

Commissioner Margrethe Vestager,  
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CC:  
Ms Ditte Juul-Jørgensen,  
Mr. Claes Bengtsson

By email and post

Brussels, Thursday 28 September 2017,

Subject: Implementation of the Articles 15 and 16 of the European Tobacco Products Directive – 2014/40/EU (Track & Trace)

Attachment: ESTA Detailed Position on the Implementation of Track & Trace

Dear Commissioner,

The European Smoking Tobacco Association (ESTA) would like to raise with you the development of Implementing and Delegated Acts of the 2014 Tobacco Products Directive's Articles 15 and 16 on tracking and tracing of tobacco products<sup>1</sup>. Three Draft Acts were published on 4<sup>th</sup> September<sup>2</sup>.

ESTA is concerned that several elements in the draft proposal will inevitably distort competition in the EU and lead to further concentration of the sector, driving smaller tobacco companies and SMEs out of business. The following key issues must be either clarified or lead to appropriate amendments:

**1. *Export products must be excluded from the Track & Trace system to avoid the self-imposed trade barrier***

Including export products in the requirement to carry a Unique Identifier (UI) is seriously undermining the ability of European smaller and mid-sized companies to export their products. Export products are explicitly excluded from the 2014 Tobacco Products Directive<sup>3</sup> and cannot be included in the scope of the implementing Regulation. Moreover, the EU cannot regulate products that are placed on the market of third countries, ignoring their existing regulation (e.g. standardised packaging in Australia) and making EU products illegal. Including export products would therefore establish a *de facto* ban on EU products, closing markets, or forcing European production abroad.

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<sup>1</sup> Articles 15 & 16 of 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.

<sup>2</sup> Commission draft implementing regulation on technical standards for the establishment and operation of a traceability system for tobacco products ([here](#)) and Commission draft implementing decision on technical standards for security features applied to tobacco products ([here](#)) and Commission draft delegated regulation on data storage contracts ([here](#)).

<sup>3</sup> Article 2 (30) of Directive 2014/40/EU reads: “‘unit packet’ means the smallest individual packaging of a tobacco or related product that is placed on the market”. Article 2 (40) of Directive 2014/40/EU also reads: “‘placing on the market’ means to make products, irrespective of their place of manufacture, available to consumers located in the Union [...]”.



Large multi-national companies can shut down manufacturing plants in Europe and shift production outside of the EU avoiding export restrictions. Smaller companies and family-owned businesses which are rooted in the locality of origin and export their traditional Western European products (e.g. fine-cut tobacco, pipe tobacco, traditional nasal snuff, cigars and cigarillos) to the rest of the world, cannot relocate and will be disproportionately hit by this unnecessary market distortion.

## **2. The generation of Uls by an “independent third-party” does not comply with EU and national competition laws**

Whilst Article 15 of the European Tobacco Products Directive repeatedly states that Member States are responsible for the establishment and the operation of a Track & Trace system, the draft proposal overrides the Directive and obliges Member States to appoint a commercial third-party ID issuer, responsible for the generation of the Uls.

This raises multiple questions regarding national public tender procedures, the selection procedures, the liability issues in case a Member States fails to ensure the issuing of Uls and, more generally, it raises major concerns regarding the freedom of competition.

An unnecessary monopoly by a single ID issuer per Member State would hinder competition in each market precluding business opportunities for non-chosen small solution-providers while increasing costs of production for the economic operators requesting Uls. The system will be prohibitively costly, disproportionately impacting smaller companies and family-owned businesses, with cost per product many times higher than for other mass-manufactured products. This lack of competition will also reduce the incentives for solution-providers to innovate.

For the system to become operational by the May 2019 deadline, and for it to be compliant with competition law and national tender rules, the choice of the ID issuer should be that of the manufacturers based on standards set-, and audited by the Commission. Generating and applying the UI at the time of packaging is the only way to comply with the Directive and to overcome unnecessary distortion of competition.

## **3. The selection procedure for the “independent third-party operating the secondary repository system” will distort competition (see Article 27 and Annex I, Part B of the draft Implementing Regulation)**

The draft Implementing Regulation introduces an EU-level secondary repository system, and whilst describing the selection procedure for the third-party operating it, Annex I - Part B, states that the commercial companies responsible for the operation of the primary repository will agree amongst themselves to appoint the company that will operate the secondary repository. In case those companies cannot agree, the Commission appoints the operator of the secondary repository “based on an assessment of objective criteria”. This procedure obviously violates competition law and cannot be adopted.

In addition, manufacturers of cigarettes and fine-cut tobacco will have to comply with this Regulation 5 years before manufacturers of other tobacco products. Those manufacturers will



therefore not have the opportunity to have “their” repository operators participating in the selection process, distorting competition.

#### **4. Security Feature requirements are too complex and fail to set a uniform security feature across the EU**

The Commission's draft Decision fails to provide the necessary details and specifications for the security feature to be placed on tobacco packaging. While the European Tobacco Products Directive aims to further harmonise tobacco regulation in the EU, the optional nature of the draft implementing Decision will result in too many different security features in use in the EU Member States and further distorting the internal market.

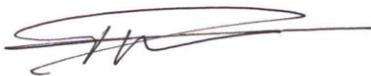
In the few Member States that are not using tax stamps, smaller and mid-sized companies will be disadvantaged as they will have to bear the full cost of the technologies for the combination of five authentication elements. In the 22 other Member States using tax stamps, the cost of compliance upgrades will be supported by the state if tax stamps are used as the security feature.

Rather than listing compliant technologies, the regulation must set uniform standards and simplify the requirements for the security feature, limiting the number of required authentication elements to three (instead of five).

ESTA therefore requests your assistance in clarifying the interpretation of Articles 15 and 16 of the Tobacco Products Directive and EU competition standards with your colleagues in DG SANTE ensuring the legitimate interests of European mid-sized, small and family owned companies.

For your information, we have attached a full position on the subject and remain at your disposal.

Yours sincerely,



Peter van der Mark,  
Secretary-General ESTA

*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.*

