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Response from the *University of Bath Tobacco Control Research Group* to HM Government's "Sanctions to tackle tobacco duty evasion".

Written by Dr. Allen Gallagher

February 2021

The Tobacco Control Group (TCRG) at the University of Bath is a multidisciplinary group producing high quality academic research that evaluates the impact of public health policy on health, and the influence of major corporations on health behaviours, health outcomes, and policy. The TCRG and the University of Bath are the research partner in STOP (Stopping Tobacco Organisations & Products) which is a global tobacco industry watchdog whose mission is to expose and counter industry behaviour that undermines public health. STOP is funded by Bloomberg Philanthropies (www.bloomberg.org). The TCRG is also funded by Cancer Research UK (CRUK) grant number A25745 ('Harnessing big data alongside investigative methods: Investigating tobacco industry conduct in an era of political uncertainty'), and is a member of the SPECTRUM consortium (Shaping Public Health Policies to Reduce inequalities and harm) funded by the UK Prevention Partnership led by the Medical Research Council (grant ref: MR/S037519/1). This University of Bath is making this response in its own right.

We can confirm that we have no direct or indirect links to the tobacco industry, and note that this was not a required declaration in the consultation. However, since the UK is a Party to the World Health Organisation's Framework Convention on Tobacco Control (FCTC),¹ under article 5.3, the UK has an obligation to protect the development of public health policy from the vested interests of the tobacco industry. Since sanctions to tackle tobacco duty evasion form part of public health policy we therefore encourage HMRC to consider responses to this consultation in light of possible conflicts of interest, and to include a requirement for such declarations in any future consultations.

The Tobacco Control Research Group's response to this consultation draws from and endorses the response from Fresh to this same Inquiry.

¹ <https://www.who.int/fctc/cop/about/en/>

Question 1

Should Trading Standards officers have the ability to issue compliance notices and the discretion to deactivate EOIDs? Please provide your reasoning.

The Protocol to Eliminate Illicit Trade in Tobacco Products commits Parties to “*take any necessary measures in accordance with their national law to increase the effectiveness of their competent authorities and services, including customs and police responsible for preventing, deterring, detecting, investigating, prosecuting and eliminating all forms of illicit trade in goods covered by this Protocol.*”² As Trading Standards is a competent authority in the UK involved in tackling illicit tobacco trade, it should have the ability to both issue compliance notices and to deactivate economic operator identifiers.

Question 2

The Tobacco Products (Traceability and Security Features) Regulations 2019 lists the circumstances under which an EOID can be deactivated. Which, if any, of these circumstances would not be appropriate for Trading Standards to administer and why?

In line with the Protocol to Eliminate Illicit Trade in Tobacco Products the Protocol, Trading Standards, as a UK competent authority, should have the ability to deactivate an EOID in all of the circumstances listed in the Tobacco Products (Traceability and Security Features) Regulations 2019. However, for this to be successful, regular communication between Trading Standards and HMRC would likely be required.

Question 3

Are there any other considerations or safeguards relevant to the extension of TTS (track and trace system) enforcement powers to Trading Standards?

Regular collaboration between Trading Standards and HMRC would likely to be required to ensure that enforcement powers are extended successfully. Furthermore, Trading Standards may benefit from additional powers not currently captured by the measures currently suggested. For example, measures such as EOID deactivation cannot be used against sellers who only sell illicit product/they have no EOID to begin with. The fines covered in Table 1 of the consultation document could still be applied in such cases, but, as mentioned below (Q6), the suggested fine amounts could be increased to further deter illicit trade of tobacco products.

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704635/EM_Misc5.2018_Prot_Tob.pdf

It is also crucial that the Protocol is adhered to when extending enforcement powers to Trading Standards, particularly Points 12 and 13 of Article 8 of the Protocol, which state that “Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry”³ and that “Each Party shall ensure that its competent authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of this Article”.

Question 4

- a) Excluding tobacco products brought into the UK by individuals as part of any travellers’ allowance, are there any circumstances where a business or private individual could legitimately hold non-compliant TTS products?**
- b) What reasonable evidence could be provided to show this legitimate purpose?**

There may be rare circumstances where this might take place eg. a person legally owning product they purchased prior to the introduction of the TTS, or having non-compliant products for research purposes. For the former, reasonable evidence could include a receipt showing a purchase date, and for the latter, documentation from a university demonstrating why the non-compliant product is in the university’s possession and how it was obtained.

Question 5

Do you think the penalty model outlined in Table 1, with its initial fixed penalty amounts based on bands and previous compliance, would be a proportionate response?

Yes, but collaboration between HMRC and Trading Standards will be necessary to develop a system to ensure that these fines are actually paid.

Question 6

How could the model in Table 1 be altered to be more effective in combatting illicit tobacco activities?

The profitability of illicit tobacco trade is a key motivation for illicit traders.⁴ As such, the fines put in place to deter illicit traders need to be of a level that will negate this profit. As such, we welcome the increased fines suggested for Categories A-C, but advise against decreasing the fines for Category D cases (specifically the decrease from £12’000 to £10’000 for 2^{nd-4th} offences). As these cases indicate large-scale smuggling operations, they also represent more potential profit for the illicit traders

³ The Protocol to Eliminate Illicit Trade in Tobacco Products

⁴ <http://www.fatf-gafi.org/media/fatf/documents/reports/Illicit%20Tobacco%20Trade.pdf>

involved. It is thus appropriate for Category D cases to be fined at a higher rate than the other categories, rather than capped at £10'000.

Furthermore, additional penalties specifically for when a seller is found to have sold to someone underage should also be considered. Lastly, further clarity is needed on who would be liable for any penalties given eg. the EOID applicant, responsible staff member, both, etc.

Question 7

Are there any circumstances where an economic operator or first retail outlet could legitimately hold non-TTS compliant product, alongside compliant product, at a TTS facility?

Such mixed circumstances could occasionally exist in very specific circumstances, for instance during or soon after a 'sell through' process where product requirements are changing (or have just changed) but retailers are still holding some old, non-compliant stock.

Question 8

Would the power to seize TTS compliant product, where found alongside noncompliant stock, be an effective deterrent to tobacco fraud? Please provide your reasoning.

Compliant and non-compliant stock can be mixed in an effort to hide the non-compliant stock. In such cases, seizing all of the product could help to deter such activities from reoccurring. Such powers are therefore worthwhile introducing.

Question 9

a) Do you agree that where non-TTS compliant product is discovered at a facility covered by an EOID, on more than one occasion, then the corresponding EOID should be deactivated?

Yes.

b) Are there any circumstances where this may not be appropriate?

Not to our knowledge.

Question 10

a) Would you agree that a period of six months would be an appropriate length of temporary EOID deactivation?

Yes, this seems reasonable for a first time offence. However, as noted in the consultation document:

“Although HMRC can make an application to the courts for a six month banning order of tobacco sales, this is dependent on a criminal prosecution for excise evasion, which is not viable in most small-scale cases.”

As such additional non-financial measures should also be considered for such small-scale cases- potentially a warning system whereby EOIDs can be removed after several warnings, even if no criminal prosecutions for excise evasions have been made. Alternatively, the burden of proof to remove EOIDs could be lowered in order to also address small-scale cases. For example, a shorter ban might be applied without a criminal prosecution needing to be made.

b) Are there any circumstances when withdrawal should be longer or even permanent? Please provide your reasoning.

A six month ban is suitable for a first offence, but there should be a zero tolerance policy to any further offences so any second withdrawal (or at the very least any third withdrawal) of an EOID should be permanent. Significant penalties are necessary to ensure that retailers are strongly discouraged from trading illicitly.

Question 11

a) What appeals processes do you think are necessary before an EOID can be deactivated?

Any appeals process should avoid adding costs to local authorities so as not to deter them from deactivating EOIDs in cases where that is an appropriate action.

b) Do you think a warning notice should be required in all cases?

No. Unlike in cases where a debt is owed and a warning notice can help ensure this debt is paid, if a party has already committed an action which justifies an EOID deactivation then a warning notice would serve little purpose as there is already grounds for the EOID to be deactivated and this is what should happen. Indeed, serving a warning notice would give such retailers time to prepare and that might in fact result in more illicit tobacco sales.

Question 12

a) Do you think the sanctions model in Table 2 could be effective in combatting illicit tobacco activities?

Yes, though some alterations are suggested below.

b) Can you suggest how this model could be altered to make the sanctions more effective?

Given the extensive societal harms of illicit tobacco trade, the current sanctions appear unnecessarily lenient in cases where there have been repeat offences. For example, as it currently stands, a party with 300-499 unit packets could commit three offences of this level yet still then be eligible for another EOID.

There should be no third instance of an offence that does not lead to a permanent EOID deactivation. All third offences of any category should lead to permanent EOID deactivation. HMRC may wish to consider even making any second offence at any category grounds for permanent EOID deactivation.

Furthermore, under the currently proposed sanctions, a party could have any number of non-compliant product beyond 500 unit packs, and if it is their first offence, they will still retain their EOID. 500+ packets indicates a large-scale illicit operation and as such should be grounds for permanent EOID deactivation in the first offence, or at the least should be grounds for a significant temporary EOID deactivation for a first offence.

Lastly, seizures should also be considered for Category A first offences as this may act as an additional deterrent and would mean the sanctions are consistent in that non-compliant products are always seized.

Question 13

Where a retailer is in receipt of a banning order preventing tobacco sales or has been excluded from a national tobacco licencing scheme for persistent non-compliance, do you think Trading Standards should have the ability to deactivate the retailer's EOID for the period that they are excluded from making tobacco sales?

Where a retailer has repeatedly failed to comply with existing tobacco regulations, they should be fully penalised for this, including the deactivation of their EOID. Repeated offences demonstrate a track record of non-compliance which indicates that there's a reasonable chance that the party would also fail to comply with the track and trace system and thus undermine its effectiveness.

Question 14

How would deactivation of a retailer's EOID in these circumstances help tackle tobacco duty fraud?

Deactivating the EOIDs of parties who have a history of being non-compliant with existing tobacco regulations would help ensure the integrity of the system and would act as a deterrent to other illicit tobacco traders.

