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ARTICLE

Tobacco end-game policies and the intrinsic connection of health and EU market law

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Abstract
This article explores the relationship between EU internal market law and ambitious tobacco end-game policies, using the United Kingdom's proposed smoke-free generation measure and its application to Northern Ireland under the Windsor Framework as a focal case. Responding to objections raised by EU Member States through the Technical Regulations Information System (TRIS), the article develops an interpretative framework that situates free movement rules within the EU's broader constitutional commitment to public health protection. Drawing on a doctrinal analysis of EU primary law, the Tobacco Products Directive, EU Court of Justice case law, and the TRIS submissions themselves, the article challenges claims that generational sales bans are inherently incompatible with EU law. It argues that such claims rely on narrow and selective readings of internal market doctrine that overlook the extent to which health protection is embedded in EU market regulation. The analysis demonstrates that EU law leaves significant regulatory space for national authorities to pursue proportionate, evidence-based tobacco control measures, including end-game strategies. Beyond the immediate UK–Northern Ireland context, the findings have broader implications for innovative public health regulation within the EU, contributing to ongoing debates at the intersection of health policy, regulatory governance, and economic integration.

Keywords: end-game policies; European Union; tobacco; Windsor Framework

Introduction

At the end of the century, Germany, arguably incentivised by the tobacco industry (Neuman *et al.*, 2002), tried to annul a 1998 EU Directive in the European Court of Justice (Court) that would ban all tobacco advertising (C-376/98 *Tobacco Advertising Directive*, 2000). In this (in)famous legal case, the Court established that, while harmonisation of national laws purely for the sake of health is not permitted, because Member States did not confer a general law-making power on the EU for public health protection in what is now the Treaty on the Functioning of the EU (Article 168(5) TFEU): 'health requirements are to form a constituent part of the Community's other policies' (C-376/98 *Tobacco Advertising Directive*, 2000, para 78). And the Court affirmed that indeed, where it concerns the creation of an EU internal market by adopting unified EU laws, 'in the process of harmonisation, a high level of human health protection is to be ensured' (C-376/98 *Tobacco Advertising Directive* 2000, para 88). Currently, we are in a reversed situation: it is not the EU that is proposing legislation, but rather, all across Europe - including the UK - there is

a renewed urgency to adopt national laws aimed at reducing tobacco and nicotine use, particularly among young people (World Health Organization, 2026).

One such piece of national legislation is the United Kingdom's Tobacco and Vapes Act 2026, whose centrepiece is the 'smoke-free generation' policy: a progressively increasing age of sale that will, over time, eliminate legal access to tobacco for those born after 1 January 2009 (UK Parliament, 2026). This approach, while novel, is not unique. It was inspired by legislation in New Zealand, rescinded when a government with tobacco industry ties came to power (McKee and Hopkinson, 2023). Although the UK has left the EU, Northern Ireland's post-Brexit legal position raises the question of whether the UK's Tobacco and Vapes Act is consistent with EU law. Under the Windsor Framework (UK Government, 2026), EU rules on free movement of goods continue to apply in Northern Ireland. Several Member States have voiced their legal concerns through the Technical Regulations Information System (TRIS) process (European Union, 2015). TRIS requires the UK to notify the European Commission of any measures relating to Northern Ireland's participation in the EU internal market for goods and allows EU Member States and interested parties (including the tobacco industry) to respond to UK legislation that could infringe or otherwise undermine EU law (HM Government, 2023).

If these objections were upheld and the UK Tobacco and Vapes Act were found to infringe EU law, the legislation may not apply in Northern Ireland. Such an outcome would have implications beyond the UK, potentially constraining similar national tobacco control initiatives across the EU. Several Member States, including Denmark and Ireland, have already contemplated comparably ambitious regulatory strategies in response to stagnating progress in tobacco control (Dáil Éireann, 2024; Sundhedsministeriet, 2022). This raises a broader legal question. In *Tobacco Advertising*, the Court affirmed that all EU law is to ensure a high level of health protection. This principle is also stated in Articles 9 and 168 TFEU, and in Article 35 of the EU's Charter of Fundamental Rights. But does this principle extend fully to EU internal market law, which traditionally seeks to remove barriers to the free movement of goods, including, at times, national health-protective measures? More specifically, does the UK Tobacco and Vapes Act constitute an unlawful restriction on free movement, or should EU internal market law be understood as inherently health-protective rather than as a deregulatory free-trade framework?

Methods

Methodologically, we address these questions through a three-stage legal analysis. First, we developed an analytical framework from legal discourse and history against which we are to understand the current legal discussion of the application of EU free movement law to the UK Tobacco and Vapes Act. Our framework draws on the evolving broader role of health within EU (internal market) law. Second, we conducted a close textual reading of the detailed opinions submitted by EU Member States through TRIS, alongside the UK Government's formal response, to identify the core legal claims, underlying assumptions, and points of divergence. This review drew directly on the Member State submissions and the UK's reply, retrieved from the TRIS portal. Third, we undertook a detailed analysis of relevant EU case law and the academic literature interpreting it, in light of our (first step) analytical framework. This standard 'legal doctrinal' methodology focuses on key judgments which establish authoritative interpretations of applicable EU law norms (in particular the Tobacco Products Directive (TPD) (European Union, 2014) and Article 34 TFEU on the free movement of goods), assessing their implications for market access, proportionality, and Member State discretion in public health regulation.

EU free movement law's intrinsic connection to health protection

The prevalence of tobacco use in parts of Europe remains among the highest in the world (World Health Organization, 2025b). The rapidly evolving market of e-cigarettes, nicotine pouches, and

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other novel products has exposed serious regulatory gaps, which also form the backdrop to the emerging new national tobacco regulation, including 'end-game' regulations that are seen throughout Europe. These trends sharpen concerns that traditional tobacco control instruments, such as taxation, warning labels, advertising bans, and smoke-free legislation, are inadequate in the face of rising youth experimentation, evolving nicotine products, and pervasive industry marketing (Ollila *et al.*, 2025). End-game policies seek to move rapidly to a position where lawful tobacco and nicotine use is minimised in a population, with supply limited to outlets such as health facilities rather than retail premises.

The European Union's involvement in tobacco regulation has always been contested. The first EU measures emerged from the Cancer Plan in the 1980s, with a strong public health foundation (Hervey and McHale, 2004). But many EU measures affecting tobacco rely on internal market legal bases and are justified by claims to eliminate trade barriers and harmonise product standards (Jarman, 2018). The longest-standing EU rules in this area focus on advertising, labelling, and minimum standards for the manufacture and presentation of tobacco products (Duina and Kurzer, 2004; Godfrey, 2000), all of which are framed as necessary to prevent divergent national policies from fragmenting the EU's internal market. The underlying logic was that inconsistent national rules on ingredients, warnings, or cross-border advertising risked obstructing the free movement of goods or services. Reducing smoking prevalence and protecting public health were a central part of this legislation, but legally fully integrated with the EU regime of the internal market (Hervey and McHale, 2004).

In the discourse, this has been seen as a structural tension, where EU law would define tobacco on the one hand as a good that has the 'right to free movement' while also being the leading cause of preventable death (World Health Organization, 2025a). This has also, as we argue below, led to a false dichotomy in the understanding of EU free movement law: not 'health-protective' but merely about building a market. This is not the constitutive and interpretive backdrop against which to understand EU free movement of products law; instead, as recently confirmed by the Court (C-155/24 *Rookpreventie Jeugd*, 2026), health protection is intrinsically woven into its fabric, specifically around the free movement of tobacco.

From the early 1990s onwards, particularly following the inclusion of a dedicated public health competence in the Maastricht Treaty (European Union, 1992), the EU began to embed stronger public health considerations into tobacco regulation (Hervey and McHale, 2004). Health protection was recognised as an EU-level objective in its own right, complementing the internal market rationale that had previously dominated. As scientific evidence on the harms of tobacco accumulated and international developments such as the WHO Framework Convention on Tobacco Control reinforced the need for coordinated action (Schütze, 2016; World Health Organization, 2003), the EU increasingly integrated health protection into its regulatory framework.

The 2001 TPD introduced harmonised rules on cigarette labelling, tar and nicotine yields, and restrictions on descriptors such as 'light' and 'mild', marking a significant departure from earlier, more trade-oriented regulation (European Union, 2001). The 2014 TPD went further, mandating pictorial health warnings covering 65% of the pack, standardising product content rules, banning characterising flavours, regulating e-cigarettes, and tightening restrictions on cross-border sales (European Union, 2014). Although both instruments continued to rely on the internal market legal basis, their explicit dual purpose: harmonisation for market functioning and high-level health protection, signalled an obvious regulatory philosophy, and an evolving conceptualisation of what kind of market the EU is creating.

This evolution reflects the steady embedding of a legal recognition that health protection can justify significant constraints on commercial freedoms, even when such measures indirectly affect market access or product availability (C-155/24 *Rookpreventie Jeugd*, 2026). While it is true that, compared to most Western states, one might argue that this presents a 'constitutional asymmetry' between the ability for the EU to legislate around social and welfare state issues, such as health, vis-à-vis economic issues (Garde *et al.*, 2025; Scharpf, 2010), if we trace legal developments in internal

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market law in legal praxis, we can observe a deepening of the embedding of public health and internal market considerations.

In primary law, we see the interweaving of the free movement law and public health protection, particularly in recurring legal tensions and dynamics around on the one side the prohibition of barriers to the free movement of goods of Article 34 TFEU, in the form of national legislation that holds 'quantitative restrictions' and 'measures having equivalent effect'; and on the other side Article 36 TFEU that allows exceptions to the prohibition of Article 34 TFEU based on, inter alia, public health. In other words, it is forbidden to create certain barriers (such as some public health protection laws) to the free movement of goods across EU borders (Article 34 TFEU), unless such laws are necessary to protect public health (Article 36 TFEU).

The Court has played a central role in navigating this dynamic in free movement law, through sophisticated jurisprudence to assess whether national measures 1. fall within the scope of EU internal market law, and 2. whether they are justified because they pursue a legitimate objective, such as health protection, and are proportionate (Craig and De Búrca, 2024). Importantly, as we saw in *Tobacco Advertising* noted above; the EU's regulatory power for the creation and functioning of the internal market itself is premised on the inclusion of public health protection (Article 114(3) TFEU). This is woven into interpretations of Articles 34 and 36 TFEU.

In order to understand how this interweaving is to be interpreted legally, we need to assess cases such as *Cassis de Dijon* (Case 120/78, 1979) and *Scotch Whisky Association* (C-333/14, 2015), particularly on how the Court develops the proportionality framework. This concerns what Member States must show to claim that national legislation seeking to protect public health does not unnecessarily, at least no more than needed, hinder the EU's free movement of goods.

In this respect, related to tobacco, *Philip Morris* (C-547/14, 2016) and related judgements clarified the permissible scope of national autonomy within the harmonised framework established by the TPD. Across this jurisprudence, the simplistic narrative is that the Court has consistently required that Member States demonstrate clear public health objectives, robust supporting evidence, and explicit consideration of less restrictive alternatives. It is in these cases, and in several other health-related cases, that the Court has consistently articulated a more subtle and nuanced notion that the EU's internal market is a particularly 'health-protecting' one, not simply driven by deregulation. We do not only see this line of reasoning in the context of free movement of products, but also in the context of health care services, where the Court, in a series of cases, carved out an extensive range of protections for national autonomy to protect health systems against the free rein of market logics (Frischhut, 2024; Hatzapoulos, 2007; Hervey and McHale, 2015). This is not to say that these cases did not receive any criticism from the health community, but from the perspective of EU free movement laws, these carve-outs by the Court are a recognition of the importance of protecting public health as an internal logic and constitutive part of EU internal market law. This is the EU legal landscape against which contemporary tobacco end-game measures must be assessed.

Last, when it comes to assessing the proportionality of national measures in creating barriers to the free movement of goods, the evidentiary standard of proving the necessity of national health-protecting legislation allows for flexibility. The Court has developed precaution as a leading principle in national public health protection. This means that when national laws that protect public health are adopted, uncertainty may remain about their real-world effects. Opponents might argue that this renders the measures unsuitable or unnecessary within the meaning of proportionality. Yet, the Court in *Scotch Whisky* (C-333/14, 2015) stated that, when reviewing proportionality, one 'may take into consideration the possible existence of scientific uncertainty as to the actual and specific effects [. . .] of a measure [. . .] for the purposes of attaining the objective pursued' (para 57). Without expressly naming it, the Court here was using the precautionary principle discourse in the context of the free movement of goods. This principle (a 'general principle' of EU law, according to the General Court in *Artegodan* (T-74/00, 2002, para 184)) applies measured evidentiary requirements, meaning that regulators are not required to

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prove with certainty that a measure will be effective to pass the proportionality hurdle. The Court recently upheld this new approach in a health context (C-128/22 *Nordic Info*, 2023, para 79). Here, the precautionary principle allowed governments to act without waiting for perfect or long-term proof of effectiveness. It is not necessary to quantify the impact of these measures precisely, as it may evolve. The principle of precaution recognises that delaying action until full certainty is achieved could result in avoidable harm. It therefore supports the implementation of policies based on credible and emerging evidence, rather than definitive proof, to protect public health as part of the evolving EU internal market.

In the following analyses, we first outline how the UK Tobacco and Vapes Act evolved and the rationale underlying it. Secondly, we summarise the objections of some EU Member States to this Act, which appeal to both the TPD and general EU free movement law. We integrate the above interpretative backdrop into a legal assessment of these free movement arguments, drawing on the Court's historical reasoning in other free movement cases involving a public health concern.

An EU law analysis of the UK Tobacco and Vapes Act for a smoke-free generation

The UK's Tobacco and Vapes Act represents one of the most ambitious pieces of tobacco control legislation introduced in Europe in recent decades (UK Parliament, 2026). Unlike traditional age-of-sale laws, which apply uniformly to all individuals above a certain threshold, the UK's model sets a rolling age limit that increases by one year each year. Over time, this approach is intended to phase out legal access to tobacco entirely for future generations, without imposing an immediate ban on the existing adult population. The Act also includes a range of complementary measures to address the broader nicotine landscape.

The Act's policy rationale is anchored in the objective of preventing young people from starting to smoke and thereby reducing long-term smoking prevalence with all its associated health detriments (UK Parliament, 2024). Evidence consistently shows that the vast majority of smokers begin during adolescence or early adulthood and that early initiation is strongly associated with lifelong nicotine dependence and increased morbidity (World Health Organization, 2020). By removing legal access for each successive cohort, the smoke-free generation policy seeks to cut off the flow of new smokers, weakening the long-term sustainability of the commercial tobacco market.

The Act is supported by an emerging evidence base, including modelling studies projecting substantial reductions in smoking-related disease, hospitalisations, and mortality over the coming decades (Department of Health and Social Care, 2023). These models indicate that a generational prohibition would achieve greater long-term health benefits than conventional measures such as raising the age of sale to 21 or 25, precisely because it creates a durable structural shift in tobacco availability (Department of Health and Social Care, 2024b). Behavioural research shows that reducing retail access is one of the most effective ways to prevent youth uptake, particularly in communities where smoking remains highly normalised (Kong and Henriksen, 2022). These are the very communities with the worst health outcomes overall, and the greatest 'drain' on the national health system (Department of Health and Social Care, 2024b).

The proposal aligns closely with the UK's commitments under the WHO Framework Convention on Tobacco Control (World Health Organization, 2003), particularly its call for end-game strategies that protect future generations from addiction. Against a backdrop of rising concern about youth vaping and sustained health inequalities linked to smoking, the smoke-free generation policy has been framed as a necessary and proportionate next step in the UK's tobacco control trajectory. Under the Windsor Framework, while the Act is intended to apply across the whole of the UK, its application in Northern Ireland must be consistent with EU internal market law, including the TPD. In practice, Northern Ireland remains a 'rule-taking' jurisdiction for key aspects of EU tobacco and nicotine regulation. When the UK proposes to extend new domestic rules on tobacco or vaping products to Northern Ireland, as in the case of the Tobacco and Vapes

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Act, it must notify the European Commission through the TRIS procedure. This notification allows EU Member States to scrutinise the proposed measure and raise objections if they believe it is incompatible with EU law.

Member state objections and the UK response

Czechia, Greece, Italy, Slovakia, and Portugal used the TRIS procedure to object to applying the UK's Tobacco and Vapes Act, specifically the smoke-free generation provision, to Northern Ireland. Despite variations in emphasis, the core of their argument is remarkably consistent: the generational sales ban amounts to a *de facto* prohibition on the sale of tobacco products in Northern Ireland. Because it bans products and does not create or sustain a market in them, it obviously conflicts with both EU internal market law/free movement of goods law and the harmonised regulatory framework established under the TPD.

Taken together, the Member States' objections converge around four legal points:

1. Article 24(1) TPD – The measure unlawfully restricts the marketing of compliant products and exceeds national competence.
2. Article 24(3) TPD – Any ban on a category of product requires Commission approval.
3. Article 34 TFEU – The measure is a *de facto* market access restriction.
4. Proportionality – The UK has not demonstrated that the generational ban is necessary, evidence-based, or the least restrictive option.

Secondary EU law: either out of scope, or exempted from the TPD

Following the legislative priority rule, whereby EU legislation, rather than Article 34 TFEU, is the starting point (Ní Chaoimh, 2023), our analysis starts with the TPD. The TPD regulates the manufacture, presentation, and sale of tobacco and related products, including cigarettes, at the EU level. The key question is whether the TPD allows Member States to adopt measures stricter than those provided for in the Directive. The relevant provision is Article 24 (Box 1).

Box 1 Relevant text of Article 24 of the Tobacco Products Directive

1. 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. [. . .]

3. A Member State may also prohibit a certain category of tobacco or related products, on grounds relating 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. Such national provisions shall be notified to the Commission, together with the grounds for their introduction. The Commission shall, within six months of the date of receiving the notification provided for in this paragraph, approve or reject the national provisions after having verified, taking into account the high level of protection of human health achieved through this Directive, whether or not they 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. In the absence of a decision by the Commission within six months, the national provisions shall be deemed approved.

Article 24(1) TPD bars Member States from enacting further measures that would restrict or prohibit the marketing of products complying with the Directive, but only 'for considerations relating to aspects regulated by the Directive'. This raises a first question: whether the Directive even regulates the generational ban adopted in the UK Tobacco and Vapes Act?

As argued by the UK government and acknowledged by the Commission (European Parliament, 2022), the TPD does not regulate 'domestic sales arrangements' (European Union, 2014). A generational sales ban does not prohibit placing a product on the market; it regulates

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buyer eligibility. Article 1 TPD provides that the subject matter of the Directive does not include sales arrangements. This leads to the conclusion that a generational ban falls outside the TPD's scope.

If we argue the opposite, one might say that a generational sales ban is not merely a 'sales arrangement' because its long-term effects are comparable to a ban on placing a product on the market. If we accept that argument, nonetheless, Article 24(3) authorises a Member State to ban 'a certain category' of products on public health grounds relating to the specific situation in that Member State, potentially rendering a duly notified generational sales ban lawful. Beyond proportionality, which will be analysed together with Article 34 TFEU below (Ní Chaoimh, 2022), two points arise.

First is whether the precise wording of Article 24(3) – 'may … prohibit a certain category of tobacco or related products' – only permits Member States to adopt targeted bans and precludes the adoption of a general ban on all tobacco products. This interpretation is not supported by the Court, which, particularly in the context of the TPD, has accepted the need for Member States to protect public health in the context of free movement of tobacco and outlined that this Directive is 'not intended to interfere with the policies of the Member States concerning the lawfulness of tobacco products as such' (C-547/14 *Philip Morris Brands* 2016, para 88). Thus, Article 24 TPD means that only products legally permitted to be marketed in the country concerned are subject to the free movement clause under Article 24(1).

Second, Article 24(3) allows further measures on grounds relating to the specific situation of the Member State concerned. Opponents of the Act might argue that tobacco consumption rates in the UK are not specific to the UK. However, this condition has not been applied strictly in recent European Commission decisions. For instance, in the cases of Belgium (European Commission, 2024a), France (European Commission, 2024b), and Bulgaria (European Commission, 2026), the authorities merely highlighted that the products in question were gaining traction on their national markets and that consumption was increasing, without demonstrating that these developments differed from those in other Member States.

The UK law is therefore likely to fall outside the scope of the TPD and, even if within its scope, would be lawful under Article 24(3) of the TPD.

Primary EU law: prohibited, or justified for public health reasons?

Many Member State objections in the TRIS process begin from the broad principle articulated in *Dassonville* (Case 8/74, 1974): that any measure 'capable of hindering, directly or indirectly, actually or potentially' trade between Member States constitutes a measure having equivalent effect to a quantitative restriction. This broad formulation is routinely invoked when seeking to characterise national rules as internal market barriers.

Member States rely on *Commission v Italy* (C-270/02, 2004) to argue that the smoke-free generation policy is effectively a ban, obviously within the scope of Article 34. But the Court very rarely applies the *Dassonville* formula as such (Barnard and Peers, 2026; Craig and De Búrca, 2024; Maduro, 2001; Schütze, 2016). Rather, it distinguishes between rules about the characteristics of goods, and rules about selling arrangements – the conditions under which goods are marketed or sold. While product requirements typically fall within Article 34 TFEU, selling arrangements fall outside its scope if they apply equally, in law and in fact, to domestic and imported goods (C-267-268/91 *Keck*, 1993).

Thus, neutral rules governing how, when, or where sales occur are not automatically unlawful barriers to trade. The generational ban fits within this category: it regulates the 'conditions under which goods may be lawfully marketed', in particular, to whom a product may be sold, not product characteristics. The key question is whether it is a neutral rule. An advertising ban is non-neutral because it deprives non-national traders of a sales route that is not needed by national traders already established in the market (C-34-36/95 *De Agostini*, 1997). But the UK's

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generational ban does not impose differential burdens. It applies equally to all traders, domestic and foreign, and does not vary by product origin.

Arguably, non-differential selling arrangements are subject to a residual market access test (C-108/09 *Ker-Optika*, 2010; C-142/09 *Lahousse*, 2010; Schütze, 2016), or consideration of whether a measure has 'considerable influence on the behaviour of consumers' (C-110/05 *Italian Motorcycle Trailers* 2009). If this is a correct interpretation of the Court's case law, a selling arrangement rule, even if neutral, with significant economic consequences for the market, falls within Article 34 TFEU. However, there is ample older (C-292/92 *Hünermund*, 1993; C-69/93 & C-258/93 *Punto Casa*, 1994; C-401/92 & C-402/92 *Tankstation*, 1994) and more recent case law (Case C-221/15 *Colruyt*, 2016; Case C-147/21 *CIHEF*, 2023) where the Court has stuck to a classic non-discriminatory test for selling arrangements, with no reference to a market access test.

Thus, it is far from clear that market access or market contraction alone determines the applicability of Article 34 TFEU. Given that the Court has never been faced with a sales arrangement like the generational sales ban, uncertainty remains. Moreover, even if the Court were to apply a market access test, a generational sales ban would not necessarily breach EU law, as it could be justified under Article 36 TFEU, provided it serves a legitimate public interest and is proportionate.

Justification of a national barrier to free movement is to be judged against the backdrop of the constitutional embedding of health protection within the fabric of the market. Contemporary EU law embeds increasing aspects of health policy *within lawful EU-level activity* (Greer *et al.*, 2024; Hervey *et al.*, 2026), not merely leaving health to the national level. This approach inflects the reasoning in free movement case law, particularly where free movement impacts national healthcare systems (Frischhut, 2024; Hervey and McHale, 2015). Rather than a simple rule/exception approach, health has become constitutive of the type of market being created. Moreover, the COVID-19 pandemic showed that free movement can lawfully be restricted where health protection requires it (Delhomme, 2024).

The 'public interest objective pursued' is the first element needed to justify restricting the free movement of goods under EU primary law. The Explanatory Notes accompanying the Tobacco and Vapes Act (UK Parliament, 2024) explain that the smoke-free generation measure's objective is the protection of public health, with the UK aiming for a smoking prevalence rate in England of 5% by 2030 (Office for National Statistics, 2024). The protection of human health is an express derogation under Article 36 TFEU that can justify restrictions under Article 34 TFEU.

Public health protection as the 'public interest objective pursued' is further supported by the need to protect the functioning and sustainability of the National Health Service (NHS). The Court has endorsed three relevant NHS-protection objectives. The first is the need to maintain treatment capacity or medical competence within the national territory, insofar as this is essential for public health (C-158/96 *Kohll*, 1998). When national health systems across Europe are increasingly under strain, including in the UK, health issues caused by tobacco and related products consume the valuable treatment capacity of medical practitioners and establishments that could be redirected if a smaller portion of the population were exposed to these products.

Second, the Court has recognised the need to maintain a balanced medical and hospital service open to all as a legitimate objective, insofar as it contributes to achieving a high level of health protection (C-158/96 *Kohll*, 1998). This includes requirements aimed at controlling costs and avoiding wastage of financial, technical, and human resources (C-157/99 *Smits/Peerbooms*, 2001; C-372/04 *Watts*, 2006; C-173/09 *Elchinov*, 2010; C-50/14 *CASTA*, 2016; C-243/19 *A*, 2020). The WHO (2025a), UK (Department of Health and Social Care, 2025), the United States (National Cancer Institute, 2026) and the EU itself (European Commission, 2024c), amongst many others, affirm that all forms of tobacco are harmful, that tobacco consumption is a significant cause of avoidable death, and that there is no safe level of tobacco consumption. These substantial risks thus threaten the balance of healthcare systems and can be avoided through measures such as smoke-free generation legislation.

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Finally, the Court has recognised the need to protect against risks to the financial balance of the social security system as an objective capable of justifying restrictions to the free movement of goods and services (C-158/96 *Kohll*, 1998). With the smoking-related cost to NHS England alone estimated to be £2.6 billion annually (NHS England, 2022), and the government already struggling to manage the NHS budget (Lee, 2024), the use of tobacco and related products clearly represents such a risk.

Proportionality of the generational ban

Scotch Whisky Association is a key statement of the Court's proportionality test for novel public health measures. It emphasises evidence-based reasoning, including consideration of less trade-restrictive alternatives. The UK has presented credible evidence, modelling, health data, and analysis of youth initiation patterns. In this regard, its justification could benefit from further evaluation of alternatives, particularly as to why fixed-age increases or enforcement-based measures would be insufficient, and especially in Northern Ireland. However, while the Court emphasises evidence-based reasoning, it has also confirmed that Member States have discretion when addressing major health risks, especially where predictive judgements are needed, drawing on the principle of precaution. The Court accepted modelling and behavioural projections even in the absence of definitive data, requiring only an assessment of 'whether it may reasonably be concluded from the evidence' that the chosen measure is suitable and that alternatives are unlikely to offer equivalent protection (C-333/14 *Scotch Whisky Association*, 2015, para 56).

Proportionality requires demonstrating that the restrictive measure is capable of achieving the objective pursued (C-456/10 *ANETT*, 2012). In assessing the appropriateness of the measure where the objective is public health, the Court has noted that 'a Member State may take the measures that reduce, as far as possible, a public health risk' (C-171-172/07 *Apothekerkammer des Saarlandes*, 2009), and it is up to the Member State to decide on the appropriate degree of protection, within the limits imposed by the Treaties (C-170/04 *Rosengren*, 2007; C-333/14 *Scotch Whisky Association*, 2015). Also here, Member States are afforded a wide margin of discretion, both as to the degree of protection and the way in which that degree of protection is to be achieved (C-222/18 *VIPA*, 2019). In scrutinising the exercise of a Member State's discretion, the Court looks at the Member State's particular social circumstances and the importance attached by the Member State to the relevant objective (C-221/15 *Colruyt*, 2016). In that respect, the UK has long been amongst the most assertive European countries in tobacco control (Willemsen *et al*., 2022) and is considered to have one of the most comprehensive tobacco control approaches in the world (Cairney, 2019). Furthermore, the question of suitability requires that the objective must be pursued in a way that genuinely meets the relevant concern (C-390/12 *Pfleger*, 2014), consistently and systematically (C-243/01 *Gambelli*, 2003). In assessing the genuine capacity of the measure to achieve the objective, it is not necessary to ascertain this 'empirically and definitely' (C-464/15 *Admiral Casinos*, 2016, para 29). Rather, a global assessment of the circumstances surrounding the adoption of the legislation must be undertaken (C-390/12 *Pfleger*, 2014).

Based on the evidence indicating that raising the minimum age of sale has corresponded to reductions in smoking prevalence (Millett *et al*., 2011), as well as the simple logic that making tobacco and related products more difficult to access is likely to reduce their use, the UK measures are genuinely suitable to protect public health. One objection to the measure's suitability concerns the claim advanced by the tobacco industry and certain Member States that it would increase illicit trade (Snowdon, 2025; Tobacco Manufacturers' Association, 2024). In that regard, it can be observed that 'There is no evidence that the smoke-free generation measure will contribute to increases in the availability of illicit tobacco' (Institute of Public Health, 2024). Moreover, the UK forwards evidence that is, in fact, available, indicating that, by curbing overall demand, tobacco control policies have been associated with declines in illicit tobacco use (Department of Health and Social Care, 2024a). Even if illicit trade were to increase, that would not ultimately render the

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measure unsuitable for protecting public health. So long as there is a decrease in the overall rate of tobacco and related product use, the measure remains appropriate (Davies *et al.*, 2025). As the UK has consistently adopted comprehensive tobacco control policies, the requirement to pursue the objective consistently and systematically is also met. The smoke-free generation measure is also in line with the objectives set by the EU, as expressed, in particular, in the EU Beating Cancer Plan, an aspect that the Court takes into account when assessing a measure's suitability (C-128/22 *Nordic Info*, 2023).

Last, the necessity criterion requires that no less onerous means be available to achieve the relevant objective as effectively (C-347/89 *Eurim-Pharm*, 1991; C-121/00 *Walter Hahn*, 2002; C-170/04 *Rosengren*, 2007; C-456/10 *ANETT*, 2012; C-333/14 *Scotch Whisky Association*, 2015). Critics invoke *Scotch Whisky* to argue that the UK failed to assess less restrictive alternatives, such as raising the age of sale to 21 or 25, stronger enforcement, expanded cessation support, or tax measures, and therefore cannot show necessity under Article 36 TFEU. Yet, this overstates what *Scotch Whisky* requires. The UK's evidence is broadly sufficient. Its impact assessment considers the age-of-sale alternatives, and its modelling shows that fixed thresholds cannot achieve the long-term structural reduction in smoking that a generational rule delivers. The UK could elaborate more explicitly on why alternatives fall short, but proportionality does not demand perfect proof; it requires only a plausible, evidence-supported rationale. The burden of proof does not go as far as requiring positive proof 'that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions' (C-333/14 *Scotch Whisky Association*, 2015, para 55).

A final argument advanced by the Member States in the TRIS process is that less onerous means are available to achieve the public health objective. But the UK has already adopted restrictions on advertising, progressively increased taxation, raised the legal age of purchase, limited smoking in public places, restricted smoking in cars, and provided support for smoking cessation (Anyanwu *et al.*, 2020; Association of Directors of Public Health, 2025). Still, 10.6% of UK adults are current cigarette smokers and 10% use vapes (Office for National Statistics, 2024), implying the need for bold measures if this figure is to be halved to meet the 2030 5% target. Increasing the minimum age for tobacco-related sales could foreseeably further reduce the use of such products. However, it cannot be said that a one-off increase in the minimum age would be as effective as a gradual, yearly increase in the legal age of sale.

The proportionality test is often understood as involving a third step, so-called 'stricto sensu' proportionality, according to which 'the disadvantages caused must not be disproportionate to the aims pursued' (C-50/14 *CASTA*, 2016, para 165). This third step is rarely applied in the context of the review of national measures, but even if it were applied, the generational ban could meet it. According to Advocate General Bot, this third stage 'assumes the balancing of the interests involved' and 'consists in comparing the extent of the interference which the national measure causes to the freedom under consideration and the contribution which that measure could secure for the protection of the objective pursued' (C-333/14 (Opinion) *Scotch Whisky Association*, 2015, para 76). In this regard, the Court has consistently held that 'the objective of protection of health takes precedence over economic considerations, the importance of that objective being such as to justify even substantial negative economic consequences' for economic operators (Case C-151/17 (Opinion) *Swedish Match*, 2018).

Discussion

We examined the objections raised by several EU Member States to the application of the UK's smoke-free generation policy to Northern Ireland under the Windsor Framework and the TRIS procedure. Our analysis shows that these objections rest on an unduly restrictive and selective reading of EU internal market law. When placed within the broader doctrinal and constitutional

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development of EU free movement law, particularly in the context of tobacco, the claimed incompatibility of end-game measures with EU law is far from self-evident. On the contrary, EU internal market law has evolved in ways that increasingly embed public health protection not as an external exception to market integration, but as a constitutive feature of the type of market the EU seeks to create. This applies not only when the EU is legislating, as we saw in *Tobacco Advertising*, but also when Member States and places within the scope of (some) EU law, such as Northern Ireland, are adopting national health-protective laws.

Our central contribution lies in reframing the understanding of EU free movement law in contexts of intense public health risk. Much of the legal opposition to the smoke-free generation policy assumes a simple rule/exception model, in which market access is the default and health protection a narrow derogation requiring exceptional justification. However, as the preceding analysis demonstrates, this framing no longer captures the internal logic of EU law as it has developed, particularly in areas such as tobacco regulation.

EU internal market law, through Treaty provisions, harmonising Directives, and Court jurisprudence, has progressively integrated health protection into its interpretative structure. The TPD, despite its internal market legal basis, explicitly pursues a high level of health protection. Its 'two-fold objective' was explicitly recognised by the Court again in April 2026 (C-155/24 *Rookpreventie Jeugd*, para 35). Free movement provisions themselves are conditioned by public health objectives through Articles 36 and 114(3) TFEU. Proportionality analysis in public health cases increasingly accommodates scientific uncertainty and precaution. Taken together, these developments undermine claims that ambitious tobacco control measures are inherently and obviously suspect under EU law simply because they restrict market access.

Seen through this lens, the objections raised in TRIS mischaracterise both the applicable legal tests and the constitutional setting in which they operate. Our analysis supports a shift away from a rigid free movement rule/health derogation exception framework towards an understanding in which public health is embedded within the internal market itself. This shift is particularly evident in tobacco control, where the product in question is the leading cause of preventable death and where EU action has long recognised the legitimacy of far-reaching regulatory intervention.

This perspective also helps to clarify the role of proportionality. Proportionality is not a mechanism designed to block ambitious public health regulation unless it is minimally disruptive to markets. Rather, it is a structured inquiry that balances and integrates free movement of goods and services in the EU with the level of health protection that Member States are entitled to pursue. Where measures address serious and well-documented risks, such as youth nicotine addiction, EU law protects national autonomy and discretion, particularly when measures are adopted as part of a coherent and systematic public health strategy.

Importantly, the implications of this analysis extend beyond smoke-free generation policies and beyond the UK/Northern Ireland context. Across Europe and beyond, governments are increasingly considering novel tobacco and nicotine control measures to achieve end-game objectives. These include restrictions on retail availability, bans on specific high-risk product categories, and the pharmaceuticalisation (for example, sale in pharmacies, sale only with a medical prescription) of nicotine-containing products for smoking cessation purposes, particularly electronic cigarettes (e-cigarettes). This reflects the growing recognition of their considerable risks to health (Glantz and Oliveira da Silva 2026).

EU Member States considering end-game strategies should not read TRIS objections as evidence that such measures are inherently incompatible with EU law. States should ensure a robust proportionality analysis and careful regulatory design, regulating buyers rather than banning products, to remain compliant with the TPD. But the TRIS procedure is a governance mechanism, not a forum for producing authoritative legal determinations. Detailed opinions submitted through TRIS reflect political priorities, economic interests, and regulatory preferences of Member States and stakeholders, including the tobacco industry. They do not constitute binding interpretations of EU law, nor do they resolve genuine legal uncertainty.

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There is a risk that overreading TRIS objections as indicators of unlawfulness may chill public health ambition, particularly in politically sensitive or legally hybrid contexts such as Northern Ireland or at the EU level. This risk is exacerbated where objections are framed in absolutist terms that understate the scope for justification and discretion recognised by EU law. A more measured understanding of TRIS as an early-warning mechanism would better reflect its institutional role. Northern Ireland's position under the Windsor Framework renders it a particularly poor test case for the general points at issue. As a rule-taking jurisdiction over EU internal market law, without direct participation in EU decision-making, Northern Ireland is especially vulnerable to conservative legal interpretations that prioritise regulatory stability over public health ambition. The analysis presented here counters the assumption that Northern Ireland must default to a lower standard of tobacco regulation permissible under EU law. Instead, when EU internal market law is understood as health-protective, the application of ambitious public health measures in Northern Ireland should be seen as entirely legally defensible. This has broader significance for differentiated integration arrangements, where concerns about legal certainty may otherwise inhibit regulatory innovation in fields central to population health.

Our findings also speak to the future direction of EU-level tobacco regulation. As the TPD comes under review, the legal uncertainty exploited in debates such as this one underscores the need for greater clarity at the EU level. Explicit recognition of the EU's commitment to a health-protective internal market, the objectives of the Beating Cancer Plan (European Commission, 2021), and that end-game strategies are compatible with EU law would reduce reliance on defensive proportionality arguments which limit the strategic deployment of free movement law in pursuit of public health objectives.

Conclusion

Focused on legal doctrine and constitutional interpretation rather than empirical evaluation of policy outcomes, we examined the objections raised by several EU Member States to the application of the UK's smoke-free generation policy in Northern Ireland, situating them within the broader legal development of EU internal market law. We do not predict how the Court would rule in a future case, nor do we assess implementation challenges on the ground. Instead, we clarify the legal space available for ambitious public health regulation within EU internal market law.

By situating smoke-free generation policies within the broader evolution of EU health and internal market law, we challenge deregulatory narratives that continue to dominate opposition to tobacco end-game strategies. The constraints imposed by EU law are narrower, and the opportunities for forward-looking public health regulation are broader than is often claimed. As tobacco control confronts increasingly complex challenges, legal arguments portraying ambitious measures as incompatible with EU law should therefore be treated with caution rather than deference.

Our analysis shows that objections to end-game policies like the UK Act rely on expansive and selective readings of free movement doctrine that sit uneasily with the structure of the TPD, established case law, and the constitutional embedding of public health protection within EU law. When internal market law is understood not as a deregulatory free-trade project but as the legal framework for a health-protective market, the alleged incompatibility of end-game measures is far from obvious.

A close reading of free movement jurisprudence reveals significantly more scope for national regulatory autonomy than the TRIS objections suggest. The legal argument supporting the compatibility of smoke-free generation policies with EU law is at least as coherent and persuasive as the position advanced by their opponents.

Beyond the Northern Ireland context, this analysis has wider implications for innovative tobacco end-game strategies, including pharmaceuticalisation. Properly understood, EU law does

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not preclude such measures. Instead, it leaves meaningful space for governments to move beyond incrementalism and address nicotine addiction as a long-term public health challenge. Claims that ambitious tobacco control is foreclosed by EU law should therefore be treated with caution: the constraints are narrower, and the regulatory possibilities broader, than is often assumed.

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