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Cigarette Manufacturers of Belgium and Luxembourg

Subject: Notification 2018/446/B by Belgium of rules relating to the standardisation of the presentation of packets of cigarettes, rolling tobacco and waterpipe tobacco.

Cimabel, the Federation of Cigarette Manufacturers of Belgium and Luxembourg¹, wishes to express its concerns with the abovementioned notification by the Belgian authorities. These concerns are based on the following observations:

1. Reference to Article 24 of Directive 2014/40/EU (TPD2) as enabling Member States to implement standardised packaging for tobacco products

TPD2, including Article 24(2), has been challenged at the Court of Justice of the European Union (CJEU). Although the Court confirmed the validity of the Directive including Article 24(2), the ruling did not address the legality of the standardization of packaging for tobacco products as such². Any Member State considering adopting such a measure would still have to show that it does not breach national, EU and international legal requirements.

As a matter of EU law, the standardization of packaging for tobacco products clearly falls within the prohibition contained in Article 34 of the Treaty on the Functioning of the European Union (TFEU). Measures infringing the free movement of goods are unlawful as a matter of EU law unless they can be justified. The burden of justifying the interferences with the right of free movement of goods, again, falls on the Member State. CECCM and ESTA are not alone in our belief that plain packaging creates a barrier to trade.

This view is clearly shared, given the unprecedented number (62) of Detailed Opinions issued in response to the Irish, UK, French, Hungarian and Slovenian TRIS notifications regarding the standardization of packaging for tobacco products³.

2. Compatibility of the standardization of packaging for tobacco products with international law

The question as to the compatibility of a standardization of packaging for tobacco products proposal with international law obligations will be answered by the final determination of the WTO Dispute Settlement Process in examining Australia's standardised packaging legislation. Both Honduras and the Dominican Republic have appealed the WTO Panel's

¹Cimabel is the representative organisation of cigarette manufacturers in Belgium and Luxembourg. Its members are: British American Tobacco, Imperial Tobacco, Japan Tobacco International and Landewyck.

²On May 4, 2016, the CJEU delivered its judgement on the TPD2 related legal cases. See at: <http://curia.europa.eu/juris/documents.jsf?num=C-547/14>

³ An EU member state can issue a DO when it is considered that the draft technical regulation may create obstacles to the free movement of goods; the freedom to provide information society services or the freedom of establishment of information society service operators within the Single Market. The aim of a DO is to obtain the amendment of the proposed measure so as to remove any resulting barriers to such freedoms at source. See more at: http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/tris/index_en.htm.



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ruling in the case by filing a Notice of Appeal and an Appellant's Submission with the WTO's Appellate Body. The doctrine of precedent of WTO Panels and in particular Appellate Body decisions has been well established. Indeed, WTO member countries have repeatedly expressed strong concerns in relation to members not awaiting the Appellate Body decisions. An EU Member State should not attempt to pre-empt the work of the WTO by attempting to proceed before the ruling of the WTO Appellate Body is delivered.

Regulatory Impact Assessment (RIA)

In its notification of 10 September 2018, Belgium has not included an impact assessment regarding the impact the proposed rules relating to the standardisation of tobacco products will have. Unless this assessment is published significantly prior to the end of the standstill date of 11 December 2018, the EU Commission and the other EU member states will not be in a position to benefit from the insight such an assessment would provide.

This would be in contradiction to best practice as set out by the Commission⁴ and Belgium's requirement to conduct RIAs as a member of the OECD.

Failure of the standardization of packaging for tobacco products in Australia, France and UK

Plain packaging has been implemented in Australia, France and the UK (and more recently, in Ireland). The data from these countries so far shows that the measure has not had any discernible impact on smoking prevalence or consumption.

Australia

Official data released by the Australian Government over the last few years demonstrates that the measure has not had a material impact on smoking rates and in fact the decline in smoking prevalence actually stalled between 2013 and 2016 after its implementation in 2012. The National Drug Strategy Household Survey (*NDSHS*) 2016⁵ data demonstrates that after the implementation of the standardization of packaging for tobacco products along with larger graphic health warnings in 2012, the existing downward trend in smoking slowed with only a slight (and not statistically significant) decrease of 0.6 percentage points between 2013 and 2016.

After Australia implemented the measure, illegal tobacco sales went up by 30%. The overall illegal market is now at 15%, the country's highest level on record⁶.

On May 8, 2018, the Australian Treasurer announced that a new multi-agency 'Tobacco Taskforce' will be created to crack down on crime syndicates and 'dismantle illicit tobacco

⁴See for example the launch of the European Commission's Better Regulation package on 19 May 2015: http://ec.europa.eu/smartregulation/better_regulation/key_docs_en.htm

⁵Available at: <https://www.aihw.gov.au/reports/illicit-use-of-drugs/ndshs-2016-key-findings/contents/summary>

⁶See KPMG's 2017 Full-Year Report, "*Illicit Tobacco in Australia*", April 2018 page 6. Available at: https://assets.kpmg.com/content/dam/kpmg/uk/pdf/2018/05/australia_illicit_tobacco_report_2017.pdf



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supply chains'. This agency will be led by the Australian Border Force, which had already set-up a special strike team to combat the growing illegal trade issue in 2016.

The evidence also shows that the standardization of packaging for tobacco products has led to down trading, where price has become the main aspect of competition and product selection^{7,6}

France and UK

While the Australian experience remains the key indicator of the effects of the policy, the data emerging from the early stages of implementation in France and the UK is pointing in the same direction. One year after the implementation, data published by the French Observatory for Drugs and Addiction shows that tobacco products shipped to retailers (cigarettes and RYO/MYO) were broadly stable in France, with only a slight evolution of - 0.7% in volume, following a 1.3% increase in sales during the first half of the year⁸.

In addition, a statement by the Minister of Health of France Mme Agnes Buzyn, admits herself that this measure "doesn't lead smokers to stop smoking" and concluded that "official cigarette sales have increased in France: plain packaging therefore did not contribute to reducing official tobacco sales" ([Assemblée Nationale-2017](#)).

In the UK, there has been no statistically significant impact on smoking rates or tobacco consumption⁹.

Like in Australia, the standardization of packaging for tobacco products risks leading to negative effects in the UK and France or other countries that adopt the measure or are considering its introduction. For example, it has been recently reported in the UK that authorities have started to discover counterfeit 'standardised' packs¹⁰.

European Parliament Views on Intellectual Property Rights (IPR)

In the recently published [European Union's Annual Report on Competition Policy](#) (2018), the European Parliament called for ongoing measures to boost: *"the effectiveness of Member States' protection of intellectual property rights, which [are] an essential element of health competition policies; stresses that trademark protection is essential for the purposes of identifying and distinguishing products in the marketplace; and that without trademarks and*

⁷ *Ibid*, see KPMG's 2017 Full-Year Report, page 11.

⁸ See data published by OFDT (Observatoire français des drogues et des toxicomanies) regarding the volumes of tobacco products distributed to retailers, as reported by the Customs authorities (Direction Générale des Douanes et Droits Indirectes). Available at: <https://www.ofdt.fr/statistiques-et-infographie/tableau-de-bord-tabac/>

⁹ TPD2 and standardized tobacco packaging – What impacts have they had so far?", Europe Economics, May 2018: <http://www.europe-economics.com/publications/15/publications.htm> – Data on smoking rates for England, considered as representative for the UK.

¹⁰ See at: <https://www.betterretailing.com/first-fake-plain-packs-discovered>



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the ability to enable people to differentiate between their products, it becomes very difficult, if not impossible, for manufacturers to enter new markets; considers, moreover that by focusing competition on price, it makes it difficult for manufacturers with small market shares to strengthen their market position; emphasises, therefore, that the removal of trademarks or limitations on their use creates a significant barrier to market entry and undermines an essential aspect of free and fair competition in the EU”¹¹.

We ask that the European Commission considers these concerns when assessing the Belgian notification.

Yours sincerely

Kris De Baets
Chairwoman

Maatschappelijke zetel/Siège social:
vzw Cimabel asbl
Koolstraat 17
9300 Aalst 1170
NN 434 465 572

Correspondentie/Correspondance:
vzw Cimabel asbl
p/a Chaussée de La Hulpe 189
Bruxelles

secretariat@cimabel.be

Tel/Tél: +32 471 89 00 84

Cimabel is lid van het VBO – Cimabel est membre de la FEB

¹¹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0187+0+DOC+PDF+V0//EN>