

Response to HMRC Consultation: Control of Raw Tobacco by Action on Smoking and Health (ASH)

General

1. ASH (UK) is a health charity working towards the elimination of harm caused by tobacco. ASH receives core funding from the British Heart Foundation and Cancer Research UK and has received project funding for work to support government tobacco strategy for England from the Department of Health. ASH does not have any direct or indirect links to, or receive funding from, the tobacco industry.
2. We note that the consultation refers to the provisions of the Illicit Trade Protocol, a subsidiary treaty under the WHO Framework Convention on Tobacco Control. Article 6.2 of the Protocol requires Parties to: *“endeavour to license, to the extent considered appropriate, and when the following activities are not prohibited by national law, any natural or legal person engaged in: ... (d) wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment”*. We welcome HMRC’s timely consultation, and look forward to subsequent consultations related to implementation of other provisions of the Protocol. We believe that the problem of illicit trade in raw tobacco would be reduced significantly if excise tax were levied on it so as to increase the price and reduce the price differential between raw tobacco and fine-cut tobacco. However, we recognise that this would require changes to the Tobacco Tax Directive and urge HMRC to advocate for these changes to be made in the review of the Directive due to start shortly.
3. We note that tobacco is grown in 12 European Union countries, the main producers being Italy, Bulgaria, Greece, Spain and Poland, and that EU countries are responsible for about 3% of global yearly raw tobacco production, export around 100,000 tonnes a year, and import around 400,000 tonnes a year, principally from Africa and America.¹ We also note HMRC’s estimate that in 2013/14 64 tonnes of raw tobacco were imported to the UK from outside the European Union.
4. From a public health perspective, control of raw tobacco is an important policy objective. Failure to achieve proper control risks undermining the impact of tobacco control policies, in particular high and rising levels of taxation on cigarettes and other tobacco products. Since excise duties are applied to manufactured tobacco only, it follows that there is always a possible incentive for duties to be evaded through the import of raw tobacco into the UK and its subsequent unlawful conversion into manufactured tobacco products. Import of

¹ <http://ec.europa.eu/agriculture/tobacco>

raw tobacco as a possible means to avoid tobacco taxation is heavily promoted on the internet, including on UK-based sites.² We agree with HMRC that it can be difficult in cases where seizures of raw tobacco are made to meet the standard of proof required to show evidence of intent to evade duty.

Question 1: Does the proposed definition encompass all forms of raw tobacco which could be used to manufacture tobacco products?

5. We consider the proposed definition to be a good one: we prefer a “negative” definition that defines raw tobacco as any tobacco that does not fall into other legal categories, rather than a “positive” attempt to define raw tobacco, which we consider would be difficult and liable to leave loopholes in the legal framework.

Question 2: Should plants which have not been harvested but are still growing in containers such as pots or bags also be included to prevent an alternative route to evade duty?

6. Yes. This follows from the “negative definition” approach above. It would be perverse to allow the requirement to register or liability for seizure to be avoided simply by putting raw tobacco into containers.

Question 3: We would very much like to hear from businesses and individuals who use raw tobacco for purposes other than manufacturing tobacco products on which duty is payable, including manufacturers of e-cigarette fluids. It would be extremely helpful to know:

- **the nature of your usage;**
 - **where and in what quantities you currently source raw tobacco, including the approximate quantities used;**
 - **how you feel these proposals would impact you;**
 - **is there an alternative substance that you could use in place of tobacco?**
7. This question is not directly relevant to our organisation. However, we strongly support including in any registration scheme a requirement on businesses and individuals who are end users of raw tobacco to provide on request information on how they use raw tobacco, on the amounts they use, and on the details of their supply chain. (See answer to Question 7).
8. We sought information on alternative uses for raw tobacco and whilst we were unable to find anything of major significance we were alerted to the use of raw tobacco in animal husbandry. We understand that the stalks of tobacco plants are

² See for example: <https://boltonsmokersclub.wordpress.com/2014/11/01/tobacco-duty-taxes/> and related pages

available as nest material for pigeons but this is quite expensive: one source charges £ 7.99 for 1.5kg, compared to pine needles (free if collected in the wild) or hay/straw. We also understand that raw tobacco may be used for bedding for horses although due to the quantity required this would be a very costly option compared to more conventional sources such as straw or wood shavings. In addition, as horses often consume some of their bedding material they could be harmed if they were given raw tobacco as tobacco is poisonous.

Question 4: What are your views on a simplified scheme for low volume users for non-smoking purposes:

- **Do you think there should be a simplified scheme for low-volume users and if so, why?**
 - **At what level do you believe that the threshold should be set for a low-volume user of raw tobacco for non-smoking purposes?**
 - **How could HMRC ensure that such a scheme was not exploited to avoid Tobacco Products Duty?**
 - **Please supply any evidence you have of usage to support your view.**
9. We would be opposed to a simplified scheme for low volume users if this created a potential vulnerability in the system, for example because amounts under the threshold for this provision could be aggregated after arrival in the UK for illicit manufacturing. It should be noted (see footnote to paragraph 4 above) that there is evidence that individuals (and hence low volume users) are being encouraged to import raw tobacco to avoid tobacco excise duty. We would support providing an online tool for registration. We would also support the issuing of guidance in relation to the registration scheme which provides some flexibility in interpretation of the requirements in relation to small businesses and individuals. (See paragraph 17 below.)

Question 5: If you would be required to register under this scheme, for which other taxes and duties are you already registered?

10. Not applicable.

Question 6: Paragraph 19 includes factors that will be considered as part of a fit and proper test:

- **What is your view on the suggested factors that would be included in a fit and proper test?**
 - **Are there any additional items you think should be considered as part of this fit and proper test?**
11. We agree with all the reasons listed for refusal of registration, and with the stipulation that this list is not exhaustive. We would suggest that the reasons for refusal should be expanded over time as the provisions of the Illicit Trade

Protocol are put into effect in the UK and across the European Union, and specifically:

- Article 6 (Licence and equivalent approval)
- Article 7 (Due diligence)
- Article 9 (Record keeping), and
- Article 10 (Security and preventive measures).

Question 7: What record keeping requirements do you consider would be necessary to assure HMRC that raw tobacco is being used for a legitimate purpose, i.e. is not being used to illegally manufacture tobacco products?

12. See above. There should be a requirement to allow HMRC and other relevant enforcement authorities (for example, where appropriate, trading standards officers) access to documents to verify the required audit trail.

Question 8: Paragraph 25 states that HMRC will establish at the point of importation that raw tobacco is destined for a registered holder. It may therefore be necessary for the carrier or owner of raw tobacco being imported to provide proof of destination at the border. Are there any issues you can identify with this requirement?

13. Importers of raw tobacco should be prepared to co-operate with reasonable requirements in relation to supply chain controls, including that there is a known and properly registered end user.

Question 9: Are there any potential wider consequences of this system that we have not identified here?

14. Not to our knowledge.

Question 10: Are there any equality issues raised by these proposals, such as a disproportionate impact on any particular group of the population such as ethnic groups or disabled people, for example?

15. Not to our knowledge.

Question 11: Do you have any views on the potential impact of this scheme on businesses affected, including potential costs and burdens and any suggestions for how these can be kept to a minimum?

16. We agree with the Assessment of Impacts given on page 13 of the consultation document that the measure should have a negligible impact on lawful and properly run businesses. The need for effective supply chain control of raw

tobacco is more important than the likely marginal impact on business, particularly in view of the harm that tobacco consumption causes to users.

Question 12: What documentation do you consider it reasonable and necessary for an importer or consignee to provide to prove that a consignment of raw tobacco is destined for a legitimate end use?

17. Documentation should be provided, either physically or as electronic records, that complies with the relevant Articles of the Illicit Trade Protocol as listed in paragraph 10 above.
18. Any accompanying guidance issued by HMRC could provide for some flexibility in interpretation based on the size of the business, involved in importing raw tobacco and the volume of tobacco intended for import. For this purpose individuals importing low volumes of raw tobacco could be treated as in the same category as small businesses.

Question 13: What are your views on broadening the seizure powers, including any issues, potential costs and burdens? Please supply any evidence you have to support your view.

19. We do not agree with the consultation document that broadening seizure powers should be considered as an “alternative option” to registration. We would prefer to broaden seizure powers so that they allow for seizures, subsequent forfeiture and appropriate financial penalties where an importer of raw tobacco does not comply with the requirements of the registration scheme, including supply chain controls introduced in conformity with the Illicit Trade Protocol. We accept that this would involve some additional workload for HMRC, but if this power were appropriately used we consider that it would be likely to prove cost effective in terms of reducing tobacco tax evasion.
20. We do not believe, as the consultation document suggests, that this approach would “require HMRC and BF to investigate all consignments intercepted”. HMRC and BF should be empowered to begin an investigation of any consignment where they have reasonable grounds to believe that it may not be destined for a legitimate use.
21. The existing legislation (Section 170B of the Customs and Excise Management Act 1979) is clearly inadequate, since it only concerns offences where “any person is *knowingly* concerned with the taking of any steps with a view to the fraudulent evasion, whether by himself or another, of any duty of excise on any goods”. This clearly allows a defence based on the accused person’s lack of knowledge of, or direct intent to commit, fraudulent evasion. The provisions of the Illicit Trade Protocol mandate making unlawful, inter alia, the “importing ... of

tobacco contrary to the provisions of this Protocol”. This would include cases where importers fail to meet their obligations to carry out due diligence, keep appropriate records, etc. If such conduct is to be made unlawful, appropriate sanctions must include seizure and confiscation of imported tobacco. Importers who are *reckless* or *negligent* in failing to ensure proper supply chain controls should be subject to seizures and other penalties.

22. We accept that creating the power to make such seizures may involve a change to primary legislation (assuming that no power to make relevant Regulations exists). We would suggest that an early opportunity be taken to make such a change, as part of the process of ensuring that UK law is in conformity with the Illicit Trade Protocol.

Question 14: Are there any potential wider consequences of increasing existing powers that we have not identified here?

23. There are potential implications for the workload of HMRC which would need to be properly factored in to future Government decisions on HMRC funding and staffing.

Question 15: Do you have any alternative proposals for the control of raw tobacco and the prevention of avoidance of Tobacco Products Duty?

24. We believe that the financial incentive to engage in illicit trade in raw tobacco would be reduced significantly if excise tax were levied on it, so as to increase the price and narrow the price differential between raw tobacco and fine-cut tobacco, so reducing the incentives. However, we recognise that this would require changes to the Tobacco Tax Directive and urge HMRC to advocate for these changes to be made in the review of the Directive due to start shortly.

25. We also believe that the impact of the introduction of a registration scheme should be evaluated for its effectiveness, and if it is not found to be effective it should be upgraded to a full positive licencing scheme.

26. We would also make the general observation that HMRC’s implementation of any new controls and powers in relation to raw tobacco should be in conformity with the recommendations of the House of Commons Public Accounts Committee in its report “Tackling Tobacco Smuggling”, specifically:

“Recommendation: HMRC and Border Force should develop a clear and coherent rationale for the use of prosecutions and other enforcement action within the UK, based on good evidence of the deterrent effect. They should also publicise prosecutions and other enforcement action more widely to deter potential offenders. HMRC needs better relationships with Local Authority trading

standards officers to achieve this.”

HMRC must do more to work with other agencies to tackle tobacco smuggling in the UK. Joint working of this nature will improve enforcement activity, reduce supply and educate the public about the risks of purchasing illegal products. A pilot scheme launched in 2009 to tackle tobacco smuggling to the UK by cutting demand from the public for illicit tobacco, which involved health professionals, trading standards and police services, produced positive results. However, despite this success the scheme has not yet been rolled out across the UK.

Recommendation: HMRC should implement effective examples of joint working more quickly across the UK.”³

³ [Tackling Tobacco Smuggling](#), 23rd report of the House of Commons Public Accounts Committee, published 10th October 2013.