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Reference no: 218/11-4/1-3

Addis Ababa, January 15, 2018

To: The Director General, Food, Medicine and Health Care Administration and Control Authority (FMHACA)

**Subject: NTE's comments and recommendations on the draft FMHACA Proclamation - section five - tobacco products and electronic nicotine delivery equipment**

Dear Sir,

We write in reference to the meeting on January 16, 2018 to discuss the draft EFMHACA Proclamation - Section Five related to tobacco products.

In our letter dated January 10, 2018 we expressed our eagerness to participate in the discussions and offered to present 1) our concerns about the timeliness of the draft Proclamation - Section Five in view of the colossal illegal trade challenge that Ethiopia is currently facing; and 2) our comments and recommendations on specific provisions of the proposed draft.

In this regard, we believe that understanding the reality of the local market is of essence when considering new regulations and, for your appreciation, we hereby reiterate our proposal to present the current market situation, especially the characteristics of illegal trade in Ethiopia.

**• General concerns related to illegal trade**

Illegal trade of tobacco products currently represents approximately 44% of the Ethiopian market (38% in 2012, per the Development Studies Associates, October 2012) and up to about 90% in the East of the country. Based on our and JTI's international experience, certain tobacco restrictions can have the unwanted effect of facilitating illegal trade when the timing is ill-considered, or when measures are excessive and too sudden.

This is our concern in Ethiopia and we would encourage EFMHACA to focus its efforts, together with NTE and other branches of government, on the public health and security issues deriving from illegal trade at the present time. Indeed and as you will appreciate, illegal tobacco products do not comply with local regulations, basic quality standards and are subject to no regulatory control or accountability. Once the legal market has returned to acceptable levels, NTE would understand that EFMHACA would want to revisit certain regulations.

Passing regulations before succeeding against illegal trade may put the cart before the horse.

**• Concerns related to the absence of a preliminary impact analysis**

In general and whether related to tobacco or to any field of law and regulation, it is good practice for new legislative measures to be considered in the light of internationally accepted



This measure, once more, will only detriment legal products whilst creating a more competitive environment for the illegal trade.

Given that the share of illegal products in Ethiopia is among the highest in Africa, reaching up to 90% in the East of the country, NTE does not believe it is adequate, timely or effective to pass such measures as display ban or 70% HW.

NTE proposes that this measure be deleted.

- **Extended smoking restrictions in public places**

Current regulations ban smoking indoors, except in designated smoking areas and outdoors. The proposal is now to ban smoking (i) outdoors in places such as hotels, bars, restaurants, market places, government offices, private companies and other offices and “other places determined by the executive organ” and (ii) within “around 10 meters” of any such public place.

Taking the example of private offices on a high street filled with shops and businesses on both sides of the road, a smoker would be in violation of such law whether he/she would walk up, down or across the street, except if he/she smoked in the middle of the street. As such, NTE believes such measure to be impractical and unenforceable.

NTE recommends that hotels, bars, restaurants, market places, government offices, private companies and other offices and “other places determined by the executive organ” are removed from the list of outdoor public places where smoking is prohibited and that the 10 meter requirement is deleted, save for public places such as health or academic institutions.

- **Encroachment on fiscal policy**

Via Article 12(1), the proposed Proclamation would effectively impose upon the Ministry of Finance and Economic Cooperation (MoFEC) a tobacco taxation policy dictated by the WHO. The MoFEC is solely responsible to determine taxation policy and it is not for the proposed proclamation to restrict the MoFEC’s authority in this regard. The Ministry of Finance and Economic Cooperation should remain the only institution involved in the determination of the country’s fiscal policies and thus the levying of taxes.

It is also paramount that, when considering any tax change related to tobacco products, the MoFEC takes into account the effect of excessive tax increase on the sales of illegal non-duty paid products in Ethiopia, which have already increased from 38% in 2012 (Development Studies Associates, October 2012) to approximately 44% in 2017. The current reality of the Ethiopian market should supersede any conceptual and above ground tax recommendation based on WHO recommendations, which are made regardless of porous borders and the scale of illegal trade.

Taxation is the sole responsibility of the MoFEC. This measure should be removed from this draft proclamation.

principles of Better Regulation which can be summarized as proportionality, effectiveness and coherence. To this end, a key pre-requisite to better regulations is a Regulatory Impact Analysis (RIA). An RIA enables any regulator to take into account market needs and realities so that regulations are adapted to such realities and thus (i) actually achieve its objectives instead of being off-target and (ii) do not cause unwanted results.

We note that FMHACA has not conducted an RIA to evaluate the cost/benefit of the proposed measures and their effectiveness. If EFMHACA's objective is to reduce the number of smokers, NTE is concerned that, given the current market situation, (i) this objective related to public health will not result in the reduction of smokers, but instead (ii) cause more smokers to migrate towards illegal products which have no basic quality standards.

Indeed, the concern is that some of the measures included in the draft Proclamation on tobacco may, unintentionally but actually work in the best interest of criminal organizations that are responsible for illegal trade - not in the interest of public health, of Ethiopian smokers and of the Government revenue. Such measures are not justified by reliable evidence; they are overstated in terms of Ethiopia's obligations under the Framework Convention on Tobacco Control (FCTC); and will only restrict the ability of legal businesses such as NTE to regain territory over illegal trade, thus creating a bigger vacuum for illegal non-duty paid products into Ethiopia.

These measures include the following.

- **Larger and graphic health warnings on packs**

NTE products currently bear a 30% Health Warning (*HW*) on all of its packs. This 30% HW is in line with the WHO's requirements under the FCTC and, as such, makes every smoker aware of the health hazards related to smoking. Illegal products bear no such HW.

The current proposal is to increase the size of HW from the current 30% to 70% graphic health warning. There is no evidence that such measure will proportionately increase smokers' awareness. However, it will benefit illegal trade who, instead of complying with regulations as it never does, will capitalize on legal packs having 70% graphic HW to drive smokers' preference towards illegal brands that do not have even a 30% HW. For illustration, attached is an example of one of the most widely available illegally imported brands in Ethiopia, Business Royals (from Jebel Ali, UAE).

NTE therefore proposes that this measure be deleted and the current 30% HW maintained.

- **A display ban at retail point of sale.**

The draft Proclamation proposes to ban the display of tobacco products at retail point of sale. As you will know, illegal products are mostly sold under the counter. Should a display ban be passed, legal products will effectively be traded on a par with illegal products: legal products will be sold under the counter or behind closed doors, exactly the way illegal products are found at retail.

- **Contradicting provisions**

Some of the key definitions included in the draft Proclamation are, in NTE's view, likely to cause uncertainty and confusion, instead of enforceable measures. Among other drafting issues, we have noted certain conflicting provisions.

For example: Article 8(2) (b) qualifies private companies as public places where smoking outdoor is prohibited. Subsequently, Article 9.2 prohibits selling tobacco products in and around premises where smoking is prohibited.

So, in effect and taking the office of NTE as a real life example, the offices of NTE would qualify as a place where smoking outdoors is prohibited under article 8(2)(b) and, by that effect, would therefore be prohibited from selling tobacco products pursuant to Article 9.2. The same could obviously apply to any hotel, restaurant, wholesale and retail outlet across the country.

As you will appreciate, this makes little sense.

It is unfortunately another illustration of the serious concerns NTE has in relation to the adequacy and effectiveness of the draft proclamation and shows how consultation in the earlier days of drafting would be preferable.

We therefore urge EFMHACA, together with the office of the Attorney General, to consider NTE's comments enclosed herewith and review the draft proclamation in the light of real life examples and of the reality of the Ethiopian market, including the scale of its illegal trade. As to the above example, we recommend deleting article 9.2.

As we still have not been provided with an official English translation of the draft Proclamation Section Five as we were promised, please note that our comments herein and proposals here enclosed hereto, are based on an unofficial translation.

Yours sincerely,



Grant Mowat

Chief Executive Officer, National Tobacco Enterprise (Ethiopia) S.C.

- cc: Chairman of the Task Force on Fighting Illicit Trade
- Office of the Attorney General
- Ministry of Health
- Ministry of Finance and Economic Cooperation
- Ministry of Trade
- Ministry of Public Enterprises
- Ethiopia Customs and Revenue Authority
- Federal Police Commission

