

**HM Revenue & Customs Consultation: Sanctions to tackle tobacco
duty evasion and other excise duty evasion
17th February to 12th May 2017**

Response on behalf of Action on Smoking and Health (ASH)

About Action on Smoking and Health

Action on Smoking and Health (ASH) is a public health charity set up by the Royal College of Physicians in 1971 to advocate for policy measures to reduce the harm caused by tobacco. ASH receives funding for its full programme of work from the British Heart Foundation and Cancer Research UK. It has also received project funding from the Department of Health to support tobacco control. ASH does not have any direct or indirect links to, or receive funding from, the tobacco industry.

Overarching comments

ASH has discussed this consultation with colleagues around the UK, in particular from Fresh Northeast and trading standards, and our response indicates areas for further possible developments in the legal framework, which could improve the effectiveness of both enforcement of illicit tobacco legislation and provide additional dissuasion to individuals engaged in committing offences.

In preparing this response we believe that some basic principles need to be considered. First those contained in Article 16 of the WHO Protocol to Eliminate Illicit Trade in Tobacco Products, which the UK government has committed to ratify:-

1. Each Party shall adopt such measures as may be necessary, in accordance with national law, to ensure that natural and legal persons held liable for the unlawful conduct including criminal offences established in accordance with Article 14 are subjected to **effective, proportionate and dissuasive criminal or non-criminal sanctions**, including monetary sanctions.
2. Each Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for the unlawful conduct, including criminal offences established in accordance with Article 14, are exercised to **maximize the effectiveness of law** enforcement measures in respect of such unlawful conduct including criminal offences, and with due regard to the need to deter the commission of such unlawful conduct including offences.

Secondly the five broad principles contained in 'HMRC Penalties: a Discussion Document' of 17 September 2015¹, which are that:-

¹ <https://www.gov.uk/government/consultations/hmrc-penalties-a-discussion-document>

1. The penalty regime should be designed from the customer perspective, primarily **to encourage compliance and prevent noncompliance**. Penalties are not to be applied with the objective of raising revenues.
2. Penalties should be **proportionate to the offence and may take into account past behaviour**.
3. **Penalties must be applied fairly**, ensuring that compliant customers are (and are seen to be) in a better position than the non-compliant.
4. **Penalties must provide a credible threat**. If there is a penalty, we must have the operational capability and capacity to raise it accurately, and if we raise it, we must be able to collect it in a cost-efficient manner.
5. Customers should see a **consistent and standardised approach**. Variations will be those necessary to take into account customer behaviours and particular taxes.

To make sanctions dissuasive the range and nature of possible penalties needs to be made clear and widely publicised, to highlight the risk that potential offenders could face, such as:-

- Forfeiture and destruction of the illicit products
- A criminal prosecution, with a wide range of possible sanctions
- Civil financial penalties
- Action to recover the unpaid duty
- Recovery of criminal profits via the Proceeds of Crime Act provisions

There is a perception that small scale illicit tobacco offences are low risk, with only minor penalties and that large scale offending is similarly low risk with the potential for high profits. There should be concerted action to publicise the serious nature of the possible sanctions and the real risk that all criminal profits are liable to seizure.

Changes that could improve the effectiveness of enforcement and represent dissuasive sanctions include:-

- A robust licensing scheme for all aspects of the supply chain
- The introduction of Fixed Penalty Notices (FPN) for small scale illicit transactions, this was discussed in a previous consultation, there are legal and technical issues that need resolution, but FPN's could be a useful tool when dealing with small scale sellers operating from for example their own home
- The cost of storage and destruction of seized products could be charged to the offender
- Seizure powers of none duty paid goods contained in the Customs and Excise Management Act could be explicitly give to Trading Standards Officers, an upper threshold could be set
- The current indicative amount of 800 cigarettes (EU duty paid) used as a gauge if the products are personal use should be brought in line with the non-EU duty free allowance of 200 cigarettes.
- Sentencing guidelines should be developed for the Courts, highlighting the harm caused by the illicit tobacco market

Public Opinion

ASH commissions YouGov to carry out large sample annual opinion research surveys.² Set out below key findings with respect to the level of support from the public for increased penalties and licensing. In summary there is widespread support for increased penalties, for licensing of retailers and for requiring tobacco manufacturers to pay a levy or license fee for measures to help smokers quit and prevent young people from taking up smoking.

Support for increased penalties

Respondents were asked how strongly, if at all, they agreed or disagreed with the statement “Penalties for people who sell illegal tobacco should be higher to deter sales”. Net support for this statement was 74%, with 53% strongly agreeing and only 7% disagreeing. Of the remainder 15% neither agreed nor disagreed, and 5% didn’t know. Support was strongest among non-smokers (78% agree and 5% disagree for non-smokers compared to 48% agree and 19% disagree for smokers) and older respondents (81% agree and 6% disagree for those aged 55+ compared to 59% agree and 12% disagree for 18-24 year olds). Differences by gender, class and geographical region were smaller, and in all cases the large majority supported the statement.

Support for increased penalties for selling tobacco to children

Respondents were asked how strongly, if at all, they would support or oppose the following measure: increased penalties for selling tobacco to children. Net support for this statement was 88%, with 69% strongly supporting and only 2% opposing. Of the remainder 7% neither supported nor opposed, and 3% didn’t know. Support was strongest among non-smokers (90% support and 2% oppose for non-smokers compared to 80% support and 4% oppose for smokers). Differences by age, gender, class and geographical region were smaller, and in all cases the overwhelming majority supported the measure.

Support for licensing of retailers

Respondents were asked how strongly, if at all, they would support the following measure: requiring businesses to have a licence before they can sell tobacco. Net support for this statement was 76%, with 50% strongly supporting and only 7% opposing. Of the remainder 13% neither supported nor opposed, and 4% didn’t know. Support was strongest among non-smokers (79% support and 6% oppose for non-smokers compared to 55% support and 18% oppose for smokers). Differences by age, gender, class and geographical region were smaller, and in all cases the large majority supported the measure.

Support for levy or license fee

Respondents were asked how strongly, if at all, they would support the following measure: requiring tobacco manufacturers to pay a levy or licence fee to Government for measures to help smokers quit and prevent young people from taking up smoking. Net support for this statement was 71%, with 47% strongly supporting and only 9% opposing. Of the remainder 16% neither supported nor opposed, and 5% didn’t know. Support was strongest among non-smokers (75% support and 7% oppose for non-smokers compared to 44% support and 22% oppose for

² Opinion research from YouGov. Total sample size was 12696 adults. Fieldwork was undertaken between 16th February 2017 and 19th March 2017. The survey was carried out online. The figures have been weighted and are representative of all GB adults (aged 18+).

smokers). Differences by age, gender, class and geographical region were smaller, and in all cases the large majority supported the measure.

Answers to the questions

Increasing financial penalties for repeat offenders

Question 1. Do you think that increasing financial penalties for subsequent tobacco wrongdoings will deter repeat offending? If not, why not and what more do you think we could do?

Response: We are not convinced that the current range of financial penalties are sufficient to deter repeat offenders. In general, tobacco smuggling and related wrongdoing may be viewed by those engaged in it as a relatively low risk (because low penalty) behaviour.

In particular, fines for repeat offenders should not be limited by the potential lost revenue (PLR) in each individual case. We therefore support the HMRC proposal to introduce a penalty multiplier based on an additional 100% of PLR in each case.

Question 2: Should such a multiplier apply to wrongdoings in other excise regimes?

Response: ASH has no opinion on this question.

Question 3: What do you think about the proposal to increase the penalty by a proposed multiplier of 100% of PLR for each subsequent repeated tobacco wrongdoing? Is this enough or should it be more?

Response: ASH would support this proposal, for the reasons stated in reply to question 1.

Question 4: Do you think that maintaining reductions for cooperation and the quality of information disclosed for repeat tobacco wrongdoings is helpful in providing an incentive for individuals to cooperate with HMRC? Do you think there is a case for allowing no mitigation?

Response: A reduction should only be considered where the individual on whom the penalty is levied is able and willing to provide useful intelligence on the illicit supply chain, which forms the basis of more systematic enforcement action.

Question 5: What timescale should be considered from the first to second tobacco wrongdoing to trigger the ramping up of penalties? For example, does a 12 month period appear reasonable or a longer timescale to deter the repeat wrongdoers?

Response: To be most effective the enhanced penalties for repeat offending should be made very clear at the first instance. We see no good reason to have a timescale as short as 12 months. Five years would seem more proportionate given the harm caused by the product concerned: tobacco kills more than half of all lifetime users prematurely and causes a very wide range of disabling diseases.

A new civil penalty for dealing in illicit product

Question 6: Do you consider it would be appropriate to extend this provision to those selling other illicit products on which excise duties should have been paid?

Response: ASH has no views on extending this approach to other products.

Question 7: Do you think that the new penalty would be an effective and proportionate sanction? If not, can you suggest an alternative approach?

Response: ASH supports HMRC's proposal to introduce civil penalties for fiscal mark wrongdoings, where criminal prosecution is not appropriate. However, we are also concerned that prosecutions are not occurring as frequently as they should, and we would strongly suggest that administrative rules and procedures will be required to ensure that civil penalties are not used as an easy alternative to prosecution where this would be appropriate. Repeated wrongdoing by people who attempt to profit from illicit tobacco should lead to criminal sanctions in most cases.

Question 8: Do you think that the new penalty should be on a sliding scale as determined by the potential lost revenue?

Response: ASH supports this proposal, but we would suggest that an additional punitive element on top of PLR may be appropriate in serious cases.

Question 9: Do you think that any new penalty should be subject to a maximum amount?

Response: Tobacco manufacturers are subject to legislation was passed making it a legal requirement for them to control their supply chain and subjecting them to a financial penalty of up to £5 million if they fail to do so.³ We would suggest that the maximum penalty for other actors in the supply chain should be the same as for the manufacturers for an individual offence. HMRC should publish the factors that will lead to the assessment of penalties in each case, which would include basing penalties on PLR with an additional punitive element where appropriate.

Question 10: Who in the supply chain that is found to be dealing in illicit tobacco do you think that the new penalty should be issued to? How far could it extend?

Response: In principle, the civil penalty should be available for use against all knowing or negligent actors in the illicit supply chain. (see the answer to question 9 above).

Question 11: Do you believe that 30 days is sufficient time to pay the new penalty or do you think a different time limit is appropriate, if so what and why?

³ HMRC. [Excise Notice 477: tobacco products duty - control of supply chains](#). February 2014.

Response: ASH believes that 30 days is the maximum defensible period. For example, parking fines (Fixed Penalty Notices) are commonly doubled if not paid within 28 days.

Question 12: What are your views on the higher penalty amount for failing to pay within 30 days?

Response: ASH would recommend that the penalty amount should be doubled in such cases – by analogy with FPNs.

- **Do you think HMRC/Trading Standards should issue a reminder letter to the responsible person before the 30 days are up?**

Response: No. We cannot see why HMRC/Trading Standard departments should be required to use scarce resources for this purpose.

- **Do you think 14 additional days is the right amount of time to pay the higher penalty? If not why?**

Response: If the penalty is not paid within the additional period, then it would be appropriate to reduce the amount of time in which higher penalties should be paid.

- **At what level do you believe the second penalty should increase, by, for example, by 50% of the original amount, 100% or some other amount?**

Response: 100% seems appropriate, again by analogy with FPNs.

- **How do you think HMRC should deal with offenders who fail to pay a second penalty within the 14 days? Possible options HMRC are considering are:**
 1. **Court Order issued demanding payment known as Order of Recovery**
 2. **Application to the court for an attachment of earnings order (allows money to be deducted from wages to pay the fine or;**
 3. **Application to the court to have deductions made from benefits to pay for the fine.**

Response: HMRC should be able to pursue any or all of these recovery options.

Question 13: What design model do you believe would have the most impact on encouraging behaviour?

Response: The proposed model should be dissuasive. It is important that people likely to engage in such wrongdoing should be aware of the potential penalties. Effective publicity for enforcement action magnifies its deterrent effect: HMRC needs to consider a PR strategy before and after the new penalty system is introduced.

Question 14: Should payment by instalments be in your opinion considered? If yes, why?

Response: Instalments should be considered in exceptional cases only, where immediate payment is demonstrably not possible or would lead to unacceptable hardship. However, HMRC

should consider an appropriate level of instalment payment in each individual case, ensuring that the level is set at a dissuasive level for the person concerned.

Question 15: Are there any potential wider consequences of introducing the new penalty that we have not identified?

Response: We have no comment on this question.

Reducing the threshold for the publication of details of people or companies that deliberately evade duty

Question 16: Do you think the potential lost revenue threshold figure of £15,000 is sufficient to have a deterrent effect on those who persist in evading excise duty?

Response: ASH would welcome a reduction in the publication threshold, see our answer to Question 13 above.

Question 17: What are your views on publicising the details of companies or people who have evaded duty?

Response: At first sight this sounds like a good idea, particularly if it highlights the penalties that have been imposed. However, anecdotally there are concerns that publicity about the so-called 'illicit tobacco epidemic' in certain areas can increase the comfort level of those who may be tempted to sell illicit tobacco, reassured that it is common practice. Along the same lines publishing details of premises where illicit tobacco has been seized, whether by trading standards or HMRC, highlights the availability of illicit tobacco and may increase demand at those premises. Therefore this needs further investigation to test the messaging and the impact on public attitudes and likely behaviour (e.g. through focus groups with disadvantaged smokers) to determine whether such publicity will discourage rather than encourage participation in the illicit market.

Question 18: Do you consider the naming of individuals or companies to be an effective deterrent and likely to change behaviour?

Response: See answer to Q17 above.

Question 19: HMRC would publish the details on GOV.UK do you have any views on this? Specifically:

- 1. Who else should HMRC inform - local press, local authority, local police, public health, tobacco manufacturers? Others?**

Response: The information should be shared as widely as possible including in local media for publicity purposes, and with local authorities and police. It is important that tobacco manufacturers are also informed, as this may provide useful evidence in future cases where the manufacturers are considered to have failed to control their supply chains.

- 2. Do you think the message would have a greater deterrent if published by another source? If so, who and why?**

Response: HMRC should retain control of publicity, working to a PR strategy as recommended in our reply to question 13 above.

3. When publishing the details, should HMRC publish names in the community? If so, how and where?

Response: Names should generally be published, with limited exceptions where this might cause a serious risk to the individuals concerned (for example, if the penalties levied have been reduced because there has been useful information supplied to enforcement agencies). It should be noted that many newspapers and online sources report the names of motoring offenders, for example. The level of harm caused by illicit tobacco justifies this action.

Statutory Duty of Care on landlords and landowners of properties or land

Question 20: To help discourage illicit tobacco trading or other illicit excise trading, we are proposing to write to relevant landlord and landowners associations directly requesting that they voluntarily add a clause to their standard lease agreements. Would you be in favour of this approach?

Response: ASH supports this proposal, which should apply to commercial and domestic landlords. Currently it can be very difficult to identify the landlord and the introduction of a positive licensing system for retailers would be very helpful as it could include a responsibility to disclose the landlord. Social housing landlords such as housing associations and local authorities have a very important role to play if this approach is to succeed, given the concentration of illicit trade in low income communities. However, we would add that it would only be relevant to new leases or where existing leases already allow action to be taken. For example, housing associations generally have a provision their lease agreements that tenants may be sanctioned for anti-social behaviour (not only criminal activities), which would clearly include using their properties to support engagement in the illicit tobacco trade.

Question 21: Do you think the examples above are on the right lines to ensure that the duty of care is reasonable and proportionate?

Response: Yes.

Question 22: What would be a reasonable expectation of the steps landlords/landowners should take and the timescale for doing this and for taking action if there are further transgressions?

Response: This would depend on the lease terms, but it would be reasonable in principle to terminate leases on commercial or residential premises where there is clear evidence of serious wrongdoing involving the use of such premises, or if there are repeat offences. Furthermore if the landlord becomes aware of the illegal activity they should have a duty to inform HMRC and require the tenant in writing to cease the illegal activity.

Question 23: What sanctions should HMRC apply to landlords or landowners who have not taken steps to prevent illicit tobacco or other illicit excise activity on the property or land? For example, should HMRC impose a financial penalty?

Response: We would support a reserve power for HMRC to require landlords and landowners to take effective action in relation to illicit activity on their land or in their premises. Alternatively, or in addition, consideration should be given to charging the landlord in such circumstances with being complicit in the principal offence via an 'act or default' provision.

Question 24: Are there any potential wider consequences of introducing a duty of care and a civil penalty that we have not identified?

Response: We have nothing to add on this question.

Maximising the use of sanctions

Question 25: Do you have any information that could inform the Impact Assessment?

Response: We have nothing to add on this question.