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Washington DC, 15 January 2021

Ministry of Health, Welfare and Sport
P.O. Box 20350
2500 EJ The Hague

Subject: Comments to The Public Consultation On “Regulation of E-Cigarette Flavors”

Dear Members of the Government,

We provide these comments to the public consultation on “**Regulation Of E-Cigarette Flavors**” to express our concerns about the proposal to ban flavoring additives in components of electronic vaping products. The Property Rights Alliance (PRA) is an international advocacy and research organization based in Washington D.C. dedicated to protecting intellectual property rights and promoting innovation and free trade around the world.

The impact assessment of banning flavors in vaping products.

The proposal to ban flavors in electronic vaping products is the third measure introduced by the Dutch Ministry of Health that failed to consider the public health benefits of vaping products. Banning flavors may lead to continuous and prolonged smoking, as it would damage a harm reduction tool. The first measure taken was the smoking ban that was extended on 1 July 2020 on vaping and e-cigarette products with and without nicotine. The Dutch government announced an e-cigarette display ban for supermarkets from 1 July 2020 and other points of sale from 1 January 2021. The second measure was the plain packaging for electronic vaping products that will be introduced in 2022, which will create an inhospitable environment for intellectual property rights.

The explanatory memorandum of the proposal provides neither a proper evaluation for the use of e-cigarettes as a harm reduction tool nor evidence-based policy recommendations. Part 2.2 (explanatory memorandum) ¹ mentions that it is not known exactly how much less harmful e-cigarettes are and that they result in little or no health gain. Electronic cigarettes are 95% less harmful (**Public Health England, 2018**) than combustible tobacco.² Scientific data support the function of vaping products as a successful quit aid tool that modifies behaviors and prevents smoking relapses. **The New England**

¹ Explanatory Memorandum as it is published at <https://www.internetconsultatie.nl/smaakjes>

² Public Health England. “E-Cigarettes around 95% Less Harmful than Tobacco Estimates Landmark Review.” GOV.UK, August 19, 2015. <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review>

Journal of Medicine 2019 has published a study by the **U.K. National Health Service**, which found that e-cigarettes may help adults quit. A group assigned to e-cigarettes as a combustible tobacco replacement were more likely to remain abstinent for one year compared with a group using nicotine replacement products (18% versus 9.9%).³ Currently in Australia vaping is only legal when prescribed by a doctor, making it one of the most hostile policy regimes. With the introduction of e-cigarettes, a rapid drop in the smoking rate coincided from 19.3% in 2010 to 13.7% in 2018.⁴ The published update of **the Cochrane Collaboration review in October 2020**⁵ showed that e-cigarettes helped smokers achieve long-term smoking abstinence. This review assessed the results of 50 studies from across 13 jurisdictions, representing 12,430 participants.

The exact long-term harmfulness of using e-cigarettes is not defined in the proposal. In other words, there is no sufficient certainty established that it will actually solve a social problem, as required for the regulation. The ban of a particular category of tobacco and its related products may only be imposed if it is justified by the need to protect public health.

Banning vape flavors practically misinforms smokers about the relative risks of e-cigarettes and limits the usefulness of vaping as a tobacco harm reduction tool. That is a huge negative consequence for public health. Significantly more adults may go back to smoking combustible tobacco. According to **Consumer Choice Center**, access to flavors increases the likelihood of quitting smoking by 230% and 260,363 vapers would be driven back to smoking if flavors are banned.⁶ Vaping is a revolutionary innovation in the nicotine market capable of breaking the fatal relationship with tobacco. PRA is committed to the encouragement of effective policies for innovative tools such as vaping products with realistic impact on society.

The ASH Smoke free Great Britain 2019⁷ **Survey** has explored the effect of a flavors ban for vaping products. If the flavors were no longer available, less than 1 in 10 vapers would stop vaping, while 1 in 5 said they would either smoke more tobacco or return to smoking tobacco. It is notable that despite the ban, a quarter of the participants would still try to get flavors. The numbers underline that a flavor ban would not decrease the consumer's demand for e-cigarettes and probably will incentivize an increase of the smoking rate.

Also, the data of the Explanatory Memorandum (2.3)⁸ provide that as of 2019, 25% of young people between 12 and 16 years old have ever used an e-cigarette, without giving any meaningful information on the frequency of current use. In fact, the Explanatory Memorandum fails to note that 55% of young people in Netherlands have not vaped recently and furthermore fails to illustrate that any

³ Hajek P, Phillips-Waller A, Dunja P, et al. A randomized trial of e-cigarettes versus nicotine-replacement therapy [published online February 14, 2019]. *N Engl J Med*. doi: 10.1056/NEJMoa1808779

⁴Centers for Disease Control and Prevention.

https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm

⁵ Hartmann-Boyce et al (2020), Electronic cigarettes for smoking cessation, Cochrane Systematic Review – Intervention: <https://doi.org/10.1002/14651858.CD010216.pub4>

⁶ Consumer Choice Center. “Why Vape Flavors matter”. 2020 <https://241yjo5ffc43s84vz4462arn-wpengine.netdna-ssl.com/wp-content/uploads/2020/09/WHY-VAPE-FLAVORS-MATTER-POLICY-PAPER.pdf>

⁷ Use of e-cigarettes (vaporizers) among adults in Great Britain.

<https://ash.org.uk/wp-content/uploads/2019/09/Use-of-e-cigarettes-among-adults-2019.pdf>.

⁸ Explanatory Memorandum as it is published at <https://www.internetconsultatie.nl/smaakjes>

particular flavors trigger the use of e-cigarettes. A US 2017 survey of young adults using both e-cigarettes and vaping products indicated that a ban on e-liquid flavors would lead to increases in combustible cigarette use and reductions in e-cigarette use.⁹ In England, where flavors have not been restricted, a 2018 report by Public Health England found that e-cigarettes are attracting very few young people who have never smoked into regular use and that e-cigarettes use among those who have never smoked is less than 1%¹⁰ The provisions are not justified even by the RIVM research (Explanatory Memorandum 3.1¹¹) regarding the different flavors available in the Netherlands, which failed to define which flavor additives are attractive to young people.

Additionally, this proposal fails to explain how the costs and burdens involved are justified by the seriousness of the problem. As it is stated on the 7th part of the explanatory memorandum,¹² the Ministry of Health:

- a. Acknowledges that the total number of economic operators is unknown to the Ministry of Health.
- b. Focuses only on 1,960 specialized economic operators; and
- c. Estimates an impact of €45 per economic operator, based on the hour needed to become familiarized with the new regulation.

According to recent market research¹³ conducted by trade association Esigbond, the proposed measures put thousands of jobs at risk at shops, production and import companies. About 82% of the retail outlets would go bankrupt and the banning of flavors will result in 58% less turnover in 2021.¹⁴

Experts expect smokers to ignore the less harmful alternative of e-cigarette and resume smoking. Even worse, they will purchase their vapor liquids from illicit markets, or from jurisdictions where they are legal or internet-based suppliers. The public health may be damaged after the introduction of a flavor ban in a period where there is a sharp rise in smuggling and sale of illegal e-cigarettes. Tobacco and vaping products are the most illicitly trafficked products in the world, which hurts the economy. Unlike the licensed vape shops, illicit vendors do not verify customers' ages.

⁹ Lauren R. Pacek, "What Would You Do If...? Analysis of Young Adult Dual User's Anticipated Responses to Hypothetical E-cigarette Market Restrictions," Duke University, 2017, https://www.rti.org/sites/default/files/related-content-files/pacek_ppt.pdf.

¹⁰ McNeill A, Brose LS, Calder R, Bauld L & Robson D., *Evidence reviews of e-cigarettes and heated tobacco products 2018*. A report commissioned by Public Health England. London: Public Health England, 2018

¹¹ Explanatory Memorandum as it is published at <https://www.internetconsultatie.nl/smaakjes>

¹² Explanatory Memorandum as it is published at <https://www.internetconsultatie.nl/smaakjes>

¹³ "Market research: 82% e-cigarette shops go bankrupt next year due to taste ban". <https://www.esigbond.nl/2020/12/10/marktonderzoek-82-e-sigaretwinkels-volgend-jaar-failliet-door-smaakverbod/>

¹⁴ "Market research: 82% e-cigarette shops go bankrupt next year due to taste ban". <https://www.esigbond.nl/2020/12/10/marktonderzoek-82-e-sigaretwinkels-volgend-jaar-failliet-door-smaakverbod/>

The importance of Property Rights for innovation in the tobacco market.

The right to property (Article 1, First Protocol to the European Convention on Human Rights)¹⁵ is weighed against the legitimate interest of public health (Explanatory memorandum 5.4¹⁶). Government restricts and interferes with the property rights of the tobacco industry and its products, affecting the very essence of the guaranteed right. The rationale is considered in relation to its health function, which is not detailed, and it contradicts the overwhelming evidence on the lower harm potential of e-cigarettes compared to smoking. It is a discriminatory proposal that regulates tobacco and vaping products from the same perspective and undermines public health. Adult smokers as consumers would be denied access to products with reduced risk by a narrative that does not provide a proportionate basis to justify the measures.

States can protect public health without damaging the protection of private property rights and market-led innovation. Manufacturers invent e-cigarettes that earn strong reputations due to strong intellectual property rights. In the International Property Rights Index 2020¹⁷, which is the world's only index entirely dedicated to the measurement of intellectual and physical property rights, Netherlands ranked 7th out of 129 countries, with a score of 8.281. Regulations such banning the flavors on vaping products may erode such a positive ranking. The principal means through which industry and creators generate returns on their invention in creativity are Intellectual Property Rights.

Innovation in vaping resulted in fewer people using combustible tobacco, a goal that public health authorities fight to accomplish. Property Rights Alliance opposes all measures that diminish property rights and violates the proportionality principle. Efficient and balanced property systems are a key element to promote investment in innovation. Such a proposal may harm the smoking population and create barriers to access innovative and less harmful products.

According to the Global Innovation Index, which evaluates the innovation performance around the globe, Netherlands ranked 5th out of 131 countries, with a score of 58.76.¹⁸ This is a high score that should be maintained with informed innovation policy considerations. A country should promote new ways of thinking to add value in an existing idea that benefits consumer, industry and the economy as a whole. Governments should facilitate innovation by not imposing restrictive regulations for entrepreneurs. Also, it is essential for such a regulation to seek views from stakeholders on the analysis provided, or otherwise it fails to provide any transparency on the process. The justification for the ban in the proposed legislation is unclear and quite arbitrary for one of the most impressive innovations of the past decade, which managed to solve a problem that has been around for many years.

¹⁵ The European Convention on Human Rights https://www.echr.coe.int/documents/convention_eng.pdf

¹⁶ Explanatory Memorandum as it is published at <https://www.internetconsultatie.nl/smaakjes>

¹⁷ International Property Rights Index 2020 <https://www.internationalpropertyrightsindex.org>

¹⁸ Global Innovation Index 2020 <https://www.globalinnovationindex.org/gii-2020-report#>

Thank you very much for considering our comments. Please feel free to contact us with any questions or comments.

Respectfully submitted,

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