

[Art. 4(1)(b)]

Unit F2 – Dispute Settlement and Legal Aspects of Trade Policy
DG TRADE – Directorate-General for Trade
Rue de la Loi 170
1040 Brussels

By email and post

Brussels, Thursday 20 July 2017,

Subject: Implementation of the Articles 15 and 16 of the European Tobacco Products Directive (Track & Trace)

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

Dear [Art. 4(1)(b)]

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 products¹. These Acts are currently being drafted by your colleagues of DG SANTE.

ESTA is concerned that there may be a misunderstanding of the application of the Directive for tobacco products manufactured in the European Union, but not being placed on the EU market. In addition, we would like to raise with you the serious impact any other interpretation will have on all, but especially on mid-sized and smaller tobacco companies.

DG SANTE seems to indicate that tobacco products manufactured in the EU for export to third countries need to carry a so-called Unique Identifier (UID) as specified in Art. 15 of the Directive². At the same time, DG SANTE is clear that such products do not have to carry a security feature as per Art. 16 of the Directive³.

ESTA does not agree that the Directive requires products for export to carry an UID as they do not fall within the scope of the Directive. The Directive clearly states in Article 2 that a unit packet of tobacco for the purpose of the Directive is a product placed on the market⁴. That same Article then states that placing on the market means making the product available to consumers located in the EU. Art. 15 states that Member States shall ensure that all unit packets of tobacco products are marked with an UID.

¹ 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.

² This interpretation was confirmed by the representatives of DG SANTE, Unit B2 on Tobacco Control during the Stakeholder Workshop organised on the 15th May 2017.

³ Evers, *Implementation analysis regarding the technical specifications and other key elements for a future EU system for traceability and security features in the field of tobacco products*, Iterim Report III, May 2017, p. 39.

⁴ 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 [...]”.



It is clear to ESTA that this means that there is a clear difference between unit packets to be placed on the market and tobacco products not to be placed on the market which is the case with products manufactured in the EU but destined for third countries. These products are not being made available to consumer in the EU. Final clarity can be had from the last sentence of Article 15(1) which excludes products manufactured outside of the EU but not destined for the EU market⁵.

From a trade perspective, including EU manufactured products destined for export in the requirement to carry an UID is seriously undermining the ability of European small and medium enterprises and niche mid-sized manufacturers to export their products. Roll-your-own tobacco in Australia is manufactured mainly in the EU and Australian legislation does not allow any markings to be put on their packaging other than those prescribed in its own national legislation. Including export products would therefore establish a *de facto* ban on EU products, closing the Australian market, or forcing European production to move to Australia. Roll-your-own tobacco and pipe tobacco are typical European export products. They are produced by mid-sized and small companies who have their manufacturing sites in places like Geigenhausen, Bavaria - Germany, in Kruishoutem, Flanders - Belgium and Svendborg - Denmark employing local people. These companies do not have manufacturing facilities outside of the EU and if such would be required resulting from EU law they would be forced to relocate or give up third country markets.

Still from a trade perspective, it is interesting to note that whilst DG TAXUD is looking at improving, modernising and simplifying the Excise Movement Control System (EMCS) which already covers and monitors export tobacco products, DG SANTE may introduce further complexity and redundancies, therefore hindering the progress made thus far in the trade of excisable goods.

ESTA therefore requests your assistance in clarifying the interpretation of Article 15 with your colleagues in DG SANTE ensuring the legitimate interests of European mid-sized, small and family owned companies.

For your further information, we have attached more a full briefing on the subject.

Yours sincerely,

[Art. 4(1)(b)]

Peter van der Mark,
Secretary-General ESTA

The European Smoking Tobacco Association (ESTA) represents companies manufacturing, distributing and selling fine-cut tobacco, pipe tobacco, traditional European nasal snuff and chewing tobacco. ESTA members are mainly mid-sized companies including SME's and several generation old family owned businesses. Many 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.

⁵ Article 15 (1) of Directive 2014/40/EU reads: "In the case of tobacco products that are manufactured outside of the Union, the obligations laid down in this Article apply only to those that are destined for, or placed on, the Union market"