Mr Rupert Schlegelmilch, Director, DG TRADE, Directorate E
DG Trade,
European Commission,
Rue de la Loi / Wetstraat 170
1049 Brussels - Belgium

By E-mail,

Brussels, 5 February 2020

Ref: Track and Trace System for Tobacco Products – Export Issues

Dear Mr Rupert Schlegelmilch,

Dear

On the 1st of July 2020, several European smaller and mid-sized tobacco manufacturers, many of them family-owned, will be impaired in their ability to export rolling tobacco products to the Russian Federation. This de facto ‘export ban’ follows the 2019 implementation of the European Tracking and Tracing system for cigarettes and rolling tobacco, which will extend in 2024 to all other traditional and niche tobacco products.

We have had several exchanges with the services of DG SANTE responsible for this Regulation, as well as with the Commissioner for Health (see annexed our recent letter to the Commissioner for Health regarding this specific issue). These services have committed several times to find a suitable solution to overcoming a de facto export ban1. With only a few months left, we are concerned these commitments will not be fulfilled.

This unfortunate ‘self-imposed’ EU barrier to trade arises from the incompatibility between the European and Russian Tracking and Tracing systems, the latter being implemented for rolling tobacco products as of July 2020. The Track & Trace system is, in a nutshell, a volume-control mechanism which monitors the production and distribution of all tobacco product via a Unique Identifier applied to each unit package. Whilst the Russian system only applies to the products placed on the market, in line with the basic principles of international trade, the European system was extended2 to products destined for export and requires the application of the European code regardless of their destination, even when regulations applicable in such destination provides for a different code, using non-interoperable technologies and coding structure.

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1 Aris (2018)4574755, Letter from Commissioner Vytis Andriukaitis to (ESTA), 6 September 2018
2 Please note that Directive 2014/40/EU (TPD), which first established the Tracking and Tracing System in Article 15, initially applied to “unit packet”, which were defined in Article 2 as the “smallest individual packaging of a tobacco or related product that is placed on the market”. This was subsequently ignored in the Implementing Regulation 2018/574.
The European Commission’s Implementing Regulation, which established that system, disproportionally and detrimentally impacts the EU’s own manufacturers, that are now facing competitive disadvantages compared to other companies operating in Russia but manufacturing outside the EU. This significantly compromises the ability of these smaller and mid-sized manufacturers to continue exporting to the Russian Federation, leaving them with the choice between withdrawing their products from this market, shifting production outside the EU or trying to implement double-coding on their packages.

The services of DG SANTE may see this last option as feasible. It is, however, not. The EU Tracking and Tracing system is unprecedented, requires a highly complex infrastructure that already causes substantial disruptions in the European supply chain. The forced presence of two distinct codes to be scanned at every single stage in the distribution chain would add additional and unacceptable confusion. It is not unimaginable that the Russian Federation or other third countries when experiencing disruption in distribution due to the EU Code, will simply prohibit the EU Code. Moreover, double-coding simply cannot be implemented on the small packaging types of European niche tobacco products.

Concluding, double-coding does not provide the economic operators with legal clarity as any third jurisdiction can rule that EU codes are not allowed on their market, either from the outset, or following confusion in the distribution of these products.

When Cuba and the Dominican Republic raised concerns regarding imports of tobacco products at the time the European Commission notified its draft Implementing Regulation to the WTO, the Commission’s replies\(^3\) stated that “the obligation to ensure compliance with the Directive’s provisions falls on the importer into the EU and may be discharged during the importation process before the goods are released from a customs suspensive procedure or arrangement”, specifying that “such arrangements may facilitate the process for manufacturers in exporting countries”. Today, we fail to understand why the European Commission has not foreseen similar arrangements to protect exports of European companies.

As you probably know already, the EU trade balance with the Russian Federation is positive where it concerns manufactured tobacco. In 2018, the total volume of manufactured tobacco (those subject to Tracking and Tracing requirements) exported to Russia amounted to approximately 7.100 tons, valued at more than 90 million euros\(^4\). These exports are now more than ever compromised, as is the competitiveness of European smaller and mid-sized companies. These barriers to trade also compromise European production, as it creates incentives to shift production for third countries outside the EU.

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\(^4\) Eurostat database “DS-016890 – EU Trade since 1988 by CN8”, January 2020. Please note that the value refers to a “Free on Board” (FOB) value.
This self-imposed barrier to trade is unfortunately only the first of its kind. The Eurasian Agreement of 2 February 2013 requires other countries of the EAEU (Armenia, Belarus, Kazakhstan and Kyrgyzstan) to soon introduce a similar system. Further incompatibilities are also expected to rapidly emerge with the worldwide implementation of the WHO FCTC Protocol, which does not ensure any interoperability between the various national or regional systems. The services of DG SANTE have argued that the inclusion of export products within the scope of the European Tracking & Tracing system was mandated by this Protocol. We, however, hold the view that the Protocol caters for long-established best practices for international trade. Article 25 of that same Protocol requires the Parties to carry out their obligations “in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States”. We, therefore, believe that the EU Tracking and Tracing System should not, as it currently does, interfere with the system that the Russian Federation has chosen to address illicit trade on its own territory.

We believe a long-term solution to this issue consists in clarifying the EU Regulation to enshrine the destination market principle for export, as it is established for imports. If a Tracking and Tracing system is established in the destination market, the rules governing this system should apply to EU-made products destined for export.

We hope you can relate to our position and would appreciate your views on it. We would also appreciate if you could clarify with your colleagues of DG SANTE the principles of international trade and the importance of trade with neighbouring countries, especially with the Russian Federation. European smaller and mid-sized companies are committed to complying with Tracking and Tracing requirements, fulfilling the principles of the Protocol. This, however, should not be achieved at the expenses of their ability to export.

We thank you very much in advance and remain at your disposal should you need any additional information.

Yours sincerely.

The European Smoking Tobacco Association (ESTA) represents mainly mid-sized companies including SMEs and several generation-old family-owned businesses. These companies manufacture and distribute fine-cut tobacco, pipe tobacco, traditional European nasal snuff and chewing tobacco. Many ESTA members are still rooted in their original locality and have moved from manufacturing and selling only locally, to truly European companies selling across the EU and beyond. These traditional and artisan European tobacco products are part of European cultural heritage.

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1 World Health Organisation, Framework Convention on Tobacco Control, Protocol to Eliminate Illicit Trade in Tobacco Products

05/02/2020
Annex:

ESTA Letter to Ms Stella Kyriakides,
European Commissioner for Health and Food Safety

Ms Stella Kyriakides, European Commissioner for Health & Food Safety
European Commission
Rue de la Loi / Wetstraat 200
1049 Brussels - Belgium

Copy: Ms Anne Bucher, Director-General – Directorate-General "Health and Food Safety" (SANTE)

By E-mail.

Brussels, 3 February 2020

Ref: Track and Trace System for Tobacco Products – Export Issues

Dear Commissioner,

We would like to congratulate you with your installation as European Commissioner for Health and Food Safety. Unfortunately, we are writing following-up on several letters to your predecessor on the issue of a de facto export ban on European manufactured tobacco products, which still remains unresolved.

On the 1st of July 2020, several European smaller and mid-sized companies, many of them family-owned, will be severely hampered, if not ‘banned’ from exporting rolling tobacco products to the Russian Federation. In May 2024, this de facto export ban will extend to traditional and niche tobacco products, which are not subject to any illicit trade.

This constitutes an unprecedented, and we hope unintended, barrier to trade resulting from the EU Implementing Regulation on the Tracking and Tracing System for tobacco products, in force since the 20th of May 2019.

The European Commission committed on several occasions to find a suitable solution to overcome this export ban. On the 6th of September 2018, Commissioner Andriukaitis stated in a letter to ESTA that the Track & Trace system was “designed to address the issue of illicit tobacco trade and not to compromise exports of EU tobacco products to third countries”, adding that “it remains a top priority to ensure that EU products can continue to be exported without unintended consequences”6. A year later, in a reply to ESTA’s letter to Vice-President Katainen, the European Commission professed that “the Commission’s services will continue to use their best efforts to address potential barriers to trade – such as notably double-marking issues”7. Here the Commission clearly recognises double coding as a problem, and not as a solution.

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6 Ares (2018)4574755, Letter from Commissioner Vytenis Andriukaitis to ESTA, 6 September 2018
7 Ares (2019)4262817, Letter from Director Andzej Jan Rys (DG SANTE – Directorate B) to ESTA, 4 July 2019
It has been more than two years since ESTA first advised the European Commission against including export products within the scope of the Tracking and Tracing system and to instead maintain the system as it was initially foreseen by the co-Legislators in the 2014 Tobacco Products Directive, namely only applicable for products placed on the EU market. This is exactly what is applied for import of tobacco products, where the principle of placement on the market allows import of tobacco products which, whilst in duty-suspension and received and stocked in EU bonded warehouses, do not yet have to comply with the EU Tracking and Tracing System.

ESTA understands that the European Commission once favoured bilateral and multilateral discussions with third countries and other Parties to the FCTC Protocol\(^8\) to solve the recognised problem of double coding. We are concerned that the Commission’s services have since given up this responsibility and passed to individual Member States the task of ensuring international interoperability\(^9\), whilst leaving to private and vested third-party companies the task of finding technical solutions. These technical discussions have taken place, but those cannot yield further result until the Commission commits to finding a political solution. This, we believe, is the responsibility of the Commissioner for Health.

In its correspondence with ESTA, the European Commission consistently claimed that the inclusion of export products in the scope of the Tracking and Tracing system was an obligation under the FCTC Protocol. Yet, Article 25 of the very same Protocol enshrines the principle of sovereign equality and territorial integrity, which requires that EU regulations must not interfere with the regulations applicable within the territory of other States.

European companies currently experience double coding problems with exports to the Russian Federation and this is not the first of the kind. The European Commission successfully addressed the marking on the packaging issue with Australia and Canada. It unfortunately will also not be the last one, as export bans will continue emerging with other jurisdictions adopting their own traceability systems implementing the FCTC Protocol. Whilst the Protocol provides for international cooperation, it does not require international interoperability of individual Parties’ systems. For this reason, we believe the European Commission should acknowledge that the possibility for European smaller and mid-sized companies to export their products can no longer solely depend on the Commission’s ability and willingness to negotiate bilaterally with third countries. Instead, the Commission should consider seeking a long-term solution.

In its most recent letter to ESTA, the Commission states that “any solutions aimed at avoiding disruption of EU tobacco exports to the Russian Federation will have to be fully compatible with the now established EU system of tobacco traceability”. We believe that such a solution exists, consisting in adapting the Implementing Regulation (EU) 2018/574 as to clarify that when EU-made products are exported to a third country where a traceability regime is established, the unique identifier of that regime applies. In this instance, the tobacco product remains tracked and traced and is therefore compliant with the AIT Protocol. Customs and excise control systems (EMCS) will allow any enforcement authority to verify export of the products concerned.

\(^{8}\) World Health Organisation, Framework Convention on Tobacco Control, Protocol to Eliminate Illicit Trade in Tobacco Products.
\(^{9}\) Ares (2019)\(^{4262817}\), Letter from Director Andrzej Jan Rys (DG SANTE – Directorate B) to [REDACTED] (ESTA), 4 July 2019
Finally, when developing and implementing the European Tracking and Tracing system for tobacco products (i.e. technicalities and not policy), we believe the European Commission’s Services have failed to appropriately consult and involve European economic operators, ignoring the specificities of smaller companies and of traditional tobacco products. Not once, was ESTA given the opportunity to discuss the above-mentioned issue with the European Commission. We, therefore, would be very grateful if your services could agree to meet in the future with representatives of ESTA, as to discuss in further details a possible solution to this de facto export ban.

We thank you in advance for considering our request and hope you can relate to our position.

Yours sincerely,

The European Smoking Tobacco Association (ESTA) represents mainly mid-sized companies including SMEs and several generation-old family-owned businesses. These companies manufacture and distribute fine-cut tobacco, pipe tobacco, traditional European nasal snuff and chewing tobacco. Many ESTA members are still rooted in their original locality and have moved from manufacturing and selling only locally, to truly European companies selling across the EU and beyond. These traditional and artisanal European tobacco products are part of European cultural heritage.