

Consultation
**Sanctions to tackle tobacco duty evasion and
other excise duty evasion**

HM Revenue & Customs
HMRC

Chartered Trading Standards Institute
response

11th May 2017

About The Chartered Trading Standards Institute

The Chartered Trading Standards Institute (CTSI) is a professional membership association founded in 1881. It represents trading standards officers and associated personnel working in the UK and also overseas – in the business and consumer sectors as well as in local and central government.

The Institute aims to promote and protect the success of a modern vibrant economy and to safeguard the health, safety and wellbeing of citizens by empowering consumers, encouraging honest business, and targeting rogue traders.

We provide information, evidence, and policy advice to support local and national stakeholders.

We have also, as part of our recently revised remit, taken over responsibility for business advice and education concerning trading standards and consumer protection legislation. To this end, we have developed the Business Companion website (www.businesscompanion.info)

The CTSI Consumer Codes Approval Scheme was launched in 2013, superseding the OFT scheme (www.tradingstandards.uk/advice/ConsumerCodes.cfm).

CTSI is a member of the Consumer Protection Partnership, set up by central government to bring about better coordination, intelligence sharing and identification of future consumer issues within the consumer protection arena.

We run events for both the trading standards profession and a growing number of external organisations. We also provide accredited courses on regulations and enforcement.

A key concern for CTSI is that of resources. UK local authority trading standards services enforce over 250 pieces of legislation in a wide variety of areas. They have suffered an average reduction of 46% in their budgets since 2010 and staff numbers have fallen by 53% in the same period.

This response has been composed by Members of the CTSI National Tobacco Focus Group. Should you have any queries or wish to discuss the response please do not hesitate to get in touch at tobaccocontrol@tsi.org.uk

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Sanctions to tackle tobacco duty evasion and other excise duty evasion

Prosecutions and sanctions

General Observations

CTSI welcome the opportunity to respond on behalf of Trading Standards Services and professional officers to this consultation. Tackling the supply of illicit tobacco remains a priority area of tobacco control activity for Trading Standards however concern has been raised about the effectiveness of using Trading Standards offences for such criminal activity, for example, using labelling offences to tackle illicit white tobacco supply can be seen particularly in court as a “technical offence” and does not really convey the seriousness of the criminal activity involved.

CTSI has responded in as much detail as possible at this early stage to the questions posed in this document and clearly we would hope there is scope for further discussion at a later stage. We would however also seek to raise the matter of the use by Trading Standards of offences under the Tobacco Products Duty Act (TPDA) and the Customs and Excise Management Act (CEMA).

We would welcome a review of the decision made by HMRC (several years ago) to remove the authority of Trading Standards to use this legislation as we believe that a clear and simple authorisation process to use the TPDA or CEMA in appropriate cases would enhance the outcome of prosecutions taken by Trading Standards Services.

Questions and Responses

- 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?**

CTSI Response: In our view the deterrent effect of increasing financial penalties will depend upon where the offenders are in the illicit tobacco supply chain. If the identified individuals are operating at a “wholesale / distribution” level, the financial rewards are such that any financial penalty can be offset by continued trading in illicit product within a very short time period. The organised crime networks associated with the illicit tobacco trade generate sufficient monetary streams to ensure that penalties can be offset. We do not therefore consider that this proposal would be particularly effective in these circumstances.

However, we do consider that this particular sanction could be more effective as a deterrent at retail level. Individuals who sell product from their own premises are more likely to be affected by this form of sanction. The recovery of monies sufficient to cover any form of penalty or enhanced penalty will take substantially longer for the business to recover than at a wholesale / distribution level. This has been demonstrated by the modus operandi changing in recent years at retail level. i.e. the reduction of stock levels held on premises that may be subject to inspection and subsequent seizure has dropped dramatically.

However, consideration should also be given to the fact that the ability to frequently restock retail outlets within a very short space of time may be an indication that storage of product has now been moved to a remote location, or the wholesalers of product, have strengthened their supply chain and their ability to service their clients.

This sanction may also be more effective in relation to Border Force intercepts from individuals at entry points into the United Kingdom. The loss of the undeclared product plus a wrongdoing penalty may prove effective in preventing repeat offending in this environment.

Consideration should be given to the fact that effective exchange of information will be required between all agencies that may fall within the scope of being able to issue wrongdoing penalties, for any system to be effective.

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

CTSI Response: The multiplier principle could apply to most evaded duty regimes that are currently in place but given the type of product concerned and the comments provided in relation to question one above this type of sanction is likely to be most effective in relation to the retail sale of alcohol. The immediacy of the sanction and the levels suggested are more appropriate for retail level sales.

Likewise any such wrongdoing sanctions would need to be available to all those agencies that are currently or would be actively engaged in the delivery of a wrongdoings regime. CTSI would wish to discuss this further with HMRC.

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

CTSI Response: CTSI would support the proposal to increase the penalty with an increased multiplier for subsequent repeated wrongdoings i.e. 100%, then 200% etc.

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 mitigation?

CTSI Response: The use of reductions in penalties for cooperation or information / intelligence should only be applied once any information or intelligence has been proof tested or verified. This reduction at retail level should only be available where information / intelligence relate to the distribution or wholesaling of illicit product. A reduction for information / intelligence relating to supply at a retail level by other retailers should not attract a lower reduction in penalty.

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?

CTSI Response: We suggest that the timescale applicable between first and second wrongdoings should be greater than 12 months. A period of 3 years as a minimum should be applied to trigger the increase in any penalty applied. An escalator could also be applied to the wrongdoing trigger regime with a second offence within 3 years attracting an extended period of 5 years instead of restarting a new 3 year period.

Collaboration between agencies concerning actions taken against offenders will be critical to the effectiveness of such a scheme. Further discussion will be required on this point.

A new civil penalty for dealing in illicit product

General observations

CTSI understands that the proposed new regime amounts to a civil disposal of a criminal offence where appropriate to do so. Trading Standards have limited experience of this approach¹ however it is acknowledged that this might be a useful additional sanction particularly where (as outlined in the consultation document) the case is deemed unsuitable for criminal prosecution and, of particular interest to Trading Standards, the service of a penalty notice could be immediate.

Guidance on this point will in our view be required to ensure as far as possible consistency of approach across Trading Standards Services; the caveat being that decisions about the use of the civil penalty must lie with the authority, we would not wish to see the use of a civil penalty made mandatory in particular circumstances.

There will need to be further discussion around the mechanism for issue and collection of the financial penalty; the administration of such a penalty scheme must not place an undue burden on already stretched local authority services. We therefore suggest that consideration could be given to a system where HMRC is responsible for the set up and administration of the civil penalty scheme and for Trading Standards (where they wish to use this method of disposal) to be authorised to use it in the same way that Trading Standards can be authorised by the relevant Police force to issue penalty notices for alcohol offences.

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?

CTSI Response: We cannot think of any reason why this should not be considered. Trading Standards also deal with issues relating to the supply of illicit alcohol and thus a similar approach regarding duty stamp misuse could be helpful.

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

CTSI Response: CTSI broadly welcomes the proposal to introduce civil penalties for fiscal mark wrongdoings, where criminal prosecution is not appropriate with the caveat of the general issues outlined in the opening paragraphs above.

The effectiveness of the use of a civil penalty will only become apparent over time and thus monitoring of the use of the penalty and the intelligence generated in using the scheme will be critical in assessing effectiveness.

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

CTSI Response: CTSI supports the proposal for a sliding scale of penalty however given that we support the idea of an immediate service of the penalty notice we would suggest that the penalty

See Estate Agents Act 1979 and The Estate Agents (Redress Scheme) (Penalty Charge) Regulations 2008

increases over time such that a penalty disposed of within 14 days is less than a penalty disposed of within 30 days for example. Using the example of FPNs and Smoke free places legislation: The penalty for smoking in a smoke free place is £30 if paid within 15 days, £50 if paid after 15 days and up to 29 days.

We suggest that the penalty could be set at £150 (if paid in 14 days) rising to £500 as a maximum (up to 30 days). This provides a financial incentive to resolve the matter quickly.

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

CTSI Response: Given that the civil penalty will only be used in circumstances where a case is not suitable for criminal prosecution; we suggest that the maximum amount should be set at £500. This sum is equivalent to the average financial penalty awarded for Trading Standards cases in the Magistrates court.

We also suggest that the penalty notice makes it clear to the recipient that (along with the other information detailed at 4.6 in the consultation document) that the offending goods will be seized and disposed of.

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?

CTSI Response: We believe that this penalty is most suitable for low level offending where small volumes of product are found. In our experience this is likely to include individuals and some retailers but less likely to include suppliers, wholesalers. We do not think however that the use of the penalty should be restricted, the test of whether to use it or not in any situation will depend on the facts at the time.

Note: CTSI has taken the meaning of the word “dealing” in this question in its widest sense to include storage, sale, and supply.

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?

CTSI Response: Thirty days is in accord with other similar regimes and is, in our view, sufficient time to pay the penalty.

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

CTSI Response: See response to question 8. CTSI suggest that a failure to pay within 30 days results in the automatic maximum penalty of £500 becoming payable.

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

CTSI Response: Although CTSI recognise that this would increase the administration associated with the penalty regime; it would be unusual not to have a reminder letter generated at some point during the time period. Responsibility for this will depend on the set up of the penalty scheme i.e. will it be centralised at HMRC. CTSI also questions whether there is any proposal for an appeals procedure associated with the civil penalty.

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

CTSI Response: CTSI believe that this is a reasonable amount of time to pay.

- **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?**

CTSI Response: CTSI suggest there is a maximum penalty of £500

- **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.**

CTSI Response: CTSI has limited experience of using these methods of recovery. The responsibility for recovering non- payment will depend on how the penalty scheme is set up. We suggest that HMRC take responsibility for the administration of the penalty scheme including all recovery issues.

We are however interested in the potential of cost recovery for penalty notices that are issued by Trading Standards.

13: What design model do you believe would have the most impact?

CTSI Response: For the penalty scheme to have a deterrent effect it will need to be widely publicised.

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

CTSI Response: Only in exceptional cases should payment by instalment be available. It should not be the case that payment by instalment negates the impact of the initial penalty.

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

CTSI Response: Communicating the new penalty to individuals, businesses and regulators will be key.

There will be costs associated with the set-up of the penalty scheme and the issue and follow up of penalty notices. With approx. 145 Trading Standards services in England alone a centralised scheme may offer a more effective way of administering this.

There will also be training issues for Trading Standards Staff who have not used penalty notices (or similar i.e. FPNs) previously.

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

General Observations

We understand that section 94 of the Finance Act 2009 allows HMRC to publish details of Deliberate Tax Defaulters, where the potential lost revenue is more than £25,000 and for acts deemed to be deliberate in nature. With illicit tobacco, it is highly likely that the initial sale was deliberate but many offences do not fall within the threshold of £25,000. Therefore HMRC are proposing to allow publication of deliberate defaulters details if the tobacco element is deemed to be deliberate and reduce the potential lost revenue to £15,000.

In order to respond to the questions in this section it is necessary to consider who will be impacted by this measure and their role in the illicit tobacco supply chain. We accept that there may be people who regularly travel abroad and bring back small amounts of cigarettes or tobacco which they then sell on to friends and neighbours. However the vast majority of offenders which Trading Standards encounter are the front end of elaborate and complex Organised Crime Groups and have no intention of complying with the law when it is so profitable to them to supply illicit tobacco.

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?

CTSI Response: The potential “shame” of appearing in an HMRC list of “Deliberate Tax Defaulters” may have a deterrent effect on those who feel they are performing a community service through the sale of excess “duty-frees”. However we do not believe that it is likely to have any deterrent effect on the persistent offenders encountered by Trading Standards Services

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

CTSI Response: We do not feel it is necessarily a deterrent as outlined above. Indeed, anecdotally, we are aware of businesses that sell illegal products becoming more popular as a result of publicity and would want to ensure that any publication did not act as an “advertisement”.

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

CTSI Response: No, in itself we do not think naming is a deterrent at all. However, if the penalties imposed are very significant in relation to the criminality exposed, it could be an effective deterrent to those who are considering getting involved in the supply of illicit tobacco.

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

- **Who else should HMRC inform – local press, local authority, local police, public health, tobacco manufacturers?**
- **Do you think the message would have a greater deterrent if published by another source? If so, who and why?**

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

CTSI Response: It would be useful for Trading Standards Officers to be aware of deliberate tax defaulters linked to tobacco wrongdoing present in their areas. It may be possible to become aware through an alert from GOV.UK but if not, direct communication would be helpful.

To minimise the impact on HMRC this could be via the Regional Intelligence Analyst network. Messages would be more effective if they covered all of the issues highlighted by HMRC in point 5.6 of the consultation – crime, health and community tensions – rather than just focusing on the tax default, which may not resonate with the public or other potential defaulters.

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

- 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?**

CTSI Response: CTSI agree that a duty of care should be placed upon landlords of commercial property or land and commercial storage facilities for tenants that are storing selling or promoting goods that are duty and/or tax evading.

This duty of care should also apply to Housing Associations or Local Authority Housing stock where it would be reasonable for the entity to make checks on the tenant prior to their occupation of a property as domestic properties can be used to store, distribute or sell duty or tax evading products ('tab houses').

The suggestion is that this is for a voluntary clause but the less diligent landlords are not expected to adopt such a clause thus the CTSI consider a mandatory clause to have the greatest effect on coercing landlords to take proactive steps prior to accepting a new tenant. The reference to duty and/or tax evading is to have the widest level of protection of products that attract duty or value added tax to protect the public finances and maintain revenue levels.

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

CTSI Response: CTSI believe a mandatory duty of care on landlords would be effective when they have been informed that duty and tax evasion is taking place from property they own. If the property is owned by a legal entity such as a limited company, then the directing mind of the entity should have a mandatory duty of care.

CTSI are familiar with defences for consumer protection criminal legislation and would advocate a defence should be made available where the landlord has taken reasonable steps and due diligence prior to and whilst the tenant takes occupation of the commercial premise rather than just reasonable steps. This would prevent landlords adopting a procedure but taking no action to show that it works when tested.

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?

CTSI Response: CTSI would consider the following reasonable steps for landlords to take prior to and during a tenancy agreement:-

- Obtain copies of meaningful ID from your tenants, (example list at <https://www.gov.uk/disclosure-barring-service-check/documents-the-applicant-must-provide>) which recommends one document from Group 1, and 2 further documents from either Group 1, or Group 2a or 2b, with least one of the documents must show the applicant's current home address.
- Always ensure rent payment is via bank transfer to enable effective identification of the true business owner.
- Never take payments in cash or from third parties purporting to represent the tenant.
- Make it a condition of any contract that the property is not sublet and there are to be no alterations to the fabric of the building without the written consent of the land lord and subject to the provision of a copy of any sub-let or licence associated with the commercial property to the landlord. This would include any living accommodation that is associated with the commercial property.
- A term of agreement should specifically prevent any storage, sale or promotion of duty or tax evading goods or services even if temporary or for goods belonging to third parties.
- Periodic checks at the property to evaluate if any conditions of the tenancy agreement have been breached.
- Notification of any complaints associated with duty or tax evasion to HMRC and Trading Standards Authorities.
- Following the receipt of a notification that duty or tax evasion has occurred at a property, the landlord should provide details of the action that they have taken to HMRC / Trading Standards.

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?

CTSI Response: CTSI consider that the penalty for landlords who have failed to act after being advised of criminal activity on a premise should increase when no action has been taken in correlation to the time that has passed since initial notification by an authority. Offences should include those that sub-let or licence from an original lease agreement.

We suggest that this could be based upon similar lines to those in the Psychoactive Substances Act 2016 http://www.legislation.gov.uk/ukpga/2016/2/pdfs/ukpga_20160002_en.pdf (premise orders).

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

CTSI Response: CTSI believe that the duty of care for a landlord that rents out a single property to a private individual would have a reduced duty of care.