

Mr. Katainen, Vice-President of the European Commission
Jobs, Growth, Investment and Competitiveness

By Post & Email
European Commission
Rue de la Loi 200
1049 Bruxelles

Copy: European Commission President Mr. Jean Claude Juncker
European Commission First Vice-President Mr. Frans Timmermans

Brussels, 10 May 2019

Subject: Grave concerns on the implementation of the EU's Track & Trace System

Dear Vice-President,

We, the European Smoking Tobacco Association (ESTA), would like to raise several serious problems with the implementation of the EU's Track and Trace System for Tobacco Products by 20th of May this year which heavily impacts our Member companies. Our Member companies are European smaller and mid-sized tobacco companies, many of which are still family owned.

On 6 December 2017, we publicly replied to allegations made by Commissioner Andriukaitis, warning the Commission that proposing an overly complex and non-interoperable Track and Trace system would lead to many Member States not being able to meet the implementation deadline, exactly as was the case with the 2014 Tobacco Products Directive.

Unfortunately, these warnings were not heeded and ESTA has been addressing the Commissioner for Health on our inability to export products, including the consequences of competing non-interoperable systems, such as those of the EU and the Russian Federation. A separate letter requesting a resolution to this issue has been sent to you.

We also understand from a Commission Communication to the Member States¹ that it is highly unlikely that all Member States will be ready on time ensuring a functioning system to issue Unique Identifiers (UIs) to the tobacco manufacturing, importing and trading companies. We would like to point out that it took the Commission 4 years to develop the implementing legislative instruments, leaving the Member States with 13 months to legislate for- and set-up the system, and our companies with a few days to integrate and test the system providing the Unique Identifiers (UIs). In this regard it is necessary to mention that, even at this point, the Commission's Expert Committee on Track and Trace is grappling with the applicable Machine Codes. These need to be sent to the UI provider, but the Commission's Implementing Regulation lacked clarity risking a harmonised implementation.

The legal consequences for our companies not being able to obtain UI codes from certain Member States are significant, as we are bound to only manufacture tobacco unit packages with a UI code after 20 May 2019.

¹ "Information from the Commission services on the system for tobacco traceability", annexed to the Communication 7246/19 from the General Secretariat of the Council to the Working Party on Public Health at Senior Level, 14 March 2019.



We appreciate the recently adopted Commission Decision² that allows an Economic Operator to request UIs from another ID issuer, but it must be clear that such requests can be denied, thereby not resolving anything. The impossibility for retailers to register with an alternative UI provider under this derogation also invalidates this solution. The Decision states that it limits to a certain extent the potential distortion of the smooth functioning of the internal market. It must also be noted that this is accompanied by additional costs for business and administrations that could have been avoided.

We also note that fees set by the Member States for generating and issuing the alpha-numeric code (UIs) to our companies, differ widely throughout the EU, and are higher, in some cases even significantly higher, than those indicated in the Commission's Impact Assessment³. These costs were thoroughly calculated by consultancy Everis based on information from possible UI providers estimating the costs as 0,00043 cent per unit placed on the market.

On setting the fees, the Commission itself informed Member States how they could charge for services which are not allowed by the Implementing Regulation⁴. This is a highly unusual action by the Commission, to say the least, and has led Member States to set fees as much as 3 to 20 times higher per unit.

In addition, it is striking that Commissioner Andriukaitis, representing the European Commission, made a public statement⁵ that the cost of the entire Track and Trace system in the EU would be in the order of 0.005 Euro cents for a tobacco unit placed on the market. The average UI fee alone stands at almost half of this, with one Member State⁶ charging twice the Commission's stated total cost per unit. On top of this come recurring costs for the data repositories, IT licenses and for the obviously superfluous high-tech Security Feature (SF). Capital expenditure, including verification equipment for the SF, the provision of equipment to the trade, the anti-tampering devices and the massive investments in new, and adapted packaging lines with specialised printers and readers, as well as in IT infrastructure all tobacco and trading companies are making in order to be compliant, are running in the tens of millions of Euros.

Taking only three of the recurring costs into account (UI fee, Data Repository Costs and for Security Feature) the EU Tracking & Tracing System leads to an average recurring unit cost of 0.025 Euro cents per unit placed on the market, 5 times higher than the purported total cost stated by the Commissioner⁷. The real total cost per unit is even higher, and is much higher for our companies than for the large multinational cigarette companies that have a larger scale, whilst our product portfolio can be characterised as including many niche products that require more packaging lines and therefore more capital and other costs to convert these and to operate the system.

In his reply to a European Parliamentary Question⁸, Commissioner Andriukaitis stated that *"Minimising the burden of the system on small and medium-sized enterprises (SMEs) and traditional producers has been a priority for the Commission from the outset and a detailed assessment of the measures' proportionality and expected impact in this respect was carried out"*.

² Commission Decision (EU) 2019/691 of 2 May 2019

³ European Commission, *Impact assessment on the establishment of systems of traceability and security features for tobacco products*, SWD(2017) 455 final; Annex 6, "Implementation Study - Cost-benefit analysis", page 40; 15 December 2017.

⁴ European Commission (DG SANTE) – *Summary Record of the Meeting of the Subgroup on Traceability and Security Features of 23 October 2018* ([here](#)), page 5.

⁵ Commissioner Andriukaitis' Speech at the Competitiveness Council Hungary's AOB Point on Traceability System for Tobacco Products, Brussels, 30 November 2017 ([here](#))

⁶ Hungary

⁷ Based on recurring costs of UI fee, SF, and Data Repository as calculated by several member companies

⁸ Answer in writing given by Commissioner Andriukaitis on behalf of the Commission on 5 January 2018 to a Parliamentary Question (E-006432/2017), ([here](#))



Since the burden on our companies is much more important than estimated, due a 5 fold rise in the cost per unit placed on the market based on three cost items alone, is the Commission still comfortable that the development of the EU's Track and Trace System meets all the obligations of "better regulation", and is not distorting the internal market and competition in it?

We would also appreciate if the Commission can clarify to Member States that only costs for the generation and issuing of the UIs can be charged under the Implementing Regulation and addresses those Member States that are allowing the UI providers to charge exorbitant fees for the generation and issuing of the alphanumeric codes.

Finally, we would like to point out that ever since the adoption of the Tobacco Products Directive in 2014, ESTA and individual companies have raised technical issues and offered advice and assistance to the Commission. The Commission was informed that its sequencing of the many Implementing Acts, starting with the Implementing Decision for health warnings for fine-cut tobacco pouches through to the integration of Track and Trace equipment, would mean 2 or 3 consecutive costly machine adaptations in as many years. This could easily have been avoided if the Commission would have been willing to fully understand the manufacturing process and the SME nature of our tobacco companies.

The Commission's DG SANTE clearly decided to only have very few meetings on highly complex and technical issues with the industry, hiding behind a misinterpretation of international obligations whilst ignoring well-established democratic and self-professed better regulation principles.

The result is an overly complex EU Track & Trace system that might not be up and running by the deadline, creating legal uncertainty for our companies. It is a system that is at least 5 times more expensive than publicly stated by the Commission and that is hampering, if not, blocking our exports.

We would appreciate if you could provide us with the comfort that this was a one-off, albeit 5 years' experience, and that in future the European Commission will effectively and appropriately consult with directly impacted stakeholders whose important technical input is indispensable in establishing effective and workable regulation?

We are fully committed to be complaint and make the system work, but we also feel that it is necessary to be open and transparent and therefore chose to be very clear in this letter. We truly hope that we can all learn lessons from this process.

We are looking forward to your clarifications and assistance in resolving the many issues smaller and mid-sized tobacco companies still face.

Yours sincerely,

[Redacted signature]

[Redacted name]

On behalf of ESTA's smaller and mid-sized Member companies.

