

17 September 2019

██████████
European Commission
Directorate-General for Health and Food Safety

Dear ██████████, dear friends of the European Commission,

Thank you very much for your letter, dated 6 September 2019, in response to the FCA Policy Brief entitled “Why the EU tracking and tracing systems works for the EU only”. We appreciate your concern regarding the position of the FCA and would like to use this opportunity to address the points you have raised. To be perfectly clear, the FCA is very interested in seeing the EU tracking and tracing system succeed. The concerns voiced in the Policy Brief merely stem from our observation of what we believe are inconsistencies between the EU tracking and tracing system (EU T&T system) and the provisions established by the Protocol to Eliminate Illicit Trade in Tobacco Products (ITP)”. These include:

1. Securing the Unique Identifier (UI)

Art. 8.3 of the ITP requires that “... *unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes...*”. As you point out in the attachment to your letter, the EU T&T system establishes several safeguards against cloning such as randomization, time stamps and multiple checks along the supply chain. While all these measures are welcome, the EU T&T system does not require Parties to directly secure the UI applied to the pack, for example through the use of security ink, covert features etc., which is how we would interpret obligations under Article 8.3. In addition, the EU security feature does not apply to products destined for export. The FCA is concerned that exported tobacco products that bear unsecured UIs and no security feature, may leak into the black market once they leave the control of the EU T&T system. Since the EU system requires that only one of five elements of the security feature is sourced from independent providers, tobacco producers could relatively easily clone unsecured UIs, particularly in facilities outside Europe. It is, of course, entirely possible that EU member states choose to secure the UI despite not being explicitly required to do so by the EU T&T system and thereby comply with the ITP. The FCA encourages every Party to the ITP to do so.

2. Independence from the Tobacco Industry (TI)

Art. 8.12 of the ITP states “*Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry*”. Yet the EU delegates the task of choosing data storage providers and auditors to manufacturers and importers of tobacco products, albeit with some

oversight. This delegation of tasks to the tobacco industry is in conflict with Article 8.12 of the ITP. Moreover, Art. 13 ITP states that interactions with “...*the tobacco industry and those representing the interests of the tobacco industry* [are permissible] *only to the extent strictly necessary*...”. The EU considers a company to be independent from the tobacco industry as long as its annual turnover from supplying goods and services to the TI does not exceed 10%. This threshold is arbitrary and can easily be circumvented, as evidenced by the appointment of several data storage providers with historical links to tobacco companies.

3. Complexity

Contrary to the suggestion in your letter, the FCA is not “promoting a single provider of a turnkey system”, nor are we naïve about the dangers of cartels and monopoly pricing. Indeed, we assume that we are in wholehearted agreement with the EU (and many other Parties) that the market for T&T systems created by Article 8 of the ITP should be established and regulated in a way that achieves the goals of the Protocol at reasonable cost. As we have highlighted in past briefings to Parties, the technical nature of T&T systems and the information asymmetry between vendors and government agencies mean that many Parties – particularly smaller LMICs – are vulnerable to inflated promises, overselling and vendor lock-in. The European Union has chosen a particular route to dealing with these legitimate competition concerns, and this route may well work in the EU context. The point of our briefing paper is that elements of the EU approach should not be blindly copied by other Parties. This is of course a judgement call, but in our view, in lower-capacity countries the effort to split T&T systems into multiple different sub-markets risks actually exacerbating the information asymmetry problem mentioned above. Moreover, we felt it was urgent to warn about this problem *because vendors (notably tobacco industry-affiliated vendors) are attempting to sell their systems to LMICs on this basis* – and often misrepresenting the EU system in the process.

We would welcome a discussion with the Commission, and with any ITP Parties, as to how to help LMIC Parties deal with the challenges involved in designing and implementing T&T systems that are effective, cost-effective and protected against tobacco industry interference. For example, the ITP Meeting of the Parties might wish to invest in facilitating regional/sub-regional T&T systems, or even in running tendering processes on behalf of low-capacity Parties.

Finally, the FCA would like to reaffirm its commitment to transparency as we believe public debate and scrutiny has a role to play in this discussion. We would therefore like to ask your permission to publish your letter (as well as the annex) on our website as it contains important points we are eager to debate. The FCA would likewise publish this response and we continue to invite you to challenge our analysis as it is our intention to provide as much information to the Parties of the ITP as possible.

We congratulate the Commission for its role in the development and ratification of the ITP. We share the objectives the EU is pursuing by establishing the first regional tracking and tracing system for tobacco products. This has been an impressive and ambitious project and the EU quite rightly included a requirement to review the functioning of the EU system of tobacco traceability by May



2021. We humbly submit that the problems we believe we have identified need to be considered urgently as part of that review, so that they can be resolved before the global tracking and tracing system under ITP rules has to be in place, in September 2023. Any efforts the EU could dedicate to overcoming the problems we believe to have identified would be greatly appreciated.

We would like to conclude by thanking you for the effort you have put into drafting a response to the FCA Policy Brief. We look forward to continue this exchange in the near future.

Kind regards

A handwritten signature in black ink that reads "Francis Thompson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Francis Thompson
Executive Director

