The Tobacco Products (Traceability and Security Features) Regulations 2019
Consultation response on behalf of ASH on the draft secondary legislation
Closing date: 11th March 2019 11.45pm

1. 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. ASH does not have any direct or indirect links to, or receive funding from, the tobacco industry, or receive funding from any other commercial organisation.

2. This response was written for ASH by Deborah Arnott, chief executive, who participated on behalf of civil society in the consultation meetings run by the EU on the development of the Delegated and Implementing Regulations and the Implementing Decision. She was also a civil society observer on behalf of the Framework Convention Alliance at all the meetings held to develop the WHO Framework Convention on Tobacco Control (FCTC) Illicit Trade Protocol (ITP).

General points

3. The UK is a party to the WHO FCTC ITP. This means that the regulations also need to comply with the requirements of the WHO FCTC ITP.

4. Under Article 8 of the Protocol Parties are responsible for establishing a tracking and tracing system for cigarettes controlled by the Party within five years of coming into force (25 September 2023) and for all other tobacco products within ten years of coming into force (25 September 2028). Key requirements set out in Article 8 are that:
   • 8.2 Each Party shall establish…a tracking and tracing system, controlled by the Party for all tobacco products that are manufactured in or imported onto its territory
   • 8.12 Obligations assigned to Parties must not be performed by, or delegated to, the tobacco industry.
   • 8.13 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.
   • 8.14 Each Party may require the tobacco industry to bear any costs associated with that Party’s obligations under Article 8.

5. The independence requirements in the TPD and the ITP were developed in recognition that the tobacco industry has an incentive to control, circumvent and/or exploit weaknesses in tracking and tracing systems in order to avoid scrutiny, minimise excise tax payments, and limit their liability. The evidence, both historic and current, is that the tobacco manufacturers have been a source of supply to the illicit market and that this is still happening, and that they are trying to ensure they control any tracking and tracing system in contravention of the obligations of the ITP.

1 Gilmore AB, Gallagher AWA, Rowell A. Tobacco industry’s elaborate attempts to control a global track and trace system and fundamentally undermine the Illicit Trade Protocol. Tobacco Control Published Online First: 13 June 2018. doi: 10.1136/tobaccocontrol-2017-054191
2 Gilmore AB, Rowell A. The Tobacco industry’s latest scam: How Big Tobacco is still facilitating tobacco smuggling, while also attempting to control a global system designed to prevent it. Tobacco Control 2018.
3 Joossens L. Traceability: the tobacco industry is part of the problem, not the solution, Tob Control, 2018. https://tobaccocontrol.bmj.com/content/tobaccocontrol/early/2018/06/13/tobaccocontrol-2018-054352.full.pdf
Part 1 Preliminary

Article 1 Sell Through

6. The timeline for sell through set out in Art 1 of one year for cigarettes and HRT and two years for other tobacco products is generous. The experience from implementation of plain packs was that all retail products were compliant months before the deadline.

Article 2 Interpretation

7. In Art 2 Interpretation, the definition of “officer” for the purposes of the regulation only includes a person appointed under section 2(1) of the Commissioners for Revenue and Customs Act 2005 (a) which only includes “officers of revenue and customs”. This means no other enforcement officers, in particular Trading Standards Officers, can use these regulations to help tackle the illicit tobacco supply chain in order to protect young people and communities.

8. Trading Standards Officers are responsible for enforcement of regulations under the TPD transposed into UK law as the Tobacco and Related Products Regulations 2016. Articles 15 and 16 of the Directive are being transposed into UK law by Her Majesty’s Revenue and Customs (HMRC) but they are still an integral part of the TPD Directive. The TPD states that “a high level of health protection should be taken as a base for legislative proposals….. Tobacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco on human health, health protection should be given high importance, in particular, to reduce smoking prevalence among young people”.

9. Furthermore enforcement of the tracking and tracing regulations at point of sale will be dependent on the activities of trading standards officers, as HMRC does not have the expertise or the capacity to engage at this level.

10. For all these reasons the definition of officer should be broadened to include persons appointed by a weights and measures authority in Great Britain and each district council in Northern Ireland.

11. Lastly this will be an additional burden on Trading Standards and therefore in the short term funding should be provided in line with the new burdens doctrine by HMRC. In the longer-term the tobacco manufacturers should be required to fund TS enforcement of the regulations, as allowed for in Article 8.14 of the ITP, to which the UK is a ratified Party “Each Party may require the tobacco industry to bear any costs associated with that Party’s obligations under Article 8.”

Art 3 (2) Cross-border distance sales

12. The TPD allows Member States to forbid cross-border distance sales because, as explained in recital (33) “Cross-border distance sales of tobacco products could facilitate access to tobacco products that do not comply with this Directive. There is also an increased risk that young people would get access to tobacco products. Consequently, there is a risk that tobacco control legislation would be undermined.”

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13. The UK government is committed to a vision of a ‘smokefree generation’ as set out in the Tobacco Control Plan for England 2017,\(^5\) which includes reducing the proportion of 15 year old regular smokers from 8% to 3% or less by 2022. There is strong public support for measures, such as retail licensing, to make it as difficult as possible for young people under the age of sale to be able to acquire cigarettes. For example the UK already prohibits sales from vending machines, for this reason.

14. The UK should prohibit cross-border distance sales to consumers in the UK.

**Part 2 Prohibition from supply of non-compliant tobacco products**

15. Prohibition of supply (Art 6) should include the requirement to comply with all the requirements of the TPD not just those relating to tracking and tracing.

**Part 3 Traceability system**

**Article 7 c**

16. Article 7 c specifies that the unique identifier must not be partially or totally hidden or interrupted by any other item, “including through tax stamps or prices marks”. Price marking is illegal under the UK's standardised packaging regulations and the UK does not have tax stamps, so it’s not clear why this wording is necessary?

**Article 9 1 a**

17. Art 9 1 a states in brackets that “the data storage facility is physically located [in the territory of the European Union]”. It is specified in Art 15.8 of the TPD that this is required for the primary data repository and I assume it will be the case for the secondary repository too? What are the implications of Brexit (no deal or otherwise) on the data storage requirements and our access to the data? Illicit trade in tobacco is a global problem and the strength of the TPD tracking and tracing system is that it is an international system covering the whole of the EU. It is therefore essential that we remain part of the EU tracking and tracing system.

**Article 12 access to stored data**

18. Paragraph 22 of the Commission Implementing Regulation on technical standards for the establishment and operation of a traceability system for tobacco products states that “For investigation and enforcement purposes, it is necessary that competent authorities and the Commission have access to a record of all economic operators and operators of first retail outlets involved in the trade of tobacco products, as well as the facilities that are used by them to manufacture, store and process their products. Each ID issuer should establish and maintain a registry that contains the identifier codes for economic operators, operators of first retail outlets, machines and facilities referred to above. An up-to-date copy of these registries, along with the corresponding information should be transferred electronically via the router to the secondary repository and compiled into an EU wide register”

19. Enforcement of the regulations at point of sale will be dependent on trading standards officers. It should be made explicit that Trading Standards should have access to the necessary equipment and technology to determine whether or not products are compliant including access to stored data. For example that is the only way it can quickly and easily determine whether or not a given retailer has an ID allowing it to sell tobacco.

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It is essential that Trading Standards Officers have access to the register, and this needs to be made clear in the regulations.

**Part 5 Independence of service providers**

20. The UK should require the provision of a single universal authentication device to be used by enforcement officers to authenticate security features. Authentication devices are purpose-built devices or software applications (e.g., smartphone) that can be used to determine that a security feature and the pack it is affixed to is genuine. These are to be used by Member State enforcement officers.

21. The UK universal authentication devices should be paid for by the industry in line with the TPD and ITP. However, it is not appropriate for the industry to be involved in design, development or supplying them to enforcement officers and/or providing training. Provision and training should be provided by HMRC or, if independent of the industry, the manufacturer of the device. The UK needs to be in complete control of its ability to authenticate the security features that have been specified.

**Part 6 Deactivation of identifier codes**

22. Under Art 18 of the draft regulations deactivation of the identifier code is limited to failure to comply with the tracking and tracing requirements of the TPD and not other regulatory requirements either under the TPD or the prohibition on sale to children under 18. This implies that an individual who persistently sells cigarettes to children can keep their identifier code and continue as a legitimate operator in the supply chain. We would suggest that consideration be given to whether a business is a fit and proper business to be granted and to retain an identifier code where there are other breaches of tobacco regulations.

23. Furthermore consideration of deactivation of the code requires that failure to comply has occurred on three or more occasions within any 12-month period. This is a very tight and specific timescale and the limit of 12 months should be removed to allow consideration of three or more occasions without time limit.

**Part 7 Enforcement**

24. The draft regulations 21 and 22 only include forfeiture and compliance notices by way of sanction for a failure to comply with any requirement in the regulations. We support forfeiture where a person fails to comply with the Regulations, together with deactivation where non-compliance is repeated. However, the supply of a non-compliant product should also be defined as an offence with proportionate fines applied for non-compliance.