

Mr. Ben Smulders  
Cabinet of First Vice President  
Frans Timmermans  
Rue de la Loi 200  
1049 Bruxelles

European Smoking Tobacco Association  
(ESTA)  
Rond-Point Schuman n°9  
1040 Bruxelles – BELGIQUE  
[www.esta.be](http://www.esta.be)

CC: Mr. Frans Timmermans,  
Ms. Helena Braun

By email and post

Brussels, Tuesday 21 November 2017,

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

Attachment: Letter to ESTA, from the Cabinet of Commissioner Andriukaitis,

Dear Mr. Smulders,

On behalf of the European Smoking Tobacco Association (ESTA) and its members, including the German Smoking Tobacco Association (Verband der deutschen Rauchtobakindustrie, VdR), we would like to thank you for your letter of 16 October 2017 and for transmitting our concerns to Commissioner Andriukaitis. We do appreciate your attention to the issues we have raised, and we indeed received an answer from the Cabinet of Commissioner Andriukaitis.

Unfortunately, the letter we have received is disappointing as it simply and peremptory states that “*the Commission is strictly applying the principles of Better Regulation [...] ensuring that the principle of proportionality is fully respected*” (please see the letter attached). This letter fails to answer the questions we raised and fails to explain how Better Regulation principles have been applied for the proposed implementing and delegated laws on Track & Trace.

Therefore, we see no other choice than to raise the below questions again in the hope that you would assist in clarifying the interpretation of Articles 15 and 16 of the Tobacco Products Directive and the principles of “*Better Regulation*” with your colleagues in DG SANTE:

- How can the Commission justify that this draft Implementing Regulation applies to tobacco products intended for export whilst the primary legislation (i.e. the Tobacco Products Directive – 2014/40/EU) only applies to products “*placed on the EU market*”?

It seems important to note that the FCTC Protocol Against Illicit Trade in Tobacco Product not only has not entered into force but clearly states that such system should be established for products other than cigarettes “*within a period of ten years of entry into*



force of this Protocol<sup>1</sup>". More importantly, this Protocol cannot give mandate to the Commission for the adoption of secondary legislation, as these can only be based on Article 27 of the 2014 Tobacco Products Directive, a Directive which explicitly excludes export products.

- How can the Commission state that this inclusion of export products respects the principle of proportionality when it fails to explain arriving at such a conclusion?

The draft Implementing Regulation simply attributes: "*practices that entails the false declaration of exports*" to illicit trade, without providing any further details. ESTA believes that the inclusion of export products disproportionately impacts smaller companies and distorts the internal market. There is currently no benefit of this inclusion since the EU system may not be internationally shared. Smaller companies and family-owned businesses are rooted in their 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. They cannot (economically viable) relocate, whilst large multi-national companies can shut down manufacturing plants in Europe and shift production outside of the EU avoiding export restrictions and self-imposed barrier to trade.

- We would like to understand how is the Commission applying the Better Regulation principle when re-introducing in the Implementing Regulation, elements that the Legislators intentionally kept out from the Directive?

In the 2014 Tobacco Products Directive the Legislator never prescribed that the Unique Identifier must be supplied by an independent third party. Amendments 156, 67, 185, 189 and 108 (point 3a) to the 2014/40 Directive<sup>2</sup>, adopted by the European Parliament on 8 October 2013, included references to "*independent*" third-party. These amendments were nonetheless abandoned following the negotiations with the Member States and the Commission, thereby excluding explicitly the involvement of "*independent*" ID issuers.

The requirement for providing a commercial third-party ID Issuer with information in advance of manufacturing or shipping must in any case be removed from the draft Implementing Regulation. Some of this information cannot be available prior to packaging or shipping (when UI are applied onto the unit pack) without creating bottlenecks in the manufacturing and trading process, transforming a tobacco market economy into a "state-directed" business.

- Finally, we would like to understand how is the Commission considering the specificities of smaller tobacco companies, especially those involved in the manufacturing of niche tobacco products?

As an example, the European Commission was supposed to set a European standard for the Security Feature to be applied on the packaging of all tobacco products. Instead, the Commission simply set a list of 19 compliant technologies and requires Member States to determine the combination or combinations that are to be used in the security features (leading to thousands of possible combinations).

<sup>1</sup> WHO Framework Convention on Tobacco Control; Protocol to Eliminate Illicit Trade in Tobacco Products (AIT); Article 8 (3); page 15 – available online: [http://www.who.int/fctc/protocol/illicit\\_trade/protocol-publication/en/](http://www.who.int/fctc/protocol/illicit_trade/protocol-publication/en/)

<sup>2</sup> Amendments adopted by the European Parliament on 8 October 2013 on the proposal for a Directive of the European Parliament and of the Council 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 – P7\_TA(2013)0398 – Available online: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0398+0+DOC+XML+V0//EN>



This fully fails to ensure a uniform application of the security feature in the EU, defeating the harmonisation objective of the 2014 Directive and hindering the functioning of the Internal Market. Besides, refusal to apply a mutual recognition principle, allowing one security feature accepted by one Member State to be used in all other Member States, is counterproductive. This lack of harmonisation will disproportionately impact smaller companies greatly increasing compliance cost per unit produced, and ignoring the specificities of the packaging of pipe tobacco and traditional European nasal snuff and chewing tobaccos.

Despite our numerous attempts to flag these irregularities, DG SANTE still claims to have consulted relevant stakeholders and applying the Better Regulation guidelines. DG SANTE did not consider one single suggestion made by smaller companies. ESTA is concerned that the Commission is pursuing a political agenda that will inevitably result in driving smaller manufacturers out of business and further concentrate the sector.

ESTA and VdR therefore request your assistance in clarifying the interpretation of Articles 15 and 16 of the Tobacco Products Directive and the principles of “*Better Regulation*” with your colleagues in DG SANTE.

Yours sincerely,



Peter van der Mark,  
Secretary-General ESTA



Michael von Foerster,  
Hauptgeschäftsführer VdR

*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.*

*The Verband der deutschen Rauchtobakindustrie is the German trade association representing typical German Mittelstand manufacturing tobacco products. The VdR is a founding member of ESTA and has 18 members.*

