2 October 2017

TMA response to the EU Commission Consultation on draft Implementing Regulations EU system for establishment and operation of a Traceability system (under Article 15 (11) of the TPD 2014/14/EU)

The draft regulations raise a number of questions and concerns which must be considered as a matter of urgency. We are nearing the end of this consultation process but there are many elements which have yet to be properly defined. New and potentially onerous requirements for businesses within the supply chain have also been introduced and yet stakeholders have only been offered 4 weeks to comment. This presents significant challenges for the sector and the many tens of thousands of UK jobs that are depend on it.

The UK supply chain is very different from some other member states (MS), with a wider range of companies involved in the distribution and sale of tobacco products alongside other products categories which is not the case in some other MS. It appears that this has not been factored into this consultation process, or if it has been considered it has been ignored. This means that many actors in the supply chain will be required to scan in and out of their facilities, with the requirement to invest in new systems and software in order to comply with the regulations. A number of questions remain around whether the proposed system is even feasible irrespective of the somewhat simple assumption that simply paying for it will mean it will work.

From a UK perspective we do not believe the draft regulations will deliver any added value in the fight to tackle illicit trade. Products manufactured by TMA members for the UK market are not subject to diversion, therefore a complex trace and system is unnecessary. Moreover, products manufactured for the UK market already carry covert taggant technology and overt alphanumeric coding which allows for the authentication of goods. However, the regulations could remove both of these security features due to unnecessary requirements for the 'independence' of suppliers.

The timelines across a number of these disciplines is extremely concerning and there is a very real possibility that businesses across the EU will struggle to comply by the May 2019 deadline. Although the regulations contain no provision for sanctions for non-compliance, businesses may feel it is within their right to challenge any potential sanction given the unrealistic expectation for them to comply within such a short timeframe, especially given the complexities with what has to be implemented.

We therefore urge the Commission to properly consider the representations from the TMA and broader business stakeholders to ensure that a workable and beneficial solution is found.

1. **The Unique Identifier**

Open Standards and interoperability

The draft regulations seek the creation of a proprietary system which would need to be ready for testing by March 2019. When factoring in tender processes it will leave very little time to develop and test such systems that could work across the MS.

The solution as described is not based on open standards and will limit interoperability with other systems. The proposal for an up to 50 characters unique identifier (UI) is not in line with ISO or GS1 standards. **The regulations should be revised to reflect a serial number e.g. sGTIN, GS1 of no more than 20 characters, which would be a globally recognised standard.**

Competition amongst UI issuers

The regulations call for the appointment of one UI issuer per MS. By only allowing one UI issuer per MS it will in effect create a monopoly situation which raises questions of potential costs and reduced incentives for efficiency due to the lack of competition. **The regulations must be amended to allow each MS to instead provide a list of approved UI issuers which manufacturers would be free to select from.**

Method of delivery

Article 9 imposes unnecessary restrictions on manufacturers and importers ability to select the method of delivery of the UI. It is not clear why that decision should rest with the producer of the UI when they are in effect servicing the requirements of the client i.e. manufacturer or importer. The option of both physical and electronic delivery of UIs must be allowed. If the rationale of the directive is to tighten the control of the supply chain and reduce the risk of illicit trade why should it be potentially restricted to physical delivery, particularly if that delivery may be vulnerable to theft in transit in more vulnerable markets? **The regulations must be amended to allow for the manufacturer or importer to nominate how they wish the UIs to be delivered.**

UI data requirements

Article 8 presupposes that manufacturers will know exactly which machine will be used to produce products and that information must be provided in advance in order that it is incorporated into the code. **This information is unnecessary and can be reported through the existing GTIN. The machine can be reported alongside the date and time stamp at the point of production.**

The regulations require manufacturers to provide data on transactions such as the issuing invoice, receipt of payment linked to the UI. This, however, cannot be delivered in advance as the tobacco industry operate on made-to-stock model and incorporate credit limits into the payment terms. **We recommend that the regulations should remain within the scope of the TPD respecting established business practice and shall not create barriers to trade, taking into account existing reporting of transactions.**

Aggregation of UI

As outlined previously the creation of an effective monopoly supplier of UIs is an unnecessary and costly. The regulations stipulate that economic operators shall be authorised to generate the aggregated level UIs. **The entire unit packs are marked with a code created by a 3rd party, and therefore the aggregated level UIs are also independent through the link to the unit pack. This in effect makes the generation of aggregated level UIs by a 3rd party unnecessary and unworkable.**

2. Exports

The Directive clearly stipulates that it only covers tobacco products that are placed on the EU market; therefore we are disappointed that the regulations include reference to exported products. Marking products for export could simply create trade barriers with non-EU markets which have different requirement for the marking of products. **The Commission must remain consistent with the original TPD and amend the legislation to ensure EU manufacturers are not potentially placed in direct conflict with the country of destination.**

3. Repositories

The overall timing including the implementation timeline and testing phase for the repositories system is cause for concern. Based on our understanding of the implementation of the regulations it is unlikely that a primary repository provider will be appointed by summer 2018, following which the primary repository providers would then select a secondary repository provider. This takes the process until late 2018 at the earliest. Bearing in mind this would all have to be in place across all the MS. The secondary repository provider will then have 2 months to define the data dictionary which brings it up to the point when a very short 2 month testing process begins. **We therefore echo recommendations from our member companies that the deadline of 20 May 2019 be reviewed in order to accommodate a more realistic implementation process.**

4. Security Features

We are deeply concerned that the regulations have been written in such a way as to unnecessarily and unfairly over complicate a requirement to authenticate a product. Why has the Commission suddenly introduced a minimum of 5 requirements when the rationale is not been explained? Previously the Commission stated covert and overt features were required which at the time indicated that the UK which has both on pack features was compatible, but it appears that this is not now the case with the introduction of additional requirements such as semi-covert.

The UK has used taggant technology for 10 years during which time this has not been counterfeited. If the taggant is to be replaced, it will mean the removal from circulation of hundreds of reader devices which have been purchased by UK law enforcement at their own expense. Following this through, notification would have to be issued whilst a transition period takes place; at which time a combination of differently marked packs would be in circulation. Whilst stamps or labels are used in other markets it seems a fairly retrograde step for the UK to remove both the taggant and the current on pack alpha numeric coding which is already being evaluated by HMRC and Trading Standards. **The draft regulation should adhere to the Directive and require only visible and invisible components of the security feature. It should limit the number of authentication elements to be selected by MS to two, as required by primary legislation, which will in turn deliver more flexibility to MS taking into account the needs of both tax-stamp and non-tax stamp countries such as the UK. Innovative solutions, such as fingerprinting technology should also be considered.**

5. Further observations

Facility and Economic Operator Codes

The regulations call for the introduction of a Facility and Economic Operator Code. These codes clearly come with costs but there is no indication as to what these costs might be. This has been interpreted as a form of licensing for all retailers of tobacco products, including for example, a licensed premises such as a bar which sells cigarettes from behind the counter. This has come as a great surprise and concern too many retailers in the UK supply chain who understood from previous consultations and EU Commission documents that there was effectively limited burdens to be applied to their businesses. Now they are seemingly faced with a licensing scheme with costs, which are yet to be defined. Added to this confusion and frustration the UK treats retailer registration as a devolved matter, therefore countries such as Scotland and Northern Ireland already have a retailer registration scheme in place and there is no appetite from retailers [1]to extend this further to some form of costed scheme as described in the regulations. **The regulations must be reviewed in order to address the potential complexities and unnecessary costs that retailers and wholesalers would face with the implementation of these requirements for Facility and Economic Operator IDs.**

[1] Tobacco Retailers' Alliance Survey of more than 350 Scottish and Northern Irish retailers revealed that around 95% did not want to change the existing registration scheme, (Fieldwork conducted in June-September 2017)

Role of NGOs

The role of certain NGOs in this whole process must be brought into question. Their contribution appears to have been nothing more than to idly call for the industry to be effectively sidelined in order to ensure that what is seemingly being prescribed contains added complexity, bureaucracy and cost but with no real benefit. The NGOs will not have to implement this legislation and their lack of knowledge and understanding has been apparent throughout this process as evidenced by the line of questioning at the EU's Stakeholder session on 15 May 2017.

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