CECCM
CONFEDERATION OF EUROPEAN COMMUNITY CIGARETTE MANUFACTURERS

EUROPEAN SMOKING TOBACCO ASSOCIATION
ESTA
FINE CUT - PIPE - NASAL - CHEWING

Helse- og omsorgsdepartementet

For the attenion of Kjell Røynesdal - Avdelingsdirektør

Postboks 8011 Dep
N – 0030 Oslo

Brussels, 8 June 2015

Subject: Public consultation regarding a proposal for the introduction of plain packaging for tobacco products in Norway.

Dear Mr Røynesdal,

CECCM and ESTA member companies would like to respond to the public consultation, currently being conducted by the Ministry of Health and Care services, regarding a proposal to introduce plain packaging for tobacco products into the Act of 9. March 1973 no.14 regarding protection against damages resulting from tobacco.

To this effect, please find attached the CECCM Position Paper on Plain Packaging for your consideration.

In brief, our key position points regarding plain packaging are the following:

- Plain packaging would result in an unjustified infringement of the free movement of goods;
- Plain packaging would violate trade mark rights and interfere with property rights guaranteed by EU law;
- Plain packaging is inconsistent with WTO obligations and would expose the country in question to WTO complaints;
- Plain packaging will have other serious negative consequences, including illicit trade;
- There is no evidence that plain packaging would achieve public health goals.

Please note that an unofficial Norwegian translation is also attached for convenience.

In addition to the above, CECCM and ESTA member companies have also noted that the consultation makes significant reference to Article 5.3 of the FCTC and highlights the need to implement it in law, whilst falling short of proposing specific measures. In this context, we stress the following:

Article 5.3 states that "*In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law*" (emphasis added).

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Article 5.3 of the FCTC does not suggest that the tobacco industry or anybody affiliated with it should be excluded from the regulatory decision-making process. Article 5.3 leaves it to signatories to determine what, if any, implementing measures to introduce. Any steps taken to give effect to Article 5.3 must be in accordance with national laws.

Article 5.3 seeks to protect public health policies by protecting the regulatory/legislative process from undue influence. Article 5.3 articulates in a tobacco context a general principle of good regulation, namely that regulators should not allow their policies in a particular field to be subverted by the actors (economic or otherwise) in that field.

The Consultation also makes reference to the Guidelines on Article 5.3. It is important to reiterate that these Guidelines are *non-binding* and create no obligations for Parties to the FCTC. Any steps taken to give effect to Article 5.3 must be in accordance with national laws. This is emphasised by the guidelines on Article 5.3, which state in the Introduction that, "*without prejudice to the sovereign right of the Parties to determine and establish their tobacco control policies, Parties are encouraged to implement these Guidelines to the extent possible in accordance national law*".

CECCM and ESTA note that measures are already in place in Norway that are aimed to protect the integrity of the decision-making process and to ensure transparency. Accordingly, there is no legal need for Norway to adopt additional measures to comply with its obligations under Article 5.3.

We also notes that the Norwegian Constitution § 100 and Article 10 of the European Convention on Human Rights (ECHR) place limits on any additional measures that could be implemented. An element of the fundamental right to freedom of speech of the Norwegian Constitution § 100 and ECHR Article 10 is the possibility for stakeholders to engage in the policy-making process. Hence, implementation of a policy that openly aims to limit a certain industry's right and ability to engage in the policy-making process is questionable.

Another limitation on the measures that could be implemented is the general right to gain access to, and express ones view on, proposed amendments or new legislation in Norway pursuant to the Norwegian Freedom of Information Act and the Norwegian Public Administration Act.

In addition, the European Commission, in its letter dated 7 February 2013 clarified the nature of Article 5.3 and its guidelines as follows: *"First and foremost, it is important to underline that the WHO Guidelines for the implementation of Article 5.3 of the FCTC are not binding. Parties are encouraged to follow them to the extent possible, in accordance with their national law. Those Guidelines contain no specific compulsory requirements on holding meetings or on the publicity of such meetings. The Commission's ethical framework, the existing rules and tools concerning transparency and lobbying, and the policy in terms of stakeholder consultations are fully compatible with these non-binding guidelines*".[i]

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The statement in the European Commission's letter is particularly apt because it recognises that, like Norway, the European Commission already possesses the legislative and regulatory tools required to ensure that decision-making processes are carried out transparently and with integrity.

Similarly, in its communication *"General principles and minimum standards for the consultation of interested parties"*, the European Commission identifies the first of its guiding principles as *"participation"*:

"The Commission is committed to an inclusive approach when developing and implementing EU policies, which means consulting as widely as possible on major policy initiatives. This applies, in particular, in the context of legislative proposals".[ii]

Given the above, CECCM and ESTA believe that the legal and regulatory framework which is already in place in Norway is compatible with Article 5.3 of the FCTC; and that any additional measures would be superfluous and unnecessary, and would go counter to the widely accepted principles of transparency, accountability and integrity of the regulatory process in accordance with the OECD's principles of Better Regulation."[iii]

We believe that interactions between stakeholders and regulators should be conducted transparently and in accordance with national law, and that if this is done, there should be no reason to limit engagement.

We thank you for taking the above and attached into consideration.

Sincerely yours,

Antonella Pederiva
Secretary General

Peter van der Mark
Secretary General

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[i] European Commission Letter, dated 7 February 2013, SG/B.4 CD/dcb Ares(2013). Available at: http://www.alter-eu.org/sites/default/files/documents/RE%20Alter-EU.pdf

[ii] See Commission Communication: *"General principles and minimum standards for the consultation of interested parties"* COM (2002) 704 final. The European Commission, in an answer given by Ms Vassiliou on behalf of the Commission on 14 May 2008 (E-1879/08EN), has confirmed that the guidelines in this Commission Communication will be respected in relation to the FCTC process.

[iii] See *OECD Guiding Principles for Regulatory Quality and Performance* (2005), Principle 3. The OECD *Regulatory Policy: Towards a New Agenda,* Key Messages, OECD Regulatory Policy Conference, 28-29 October 2010, stresses that businesses need to "*truly participate*" (page 9) and that consultation over new regulation must be "*genuine*" and not "*merely lip service*" (page 4).

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CECCM POSITION PAPER ON PLAIN PACKAGING

KEY POSITION POINTS

- Plain packaging would result in an unjustified infringement of the free movement of goods;
- Plain packaging would violate trade mark rights and interfere with property rights guaranteed by EU law;
- Plain packaging is inconsistent with WTO obligations and would expose the EU and the Member State in question to WTO complaints;
- Plain packaging will have other serious negative consequences, including illicit trade;
- There is no evidence that plain packaging would achieve public health goals.

1. INTRODUCTION

The new Tobacco Product Directive (the "TPD2") will be implemented in the EU Member States as of May 2016. Until such time, the current Directive (the "TPD1") remains in force and Member States are prohibited from introducing new packaging requirements that conflict with the provisions of TPD1.

However, the TPD2 does not mandate plain packaging. It purports (in the view of CECCM's members, unlawfully) to allow Member States to introduce stricter requirements concerning the packaging and labelling of tobacco products. In seeking to do so, it goes against the basic principles of EU law and would prevent the free movement of goods in packaging which otherwise comply with the requirements of the Directive.

In any event, any plain packaging initiative would still be subject to stringent conditions, including demonstrating that it is proportionate, appropriate and necessary to achieve a legitimate aim and the least restrictive measure available. Furthermore, the recitals of TPD2 also clarify that plain packaging must be *"compatible with the TFEU, with WTO obligations and [must] not affect the full application of this Directive."*

Any plain packaging initiative would fail to meet these requirements. In particular, plain packaging would effectively deprive manufacturers of their property rights as protected by The Charter of Fundamental Rights of the European Union (the "EU Charter") and the European Convention on Human Rights. Even if such interferences were capable of justification, plain packaging would still require the payment of significant compensation by the relevant Member State in respect of the effective expropriation of valuable intellectual property rights. Moreover, a plain packaging measure would place an EU Member State in breach of its WTO obligations. These issues are described in detail below.

2. PLAIN PACKAGING WOULD CREATE UNJUSTIFIED OBSTACLES TO THE FREE MOVEMENT OF GOODS

Any national measure introducing plain packaging would create unjustified obstacles to the free movement of goods. Tobacco manufacturers could not sell products that they legally manufacture and sell in other Member States in the Member State that has imposed plain packaging.

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The introduction of plain packaging by a Member State would seriously damage competition and market dynamics, which would undermine the essential aspect of free and fair competition in the EU. Without trademarks and the ability to differentiate their products, it becomes very difficult, if not impossible, for manufacturers to enter into new markets. By focussing competition on price, it also makes it difficult for manufacturers with small market shares to strengthen their market position. The removal of trademarks, therefore, creates a significant barrier to market entry, and undermines an essential aspect of free and fair competition in the EU.

3. PLAIN PACKAGING WOULD VIOLATE TRADE MARK RIGHTS

Plain packaging violates the basic rights of trademark owners under EU trade mark law and WTO law because it effectively deprives the owner of the relevant trademark rights of the ability to use their intellectual property for its intended purposes, including in communicating quality and origin and in distinguishing their products from those of a competitor.

4. PLAIN PACKAGING INTERFERES WITH PROPERTY RIGHTS GUARANTEED BY EU LAW

Under EU law, the deprivation of property rights by the State would require (among other requirements) the payment of compensation in order to be lawful. Article 17 of the EU Charter states that "no one may be deprived of his or her possessions except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for the loss". Therefore**,** even if plain packaging did not otherwise breach EU law or WTO obligations, its adoption by a Member State would require the payment of significant compensation.

5. PLAIN PACKAGING IS INCONSISTENT WITH THE EU'S AND MEMBER STATES' WTO OBLIGATIONS AND WOULD EXPOSE THEM TO WTO DISPUTES

Issues of EU law and fundamental rights aside, the TPD2 makes clear that plain packaging can only be adopted by a Member State if it is consistent with WTO obligations. Many countries consider plain packaging to be in breach of WTO obligations.

Following the adoption of the Australian plain packaging legislation, Honduras, Dominican Republic, Cuba and Indonesia have challenged the legislation under the WTO dispute settlement system. The dispute has attracted the attention of 36 WTO trading partners, including the EU, who have joined the dispute as Third Parties.

If the Australian plain packaging legislation is found to be incompatible with WTO obligations, Australia will be required to bring its legislation into conformity with WTO law or face possible trade sanctions, including trade-based retaliation. A final ruling is not expected before 2016.

Any Member State that introduces plain packaging before the outcome of those proceedings, risks subjecting itself and the EU to WTO proceedings, and having to repeal such legislation.

6. PLAIN PACKAGING WILL HAVE OTHER SERIOUS NEGATIVE CONSEQUENCES

Plain packaging would result in increased illicit trade and down trading

Plain packaging would increase illicit trade, as counterfeit products would become easier to make, distribute and sell. Counterfeiters could expropriate manufacturer's branding and sell fake but branded product. Both counterfeiters and contraband operators would assume, correctly, that plain packaging would result in a significant increase in demand for cheap, illicit products, in particular amongst sections of society, such as minors, that many regulatory measures seek to protect.

Developments in Australia reinforce our serious concern that plain packaging may fuel the illicit trade. The latest KPMG report[i], commissioned by a number of tobacco manufacturers, using the widely accepted practice (including within the EU) of empty pack surveys, shows that the share of illicit trade of total consumption has grown from 11.5% to 14.5%, since the introduction of standardised packaging. Figures published by the Australian Customs and Border Protection Service (ACBPS) after the introduction of standardised packaging show that the number of cigarettes seized increased by over 41% and new, illegal brands, which look like they are legitimate 'standardised packs' have been found. Moreover, the presence of illicit whites[ii] (which was almost non-existent in pre-plain packaging Australia) has grown since plain packaging came into force[iii].

The KPMG Report also notes that there is an increase in down-trading by consumers to value brands and, in general, bigger brands are benefiting while smaller brands are contracting.

Plain packaging risks damaging the EU's trade interests

If one Member State were to ban or restrict the use of trade marks on tobacco products, the EU's ability to prevent other non EU countries from introducing similar measures against other product types would be undermined. It would also risk damaging the EU's international trade, investment and intellectual property credentials.

7. THERE IS NO EVIDENCE THAT PLAIN PACKAGING WOULD ACHIEVE PUBLIC HEALTH BENEFITS

There is no reliable evidence to date that plain packaging will achieve legitimate public health objectives.

The Australian Government has not been able to demonstrate that stated public health objectives (in terms of actual changes in smoking behaviour) have been achieved since the introduction of the measure in December 2012.

There has been no observed change in smoking prevalence or in the long term decline in legal consumption that was not already present before plain packaging. Overall consumption (including illicit) has remained stable.

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[i] See KPMG 2014 Full Year Report "Illicit tobacco in Australia", 30 March 2015, Page 6. Available via: https://www.imperial-tobacco.com/files/illicit_trade_h1_2014_report.pdf. This is the 4th report by KPMG examining the size of the illicit tobacco market in Australia.

[ii] The KPMG Report defines 'illicit whites' as *"Manufactured cigarettes which may be produced legally in one country/market but which the evidence suggests are smuggled across borders at some point during their transit to Australia, where they have limited or no legal distribution and are sold without the payment of tax".*

[iii] See the KPMG Report, p.44.