

Enforcing tobacco legislation: Current and future opportunities Webinar Q&A

1. Can packs be stickered with a price under the new regulations?

A legal opinion for ASH has confirmed that adding of price markings to packs subsequent to 20th May 2016 is prohibited by the regulations. For more detail please see the legal opinion.

2. Are the capsule variants that the smoker crushes to add flavours are now banned?

Cigarettes and handrolled tobacco that contain a characterising flavours, including vanilla, menthol, cherry etc. will be banned, this also applies to all components of tobacco product such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of tobacco products.

However, if a component is sold separately such as papers they may continue to contain menthol, liquorice etc. This last point would allow the sale of flavour capsules, as long as they were separate from a tobacco product, in the same way the roll-your-own filters can be bought. I cannot find this product for sale on line, (yet?)

The Tobacco and Related Products Regulations 2016:507

15.—(1) No person may produce or supply cigarettes or hand rolling tobacco with a characterising flavour.

(2) No person may produce or supply cigarettes or hand rolling tobacco with—

- a) a filter, paper, package, capsule or other component containing flavourings;
- b) a filter, paper or capsule containing tobacco or nicotine; or
- c) **a technical feature allowing the consumer to modify the smell, taste, or smoke intensity of the product.**

Note The provisions of regulation 15 (flavoured cigarettes etc.) do not apply to menthol cigarettes until 20th May 2020, only cigarettes, not HRT which is not covered by the exemption.

Also note the provisions of the Standardised packaging regulations mean that menthol cigarettes cannot be labelled as 'menthol'.

3. Where the Tobacco and Related Product Regulation 507/2016 has information regarding health warnings, and the standardised packaging 823/2015 has different appearance requirements, is there a conflict between the two requirements?

The legislation which sets out standardised packaging builds on and goes further than the requirements set out under the Tobacco and Related Products Regulations 507/2016 which transcribed the EUTPD2 into British law.

The key features of the TRPR relating to packaging and labelling are:

- Larger health warnings on tobacco packs covering at least 65% of the front and back of packs.
- Picture warnings on the front of all tobacco packs.
- All packs to carry information about where to get support to quit.

Standardised tobacco packs comply with these regulations but go further than this requiring:

- No branding other than the product name in a standard font, size and colour
- Prohibition of all other trademarks, logos, colour schemes and graphics
- The only colour permitted on the external surface (excluding the pictorial health warning and written text) is Pantone 448C with matt finish
- Cigarette packets must be cuboid in shape and contain a minimum of 20 cigarettes
- Packaging of hand-rolled tobacco must also be in same Pantone 448C colour and contain a minimum of 30g of tobacco.

As standard packs comply with the regulations set out under the TRPR there is no direct conflict between these two sets of regulations.

4. When shisha is used outside home, most consumers are not exposed to the packaging and therefore no health warnings are seen. Is there legislation we can use to ask the shisha cafes/ shisha bars to display health warning on the shisha pipe or menus?

TPD2 (Article 11) gives the UK the option to provide derogation from full labelling for tobacco products other than cigarettes, RYO and waterpipe tobacco. The UK has decided to limit the use of the derogation to only individually wrapped cigars and cigarillos. This means that waterpipe tobacco must comply with the full labelling requirements:

The Tobacco and Related Products Regulations 2016:

Combined health warnings on tobacco products for smoking:

5.—(1) No person may produce or supply a tobacco product for smoking unless it complies with this regulation.

(2) **A unit pack and any container** pack of a tobacco product for smoking must carry a combined health warning.

A unit pack is defined in as:

4.—(1) In these Regulations, a “**unit pack**”, in relation to a tobacco product or related product, means the smallest individual packaging in which that product is, or is intended to be, presented for retail sale

Following the guidance issued in relation to the previous regulations where the term used was ‘package’, as a consumer the presentation of the filled waterpipe ready for use is being presented for retail sale and should therefore have the full required label, this would apply to herbal shisha, all be it with the reduced warnings.

If the consumer picks the product from a container, before filling the pipe it must be labelled appropriately, as must retail packs to take away. I can see no requirement for menus to be marked, in my opinion the waterpipe should be marked with a full label as well as other retail packaging. From a practical point of view this may be difficult; the purpose of the regulation could be achieved if a notice with the warning label was given to the customer alongside the waterpipe

5. Whilst I appreciate the need to keep the trade at arm’s length (further if possible). But one of the suggestions, which I have employed with great success, is to use the Consumer Protection from Unfair Trading Regulations 2008 'Stating or creating the impression that a product can legally be sold when it cannot.' I cannot see how this can happen without obtaining evidence from the manufacturer/brand holder, that the goods are counterfeit.

This provision is a reserve if the other four suggestions are not available, they are:

- Labelling offences
- Reduced ignition propensity test (RIP) result
- Customs and Excise management Acts 170
- Criminal Attempts Act 1981

Labelling offences may be easier to apply after the 20th May; however the prosecution presentation needs to be clear that this is not bureaucracy and the labels have a real purpose, similarly RIP needs to be put in context that all tobacco products are dangerous. Using the Consumer Protection from Unfair Trading Regulations 2008 – banned practices i.e. ‘Stating or otherwise creating the impression that a product can legally be sold when it cannot.’ (sch1.9)

I accept this is difficult to show in some cases, if the product is hidden for example and everyone in the transaction knows it is illicit it would be hard to argue the impression was given the product could be legally sold. However if the product is bought via an overt outlet as a normal transaction the offence can be used alongside the labelling offences, RIP results or none payment of duty. Trade Mark statements do sometimes have to be obtained, but in my experience only rarely, from as practical point of view some TI companies are reluctant/slow to provide them, requiring the enforcement body to send product out of the UK for examination.

6. Illicit tobacco roadshows in London sound interesting - what will they look like? Are they for the public or stakeholders?

The roadshow unit is provided by BWY Canine, who recently gave a presentation to the North and North East London Illegal Tobacco Group. You’ll be able to see what it looks like on their website - <http://bwycanine.co.uk/services/4574261019> - but as well as the unit, it is best to have other relevant organisations there, such as the smoking cessation service and the Fire Service. The intentions are to influence the public, engage with stakeholders who will be invited to attend, and get some media coverage.

As there is likely to be some new intelligence gathered from the public, we are planning to have enforcement resources available for immediate visits.

7. 44 out of 89 selling illicit would indicate that this practice is rife. Is this an accurate impression?

The practice of retailers selling is widespread – especially in the evenings and weekends, when enforcement is perceived to be less likely – but we are not suggesting that 50% of retailers are selling illicit tobacco (IT). The enforcement visits in Operation Shona were intelligence-led – using either existing intelligence or new intelligence gathered from test purchases in the days before the visits.

8. Out of the 44 retailers, how many also sold alcohol and how many alcohol licensing Reviews were applied for – as the Review process is a very powerful tool to deal with illicit tobacco sales.

The majority were licensed and where they are, I find the licence review process much more efficient and effective to use than other sanctions. However several were not and IT was found in cafes and internet cafes, kebab shops and hairdressers, as well as traditional tobacco retailers.

9. Could there be a way that the Treasury refunds local authorities for their efforts or at a minimum pay for the time of team used, if this is below the amount saved?

There is no route for this type of funding at the moment, I believe, but it could improve enforcement immensely if there were. At the moment, certainly in London, HMRC are unable to do too much at retail level and when they do undertake shop visits, they will typically take the goods and leave a warning, or raise a civil penalty.

When Local Authorities enforce, they benefit from local knowledge of the 'quality' of their (licensed) business and often take robust action, including licence review to deter business from stocking IT, but the financial benefits go immediately to the Treasury (reduced duty / VAT evasion) and in the longer term, primarily, to the NHS (better health from reduced use of IT): local authorities gain very little and are less likely to devote resources to enforcement.

Ideally, I believe there should be regional enforcement teams (looking at illicit alcohol, as well), where expertise could be concentrated and which could act as a 'bridge' between HMRC and Local Authorities. Such teams – similar to IT teams in the NE and NW of England – could work closely (and with mutual benefits) with attempts to change the public's attitude to the use of IT, thus lowering demand from smokers for IT and demand from retailers who supply smokers with IT.

10. During Operation Shona, can you tell us the phrases used / what people ask for in attempted illegal tobacco test purchases?

Keep it simple. The test purchasers helping Islington simply asked for 'cheap tobacco' – not even restricting to cigarettes or hand-rolling. Where possible, it seems most effective when matching the ethnicity of purchaser to the business. Speaking in the language of the business and trying a little small-talk to provide an explanation of why they are a 'new' customer (asking directions to a local venue, saying they've just moved into the area etc.) are also good, if you have a suitable purchaser.

11. Training of officers in surveillance was mentioned, where was this training sourced?

This training for officers was sourced at:

PHF Training Ltd

14 Church Green East, Redditch, Worcestershire B98 8BP

Telephone +44 (0) 1527 66378 Mobile: +44 (0) 7974 152078

Email: info@phftraining.co.uk

Website: <http://www.phftraining.co.uk/index.html>

12. Do either case study providers (Islington/Durham) have any experience of liaising with Camelot about removal of licence if a premises found selling illicit tobacco?

This is not a tactic that Durham County currently uses, but is something that may well be considered for the future.

This is not a tactic currently used in Islington, though I have heard of this being done (certainly in relation to underage sales, if not re IT). I would imagine it could be a very useful lever to encourage future compliance, as I would assume that the National Lottery would be very reluctant to leave their terminal at a premises where IT is sold.

13. We have noticed that more shop staff seem to be keeping the tobacco on their person. Do we have the powers to search them?

Trading Standards Officers have no powers of search of the person so it is police powers that must be used.

However police powers of search without arrest are limited under section 1 of the Police and Criminal Evidence Act 1984 (PACE) to stop and search only if they have 'reasonable grounds' to suspect you're carrying such things as illegal drugs, a weapon, stolen property or an article which could be used to commit certain types of crime such as robbery, theft or fraud. It is unlikely that illicit tobacco or cash from the supply of illicit tobacco falls into this category.

Your best bet if you have already established an offence is to persuade an accompanying police officer to arrest them. Once under arrest, section 32 of PACE allows a police officer to search a person and may use reasonable force to conduct such searches. In addition section 54 of PACE provides a power to search an arrested person on arrival at a police station.

14. On a few occasions our trading standards team has found money hidden - sometimes more than £1k sometimes less but everyone is reluctant to seize large amounts. Should this be seized and if so who by?

Cash seizure detention and forfeiture is a civil procedure and does not require the suspect to be charged or convicted of a crime, although it can run in parallel with a criminal investigation. Overall, it is a simple and straightforward process that should be used where appropriate.

Every local authority conducting illicit tobacco investigations should have in place a contingency plan for seizure of cash. Ideally the local authority should have access to a Financial Investigator or a memorandum of understanding with their local police Financial Investigation Unit to make cash seizures on their behalf.

Trading Standards Officers unless qualified as cash seizure officers under the Proceeds of Crime Act 2002 cannot make cash seizures under this act. Smaller amounts (less than £100) or cash that is likely to be used as evidence is also best seized by the police under their powers under the Police and Criminal Evidence Act 1984.

15. Question: How much capital do small retailers have tied up in tobacco stock, as a proportion of all stock?

ASH retail report: [Counter Arguments: How important is tobacco to small retailers](#), examines the messages sent to small retailers by the tobacco industry and asks whether given changing context the traditional approach to selling tobacco in small shops is still in retailers' best interests.

The report was informed by two new pieces of research, an analysis of electronic point of sales (EPOS) data from a sample of over 1,400 convenience stores in Britain and a survey of nearly 600 owners and managers of convenience stores.

This question was not specifically looked at in the research for Counter Arguments. However, 72% of small retailers surveyed said that they have too much money tied up in tobacco stock every week and nearly a quarter (24%) said they regularly had problems with the cost of stocking up.

16. Question: How often do tobacco company reps visit small retailers and for what purposes?

ASH's survey of retailers revealed that that over four fifths (81%) of retailers speak to a tobacco company representative at least once every six months while 45% see one at least once a month.

The table below gives an overview of the topics that small retailers have discussed with tobacco industry representatives over the course of the previous 6 months.

Table 1.

Topics small retailers discussed with tobacco company reps in previous 6 months

<i>Topics Discussed</i>	<i>Retailers</i>
What brands to stock	73%
Where tobacco stock should be positioned	67%
Standardised packaging	66%
Where tobacco sundries should be positioned	64%
What brands to promote to customers	61%
Stocking their e-cig brands	60%
How to speak to customers about brand promotions	52%
Free tobacco products	26%

17. The final speaker mentioned tracking and tracing - what's the latest on that front following the European consultation last year?

Regarding tracking and tracing (T&T) the Commission has been consulting on what the standards, specifications and requirements for an EU wide system would be. Decisions are likely sometime this year (I would guess later in the year rather than sooner).

The tobacco industry has a proprietary coding system called "Codentify" (an alphanumeric code) which it wants to be able to offer to governments as the "unique identifier" on tobacco packaging required by the revised Tobacco Products Directive. The industry claims to be in favour of "open standards", which would in theory allow other competitors to offer their systems to Member State governments, but in practice it is likely that if the standards set by the Commission allow Codentify to be used, the industry would offer it at below cost price, which would prevent other competitors from entering the market.