

## ESTA Position on the Proposal for Plain Packaging in the Netherlands

*The European Smoking Tobacco Association (ESTA) represents mainly mid-sized companies including SMEs and several generation-old family-owned businesses. These companies manufacture and distribute fine-cut tobacco, pipe tobacco, traditional European nasal snuff and chewing tobacco. Many ESTA members are still rooted in their original locality and have moved from manufacturing and selling only locally, to truly European companies selling across the EU and beyond. Their traditional and artisan European tobacco products are part of European cultural heritage.*

The European Smoking Tobacco Association, ESTA, would like to comment on the Public Consultation of the Dutch government on the introduction of plain packaging in the Netherlands.

However, ESTA takes the liberty to firstly address the restrictions the Dutch government has put in place to the principle of participation which is part the principles of good governance<sup>1</sup>.

In ESTA's contacts with the European Institutions and member state governments in the European Union this principle is safeguarded. We therefore find it worrying that the Dutch government clearly does not safeguard this principle as it is not treating every stakeholder equally.

This Public Consultation is accompanied by a statement that in considering the arguments put forward by anyone reacting, Art. 5.3. of the Framework Convention on Tobacco Control will be observed. This is understandable as it requires that governments need to protect policies from commercial and vested interests of the tobacco industry in accordance with national law.

ESTA believes that any policy development or law making should be protected from undue influence, also from vested and commercial interests. All regulatory processes should be conducted to internationally accepted standards of good governance. This is promulgated by bodies such as the Organization for Economic Co-operation and Development (OECD) in its Better Regulation principles as well as the Interinstitutional Agreement on Better Regulation between the European Commission, European Parliament and Council.

However, the Dutch government has gone much further and has excluded the tobacco industry from the discussions on the National Prevention Agreement which proposes the introduction of plain packaging amongst other measures and which has yet to be debated in the Parliament.

The exclusion of legitimate stakeholders negatively affects all parties to the policy-making process – including the policymaker itself. By excluding a stakeholder, a policymaker is deprived from information essential for the balanced and proportionate development of effective policy, including an understanding of how a measure will operate once implemented, potentially resulting in unintended consequences. Exclusion suggests as well that the independence of policymakers can be subverted by the merest interaction with the tobacco industry; implying that policymakers are incapable of making independent decisions, something which is far removed from reality.

At the same time, any individual, organisation, or business, which might expect to benefit or suffer harm – either economically, commercially or in some other way – from a policy, can be said to have a vested interest in that policy. Having a vested interest does not mean that the stakeholder's evidence is flawed, or its arguments unsound.

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<sup>1</sup> Algemene rechtsbeginselen, beginselen van behoorlijke wet- of regelgeving en beginselen van van behoorlijkbestuur



In our view the Dutch government has established a policy detracting from the principle of Fair-play whilst wrongly referring to its international obligations. The Dutch policy to exclude the tobacco industry is not in line with its own principles which are generally upheld. Moreover, it is setting an example that in a pluralist society some differing views and opinions can be excluded from the start without any substantive justification other than that the views are represented by vested and commercial interests.

Plain Packaging is a radical intervention restricting the use of intellectual property to such a level that due process, proportionality, scrutiny of evidence and justification need to be taken very seriously by the legislator, especially if experiences of other countries show that the results aimed for, are not achieved.<sup>2</sup> The proposed plain packaging law also needs to be viewed against the subsequent changes to the Tobacco Law starting with the adoption of the 2014 European Tobacco Products Directive.

In 2014, the Dutch government, being part of the Council of Ministers, adopted this Directive without plain packaging requirements, regarding increased health warnings as an appropriate solution to adequately inform citizens of adverse health effects whilst avoiding restrictions on the use of intellectual property rights. The Dutch Tobacco Law was subsequently amended in 2016, and in 2017 the tobacco packaging regulation was again amended with further restrictions for the use of “glitter and glamour” elements on the packaging etc. In 2019, the Dutch Parliament will discuss plain packaging for tobacco products.

These are several fundamental law changes in the last few years which require(d) relevant consecutive costly packaging adaptations for smaller and mid-sized companies. The statement that the government is not planning to introduce the same for other sectors must therefore be seen in its own ever-changing policy and regulatory context.

Importantly, in addition to exclusion in setting policy, adopting law-after-law without any post-impact assessment on effectiveness and impacts, the Dutch government’s regulatory drive does not constitute good governance, i.e. following the principles of good care, fair-play, and justification.

Finally, thinking that plain packaging achieves the stated objectives in 2040, belies evidence from all countries where plain packaging has been introduced, best evidenced by the following quote of the current French health minister Mme Agnès Buzyn: *Unfortunately, in 2016 official sales of cigarettes increased in France: plain packaging therefore did not decrease the official sales of tobacco products.*<sup>3</sup>

**Concluding, evidence shows that plain packaging will not have the impact on tobacco use as governments purport but will impact on the legitimate tobacco market and its smaller and mid-sized companies. Competition on quality between identifiable brands is made impossible and competition on price, as observed in Australia, will drive the future market with all its consequences.**

<sup>2</sup> Refers to the “materiële zorgvuldigheidsbeginsel en evenredigheidsbeginsel”

<sup>3</sup> <http://www.assemblee-nationale.fr/15/cr/2017-2018/20180075.asp>

