

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. Interim Report II – Second Draft

Expert opinion on Report II – Second draft: [REDACTED], 22 December 2016

Summary:

1. Since the adoption of the FCTC in 2003 (preamble of the FCTC, article 5.3 of the FCTC, guidelines for implementing article 5.3 of the FCTC adopted at the 3th Conference of the Parties (COP) in 2008) and the adoption of the ITP in 2012 (preamble of the protocol, articles 8 §2, 8 §12 and 8 §13 of the ITP, 7th COP resolution on the ITP in 2016), it was never been conceived that the tobacco industry would become a partner in relation to the implementation of FCTC or ITP related policies.
2. Unique identification markings are an obligation under article 8§3 of the IPT and shall not be performed by or delegated to the industry according to article 8§12.
3. An industry operated system would imply regular, more than necessary, contacts between the competent authorities and the tobacco industry for the implementation of the system and would be in conflict with article 8 §13.
4. What the multinational cigarette companies are able to do with the storage of the unique production information codes and the unique identifiers of the Codentify code system is unknown, but it could be a 'black box' without control of the competent authorities and would be an infringement of the EU TPD and the WHO ITP.
5. Serious consideration should be giving to the possibility of two carriers on the pack printed or affixed next to each other. Both carriers should be accessible without a link to the server. The first carrier should contain date, timing and production line and the second carrier should contain place of manufacturing, manufacturing facility, product description, intended market, intended shipment route and importer.

6. Data from Project Sun should not be used in the report, because the Commission can neither endorse nor verify these figures presented by stakeholders with commercial interests.

1) According to the Interim Report II, an industry operated system with extensive control measures by the competent authorities would be compliant with article 8 of the WHO FCTC Illicit Trade Protocol (ITP).

Page 83 : “On the basis of the legal analysis carried out by the team, it can be concluded that all the three governance models may meet the primary requirements. However alternative A1 – industry operated solution will only be compatible with the legal requirements as long as extensive additional control measures are put in place.”

Page 37 : “Another consideration is related to the concept of ‘control’ of the full system, as required by the FCTC Protocol. It is important to highlight that ‘control’ does not necessarily mean ‘ownership’ of the system. The final configuration must allow the competent authorities to control (supervise and direct the actions or function of) the system, while other actors (industry or third party) may be those actually operating/performing some of the activities needed. “

2) We believe that an industry operated option would be in conflict with the Protocol for the following two reasons:

- The tobacco industry is considered by both the WHO FCTC and the FCTC Protocol (ITP) as an obstacle, never as a partner.
- Controlling the tobacco industry is not enough to be compliant with the ITP

A) The tobacco industry is considered by both the WHO FCTC and the FCTC Protocol (ITP) as an obstacle, never as a partner.

The choice for an industry operated system would imply that the tobacco industry would become a partner for the implementation of the tracking and tracing system, would imply some level of trust between authorities and industry and would result in

regular, more than necessary, contacts between the competent authorities and tobacco industry for the implementation of the system.

Since the adoption of the FCTC in 2003 (preamble of the FCTC, article 5.3 of the FCTC, guidelines for implementing article 5.3 of the FCTC adopted at the 3th Conference of the Parties (COP) in 2008) and the adoption of the ITP in 2012 (preamble of the protocol, articles 8 §2, 8 §12 and 8 §13 of the ITP, 7th COP resolution on the ITP in 2016), it was never been conceived that the tobacco industry would become a partner in relation to the implementation of FCTC or ITP related policies.

In the 2015 WHO booklet on World No Tobacco Day, the role of the tobacco industry was described in the following way:

“The tobacco industry is part of the problem, not the solution. While publicly opposing the illicit trade, and voicing commitment to supporting governments to fight tobacco smuggling, evidence demonstrates the tobacco industry’s active involvement in fostering illicit trade in most economies.”¹

In the questions and answers document on the ITP of the WHO FCTC secretariat, it was clearly stated that the tobacco industry is not a partner in implementing the Protocol.²

“In the Preamble to the Protocol, Parties are reminded “to be alert to any efforts by the tobacco industry to undermine or subvert strategies to combat illicit trade in tobacco products and the need to be informed of activities of the tobacco industry that have a negative impact on strategies to combat illicit trade in tobacco products”. The tobacco industry is not a partner in eliminating the illicit trade in tobacco products, although some contacts with tobacco companies to implement a tracking and tracing system are unavoidable. Some information, in the data carrier for instance, should be provided by the industry, such as place and date of production. However, contacts with the tobacco

¹WHO, Illegal Trade of Tobacco Products. What you should know to stop it, Geneva, 2015. http://apps.who.int/iris/bitstream/10665/170994/1/WHO_NMH_PND_15.3_eng.pdf?ua=1&ua=1

²WHO FCTC, The Protocol to Eliminate Illicit Trade in Tobacco Products: Questions and Answers, Geneva, 2016. <http://www.who.int/fctc/protocol/faq/en/index1.html>

industry should be limited and transparent. According to article 4.2 of Protocol, “Parties shall ensure the maximum possible transparency with respect to any interactions they may have with the tobacco industry”. The Protocol clearly defines that the obligations of the tracking and tracing system shall not be delegated to the tobacco industry. For instance, it is stipulated in article 8 §2 that the tracking and tracing system is “controlled by the Party”. In addition, it was emphasized in article 8 §12 that obligations assigned to a Party shall not be performed by or delegated to the tobacco industry and in article 8 §13 that each Party shall ensure that its competent authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of this Article.”

At the 7th Conference of the Parties to the WHO FCTC in India on the 12th November 2016, all Parties to the FCTC agreed and were reminded that “Except interactions to the extent strictly necessary, parties to the Convention are urged not to consider any proposal or assistance related to tracking and tracing from the tobacco industry or submitted on their behalf, including in the course of the preparatory activities for MOP1 in accordance with their obligation under WHO FCTC.”

B) Controlling the tobacco industry is not enough to be compliant with the ITP

Article 8 §2 of the ITP stipulates that the tracking and tracing system is “controlled by the Party”. For this reason, the interim report suggests extensive control measures by competent authorities in order to be compliant with the ITP. However, besides article 8 §2, there is also article 8 §12 and article 8 §13.

Article 8 §12 stipulates that obligations assigned to a Party shall not be performed by or delegated to the tobacco industry. In the industry operated option, the manufacturers are responsible for the generation of the unique identifiers. Unique identifiers are an important and essential element of any tracking and tracing system. Unique identification markings are an obligation under article 8§3 of the IPT and shall not be performed by or delegated to the industry according to article 8§12. When article 8§12 was discussed at the 4th INB in March 2010, it was the intention of the Parties not to

allow Parties to work with the industry, but rather clearly define that obligations shall not be performed by or delegated to the tobacco industry. (Statement of Ms Matsau of South Africa, Summary records: twentieth meeting, Fourth session, March 2010, page 222)

Article 8 §13 stipulates that each Party shall ensure that its competent authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of this Article. An industry operated system would imply regular, more than necessary, contacts between the competent authorities and the tobacco industry for the implementation of the system and would be in conflict with article 8 §13.

During the negotiations of the Protocol, Parties were aware that some interaction with the tobacco industry was unavoidable, but over the years, from 2003 to 2016, the Parties have multiplied obligations and statements to make it clear that the role of the tobacco industry should be minimal. An industry operated system would be against the obligations and the spirit of the FCTC and the ITP. The EU has ratified the ITP on 24th June 2016 and should comply with its obligations when the ITP comes into force.

3) The Codentify system is in conflict with the EU TPD and the WHO ITP.

The interim report II considers that there is no difference in the security risk and the potential of reducing illicit trade among the three options. (page 87 and 161)

Page 161: “Going through the answers received during the targeted stakeholders’ consultation and the public consultation, there are clearly two views confronted and both with valid arguments. The representatives of the tobacco industry defend the full potential of reducing illicit trade of the solutions operated by the industry.

On the contrary, other entities affirm that the systems operated by the industry are a ‘black box’ that do not contribute to fight firmly against the illicit trade of tobacco products. Our understanding of alternative A1, with the measures to increase control and transparency of the system do not match with the idea of a ‘black box’.”

The reference to the ‘black box’ is a reference to the WHO FCTC text with questions and answers on the ITP (section 8.3).³ The interim report endorses the position of the tobacco industry and refutes the opinion of the WHO FCTC, but does not provide any reasoning or explanation for its position.

All major international cigarette companies support the same tracking and tracing system based on the code generator Codentify for which they make very promising claims, such as for instance in the PMI leaflet which we accessed on line in December 2016:⁴

“At all times, the government is in full control of the approval process for the generation of the codes.” “Codentify® works via the application of a unique securely-encrypted 12-digit alpha-numeric code generated through a patented multi-layer encryption process.” “Codentify® avoids the requirement to store the codes by encrypting the information contained within them prior to printing through a patented combination of multiple

³ WHO FCTC, The Protocol to Eliminate Illicit Trade in Tobacco Products: Questions and Answers, Geneva, 2016. <http://www.who.int/fctc/protocol/faq/en/index1.html>

⁴ http://www.pmi.com/eng/documents/Codentify_E_Brochure_English.pdf accessed 19 December 2016

keys and digital signatures. Due to the encrypted nature of the codes they do not need to be saved on a database or stored.” “Information contained in the codes can only be decrypted by the CIS, held and controlled by the government, using a combination of multi-layer encryption and digital signatures. Manufacturers do not have access to this data.”

These Codentify statements are misleading. Codentify is a code generator system installed at the production line that creates two unique codes. An unique production information code which uses elements of production-related information (such as production line and time of production) and an unique 12-character combination of letters and numbers generated through an encrypted digital signature to the unique production information code.⁵ The PMI Codentify leaflet does not mention the unique production information code which they store and use for aggregation. PMI is storing the codes, because otherwise aggregation between packs and cartons would be impossible. Site visits to the manufacturers have shown that the two unique codes (the unique production information code and the unique identifier) are stored, at least temporarily, at the manufacturing level which would be in conflict with article 15 of the TPD. According to the feasibility report, traceability data, including the unique identifiers and aggregation relationships between units, cartons, mastercases and pallets, is submitted to the independent data management provider for storage, this data is also stored by the manufacturers (within the context of the current Codentify solution on the production line). This presents a number of potential risks, including that non-compliant manufacturers have the means to reproduce unique identifiers (as well as the corresponding aggregation relationships) onto undeclared tobacco products for diversion into the parallel illicit distribution chain.

What the multinational cigarette companies are able to do with these stored data is unknown, but it could be a ‘black box’ without control of the competent authorities and would be an infringement of the EU TPD and the WHO ITP. The security risk and the potential of reducing illicit trade is much higher with option 1 than with option 2 or 3.

⁵ US Patent application, publication, US 2014/0122353A1, 1 May 2014.

4) Contacts with the industry and the content of the unique identifier

According to TPD, Articles 15(2) and 15(3), the unique identifier shall form part by the following information :

- (a) The date and place of manufacturing;
- (b) The manufacturing facility;
- (c) The machine used to manufacture the tobacco products;
- (d) The production shift or time of manufacture;
- (e) The product description;
- (f) The intended market of retail sale;
- (g) The intended shipment route;
- (h) Where applicable, the importer into the Union;

The unique identifier of the unit packet has been estimated to require a maximum length of 161 characters in order to contain the above information which should be made accessible without a link to a data server. To our knowledge, no system anywhere in the world has an unique identifier which contains all the 8 items of article 15 (2) without a link to a data server. Generally speaking, tax stamp providers print the stamps in advance and can not include in the data carrier information which is only available at the time of manufacturing such as date, timing and production line. Systems based on codentify include date, timing and production line as part of the unique identifier and make the other information accessible with a link. Tobacco industry representatives are claiming that they should generate the unique identifier because they are only ones who know date, timing and production. Serious consideration should be giving to the possibility of two carriers on the pack printed or affixed next to each other. Both carriers should be accessible without a link to the server. The first carrier should contain date, timing and production line and the second carrier should contain place of manufacturing, manufacturing facility, product description, intended market, intended shipment route and importer. The first carrier should be added at the time of manufacturing, the second carrier can be printed in advance. Such a system has the

advantage that multiple suppliers can provide the info requested in the second data carriers and that the tobacco companies would not be responsible for the generation of unique identifiers which would be in conflict with article 8 §2, §3, §12 and §13 of the ITP.

Two final comments on the interim report II:

1) The data from Project Sun should not be used in the report, because the Commission can neither endorse nor verify these figures presented by stakeholders with commercial interests.⁶

2) The gain of printing a security feature and any method for the security feature is estimated at 1612 million euro. The gain of affixing a security feature is estimated at 1162 million euro. (page 270) This is based on assumptions. My assumption would be that the gains are far too high and that it would be difficult to believe that gains for affixing would be 450 million euro less.

⁶ Commission Staff Working Document, Technical assessment of the experience made with the Anti-Contraband and Anti-Counterfeit Agreement and General Release of 9 July 2004 among Philip Morris International and affiliates, the Union and its Member States, SWD(2016) 44 final, Brussels, 24-2-2016. Page 10.