

Decision on how the European Commission dealt with a complaint against Denmark concerning a ban on the sale of flavoured e-cigarettes - CHAP (2021)00273 (case 1661/2021/FA)

Decision

Case 1661/2021/FA - **Opened on** 11/10/2021 - **Decision on** 11/10/2021 - **Institution concerned** European Commission (No maladministration found) |

Dear Mr X,

In September 2021, you made a complaint, on behalf of the Danish Vape Business Association (BECIG), to the European Ombudsman about how the European Commission dealt with your infringement complaint CHAP(2021)00273 against Denmark.

In your complaint to the Commission, you argued that the ban on flavoured e-cigarettes [1] in Denmark is contrary to EU law because it constitutes a barrier to the free movement of goods and is disproportionate to the objectives pursued, that is, the protection of public health, in particular of children and young adults.

In your complaint to the Ombudsman, you contend that the Commission was wrong to close your infringement complaint and that it has failed to ensure proper enforcement of EU law [2] . You claim that the Commission merely relied on the arguments presented by Denmark and that it did not take into account the data and reports you referred to, thus failing to assess properly the proportionality of the measure in relation to the objective pursued. You argue, as such, that the Commission breached its duty to state grounds under Article 18(1) and (2) of the European Code of Good Administrative Behaviour [3] .

After a careful analysis of all the information you have submitted, we have decided to close this inquiry with the following conclusion:

There was no maladministration by the European Commission in this case.

The Commission enjoys wide discretion in deciding whether and when to commence infringement proceedings [4] . Regarding the substance of an infringement complaint, the Ombudsman may only intervene (by asking the Commission to look at the complaint again) in case there is an indication that the Commission was manifestly wrong in its presentation of the



facts or of the law.

The Commission has provided you with clear information about its position. The Commission explained the measures it has proactively taken to ensure that Denmark complies with EU law, in line with the [Technical Regulation Information System \(TRIS\) \[Link\]](#) notification procedure. It said that a ban on tobacco products is not, in itself, contrary to EU law, provided that the notification procedure has been followed and that the measure is justified and proportionate. It further said that the EU legislator granted a wide margin of discretion to Member States when they assess the risks related to tobacco products. In that context, the Commission considered that the ban on flavoured e-cigarettes in Denmark, adopted on public health grounds, was reasonable and proportionate to the objectives pursued, and thus, not contrary to EU law.

We find nothing to suggest that the Commission manifestly misinterpreted the facts or the law.

The fact that the Commission relied on different data and reports than the ones you provided is not, in itself, evidence of a manifest error. The Commission has the discretion to rely on the scientific data it considers most relevant.

Although we understand you will be disappointed with this reply, we nevertheless hope you find these explanations helpful [5] .

Yours sincerely,

Tina Nilsson Head of the Case-handling Unit

Strasbourg, 11/10/2021

[1] With the exception of menthol and tobacco flavours.

[2] You refer to the Joint Declaration on the EU's legislative priorities 2017, available here: https://ec.europa.eu/info/publications/joint-declaration-eus-legislative-priorities-2017_en [Link]

[3] Available at the following link: <https://www.ombudsman.europa.eu/en/publication/en/3510> [Link]

[4] Judgment of the Court of 14 February 1989, *Starfruit v Commission* , case 247/87, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61987CJ0247>.

[5] Full information on the procedure and rights pertaining to complaints can be found at <https://www.ombudsman.europa.eu/en/document/70707>