposable cigarettes is on average 13 percentage points lower. Moreover, according to the recent survey highlighted by France, the use of the disposable electronic cigarettes among very young people (13 to 16-years-old) has been rapidly raising in the last years (see recital (29) above).
- (46) In France, there is also a ban in place on sales of electronic cigarettes to minors and a comprehensive ban on advertising of disposable electronic cigarettes, and French authorities attach particular importance to enforcing these bans. However, they convincingly argue that targeted online advertising, which is increasingly being used and taking place on social media, is particularly challenging to detect and control (e.g. because it may take place in closed groups). Moreover, according to information referred to by the French authorities, young people use social media very intensively. The negative effects of social media advertising are thus most evident for that particular group. Also, many disposable electronic cigarettes have been placed on the French market that through their packaging, design, and flavours target a very young population.
- (47) In view of the above, the Commission considers that the proposed prohibition is justified as a measure to support the objective of preventing increased use of disposable electronic cigarettes in France, particularly among young people. The

⁸ Only a small number, 45 (in 2021) and 1453 (in 2024), were disposable electronic cigarettes without nicotine.

⁹ Source: Euromonitor International, Tobacco, 2024 industry edition. (The Commission notes that Euromonitor International's annual industry editions are subject to change year on year, and that Euromonitor stresses while every attempt has been made to ensure accuracy and reliability, Euromonitor International cannot be held responsible for omissions or errors of historic figures or analyses).

prohibition would remove access to those products, thereby reducing the risk of formation of nicotine addiction and dependence, particularly among young people.

- (48) Next, the Commission accepts that, insofar as the proposed measure prohibits disposable electronic cigarettes that are intended to be placed on the market in France or are placed on the market in France¹⁰, it is necessary as regards the objective pursued and cannot be attained by a less restrictive alternative measure. In this context, as regards the objective to prevent the formation of addiction and dependence on nicotine containing disposable electronic cigarettes, especially among young people, the Commission recalls that nicotine is a particularly addictive toxic substance. Any measure that is less than a preventive measure, such as the proposed prohibition which operates at a stage before dependence on such products is established, would be less effective since it is manifestly much more difficult to diminish or cease addiction after dependence has been formed. The addictive nature of nicotine underscores the need and entitlement of France to take timely preventive action, particularly in a context where there is a demonstrated risk of future widespread use and dependence.
- (49) In this regard, based on the information submitted by French authorities, the Commission accepts that alternative measures considered by France to curb the increasing consumption of disposable electronic cigarettes and thus prevent the formation of addiction and dependence, especially among young people, would not achieve the same result and would not protect public health in an equally or more effective and timely manner.
- (50) The Commission agrees with the French authorities that it is more effective to prohibit disposable electronic cigarettes from the market than to ban the possession or use of disposable electronic cigarettes by young people, particularly as such a ban poses enforcement problems.
- (51) This is demonstrated by the significant difficulties that France encounters in the enforcement of the sales ban to minors. Although the inspections on the ground and enforcement of this ban are strengthened, the Commission agrees with France that disposable electronic cigarettes would still be easily accessible to young people online. Also, they could obtain them through friends or family (e.g., older siblings) who are already of age. Moreover, such a ban does not protect the whole young generation and other non-smokers who are also attracted by the concerned products.
- (52) Similarly, as France explained, the effective enforcement of the prohibition on the advertising of disposable electronic cigarettes (that increasingly happens online and on social media), has proven to be very difficult in practice, which stands in the way of achieving France's public health aim.
- (53) Furthermore, the Commission underlines that the information submitted by France reveals that the growing popularity of disposable electronic cigarettes in France, particularly among young people, is a cumulative result of several factors, such as their widespread accessibility in many sales outlets and online, their ease of use and low price, their attractive packaging and design, the variety of flavours, as well as their intensive and targeted marketing to young people (see recitals (20) to (23) above).

¹⁰ For the purpose of this Decision, 'placing on the market' means to make products, irrespective of their place of manufacture, available to consumers located in the Union, with or without payment, including by means of distance sale; in the case of cross-border distance sales the product is deemed to be placed on the market in the Member State where the consumer is located (see also Article 2(40) of Directive 2014/40/EU).

- (54) As French authorities stress, the notified measure complements measures already implemented in France, but which have so far not proved to be effective, especially the prohibition of advertising of any electronic cigarettes and the ban on their sale to minors (see recitals (32) and (34) above). The Commission also accepts France's position that, while other measures such as the introduction of plain packaging may also in the longer term to a certain extent be effective, the public health risks of the use of disposable electronic cigarettes is of such a serious nature that a prohibition measure is justified to curb those risks in an effective and timely manner.
- (55) In view of all these factors, the Commission accepts that, in the specific situation of France, the alternative measures considered by France would not necessarily sufficiently curb the growing use of disposable electronic cigarettes in France and effectively protect public health. In this regard, the Commission takes account of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty on the Functioning of the European Union and that it is for the Member States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved.¹¹
- (56) Based on the considerations set out above and taking into account the high level of protection of human health to be achieved through Directive 2014/40/EU, the Commission concludes that the proposed prohibition of disposable electronic cigarettes with nicotine is justified, necessary and proportionate to the aim of protecting public health, as far as it concerns disposable electronic cigarettes that are intended to be placed on the market in France or are placed on the market in France.
- (57) Finally, based on the information supplied by the French authorities, the Commission considers that there is no reason to conclude that such prohibition of disposable electronic cigarettes would constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. According to the French authorities, there are 23 registered manufacturers of disposable electronic cigarettes in France. However, in particular given that those manufacturers do not specifically benefit from the proposed law there are no grounds to consider that the measure would be of a particular benefit to national producers or distributors.
- (58) It should be stressed that, based on the available data and information submitted by France, the Commission is at this stage not able to conclude that the above reasoning (i.e., in Section A of this Decision) is also valid for the prohibition of disposable electronic cigarettes that are intended to be placed on the market outside of France or are placed on the market outside of France. Such a broad prohibition would remove or limit the possibility for manufacturers and wholesale distributors in France to engage in trade in disposable cigarettes, even if they do not have the intention to place or do not place those products on the market in France. France has, to date, not provided a detailed justification as to why the envisaged prohibition on manufacture and distribution of products intended to be placed or placed on the market outside of France complies with the requirements of Article 24(3) of Directive 2014/40/EU, in particular, why it is necessary for the protection of public health in France and proportionate to that aim.

B. EVALUATION CONCERNING ELECTRONIC CIGARETTES THAT DO NOT HAVE THE CHARACTERISTICS REFERRED TO IN SUBPARAGRAPH 1° OF THE

¹¹ See, for instance, judgment of the Court of 5 December 2023, *Nordic Info v Belgische Staat*, C-128/22, ECLI:EU:C:2023:951, paragraph 78.

NOTIFIED ARTICLE L. 3513-5-1, BUT ONLY THE CHARACTERISTICS REFERRED
TO IN SUBPARAGRAPH 2° OF THAT ARTICLE

(electronic cigarettes that can be filled again with a liquid and have a non-rechargeable battery)

- (59) On the basis of the evidence provided by the French authorities, the Commission evaluation set out in Section A above cannot be extended to the electronic cigarettes that can be filled again with a liquid and have a non-rechargeable battery. These electronic cigarettes are also covered by the notified measure, falling exclusively under the second subparagraph of Article L. 3513-5-1. However, according to the information submitted by the French authorities, such electronic cigarettes are, to their knowledge, not on the French market.
- (60) It follows that the data and information submitted by the French authorities regarding the special situation in France and the necessity of the measure, which is referred to in the Section A above, in particular regarding the developments on the French market and consumption and popularity trends among French young people, do not concern such electronic cigarettes.
- (61) In justifying the notified prohibition, the French authorities also did not provide any information or data specifically about electronic cigarettes that have a non-rechargeable battery but can be filled again with a liquid, which are not disposable electronic cigarettes, but refillable or rechargeable ones. Although the French authorities argue that these electronic cigarettes are *de facto* disposable, they have for instance not provided information about aspects such as the battery life of such products, on whether the prices of those products can be expected to be similar to those of disposable electronic cigarettes, whereas those are relevant and necessary factors for an assessment of whether the products can be considered as attractive for young people as the disposable electronic cigarettes discussed in Section A above.
- (62) In their reply to the Commission's request for additional information, the French authorities noted that the notified prohibition currently applies only to disposable electronic cigarettes within the meaning of Article 2(16) of Directive 2014/40/EU. In the absence of a more detailed reasoning in relation to electronic cigarettes that can be filled again with a liquid and have a non-rechargeable battery, the Commission is at this stage not in a position to assess whether the proposed measure is also justified, necessary and proportionate in relation to those products. The French authorities are, however, free to submit a new notification substantiating why they consider the prohibition of those particular products to be justified by the need to protect public health.

III. CONCLUSION

- (63) On the basis of the considerations set out above, having regard, *inter alia*, to the information and data submitted by the French authorities, and taking account of the objective of ensuring a high level of protection of human health achieved through Directive 2014/40/EU, the national prohibition of the manufacture, possession with a view to sale, distribution or offer free of charge, the offer for sale, sale, distribution or offer free of charge of disposable electronic cigarettes containing nicotine may be regarded as complying with the requirements laid down in Article 24(3) of the Directive insofar as it concerns the disposable electronic cigarettes that are intended to be placed on the market in France or are placed on the market in France.

- (64) This conclusion does not, however, extend to electronic cigarettes that can be filled again with a liquid and have a non-rechargeable battery (falling only under the second subparagraph of the notified measure), nor does it extend to disposable electronic cigarettes that are intended to be placed on the market outside of France or are placed on the market outside of France. Regarding these aspects, France has not yet shown that the notified measure is warranted on grounds relating to the specific situation in that Member State and that the notified national measure is justified, necessary and proportionate to the aim of protecting public health.
- (65) Based on the available data and information submitted by France, it is therefore appropriate for the national measure notified by France to be partially approved.

HAS ADOPTED THIS DECISION:

Article 1

The national provisions notified by the French Republic in accordance with Article 24(3) of Directive 2014/40/EU, are approved insofar as they concern disposable electronic cigarettes containing nicotine that are intended to be placed on the market in France or are placed on the market in France.

Article 2

Based on the available data and information submitted by the French Republic, the national provisions notified by the French Republic in accordance with Article 24(3) of Directive 2014/40/EU, are rejected insofar as they concern:

- disposable electronic cigarettes containing nicotine that are intended to be placed on the market outside of France or are placed on the market outside of France;
- electronic cigarettes containing nicotine that can be filled again with a liquid and have a non-rechargeable battery.

Article 3

This Decision is addressed to the French Republic.

Done at Brussels, 25.9.2024

For the Commission
Stella KYRIAKIDES
Member of the Commission