



Chartered Trading
Standards Institute

Tobacco Illicit Trade Protocol – licensing of equipment and the supply chain

HMRC

Chartered Trading Standards Institute response

May 2016

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 40% in their budgets since 2010 and staff numbers have fallen by 50% in the same period.

This response has been composed by CTSI Lead Officer for Health, Jane MacGregor, and members of the Tobacco Focus Group. Should you have any queries or wish to discuss the response please do not hesitate to contact Jane at tobaccocontrol@tsi.org.uk.

Chartered Trading Standards Institute
1 Sylvan Court, Sylvan Way
Southfields Business Park
Basildon, Essex, SS15 6TH
Tel: 01268 582200
www.tradingstandards.uk

Please note we have only listed and responded to applicable questions in this response.

Q.1 Are you: • a representative body

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Trading standards services have been at the forefront of tackling the illicit trade at local and regional level working alongside colleagues from HMRC and Border Force. The CTSI has supported this work by providing operational guidance and coordinated funding (from the Department of Health) for the provision of tobacco detection dogs to assist in this challenging environment. Operation Henry 2 is live at the time of preparing this response; this follows the successful Operation Henry (1) in 2014¹, where 67 of 81 participating councils across England detected and seized illicit tobacco products.

The Institute is aware of many challenges faced by local trading standards services in seeking to tackle the illicit tobacco trade. In committing to the protection of honest businesses, we believe that despite some concerns about the potential administrative impact of a licensing scheme, particularly on small businesses, the benefits of such a proposal to legitimate traders should far outweigh any burden.

Q.3 Do you have any direct or indirect links to, or receive funding from, the tobacco industry?

CTSI has no direct or indirect links with the tobacco industry and receives no industry funding.

Q.4 Do you think a 'licence' system is the most effective way of controlling the manufacture of tobacco manufacturing equipment? If not, do you have any alternative proposals?

It is essential that tobacco manufacturing equipment is licensed to:

¹ Operation Henry (2014) ; Published by Trading Standard Institute available at : [file:///C:/Users/tobaccocontrol/Downloads/OH_FINAL_FOR_PUBLICATION%20\(1\).pdf](file:///C:/Users/tobaccocontrol/Downloads/OH_FINAL_FOR_PUBLICATION%20(1).pdf) accessed online 13th April 2016

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- Meet the United Kingdom's obligations under the Article 6 of the WHO Illicit Trade Protocol (ITP)
 - Ensure the maximum impact on illicit trade of the tracking and tracing system for tobacco products required under Article 15 of the EU Tobacco Products Directive (TPD)² and Article 8 of the ITP, and the security feature requirements of Article 16 of the TPD.
 - Ensure that relevant machinery does not enter the illicit production market, particularly in the form of second hand or reconditioned equipment; this is a point that the Institute has received reports on as being of concern to trading standards services.

For this purpose, we define tobacco manufacturing equipment as meaning any machine or other equipment designed or modified specifically for the manufacture of a tobacco product, and further define 'tobacco product' as a product that can be consumed and consists, even partly, of tobacco,³

We consider that the licensing requirement should go wider than 'manufacturers' and should include 'producers' of machines, using the EU definition used in other legislation 'producer' means:

(i) the manufacturer of the product, when he is established in the Community, and any other person presenting himself as the manufacturer by affixing to the product his name, trade mark or other distinctive mark, or the person who reconditions the product;

(ii) the manufacturer's representative, when the manufacturer is not established in the Community or, if there is no representative established in the Community, the importer of the product;

(iii) other professionals in the supply chain ⁴

Point (iii) adds to this definition of suppliers of machinery i.e.

- Suppliers of new machines or components (they have not manufactured)
- Suppliers of second hand or reconditioned machines

Second hand machines can and do enter the illicit tobacco production market and have been subject to seizures in the North East region by HMRC⁵. To further combat the dangers of the trade in second hand machines, licence holders should be placed under a legal obligation to ensure that machines should be destroyed after they are no longer required or only sold on to a licence holder.

We have no alternative proposals to a licensing scheme.

² DIRECTIVE 2014/40/EU

³ The Tobacco and Related Products Regulations 2016

⁴ GPS DIRECTIVE 2001/95/EC

⁵ <http://www.chroniclelive.co.uk/news/north-east-news/arrests-illegal-durham-cigarette-factory-10406341>

Q.8 Do you think a 'licence' system is the most effective way of controlling the import and export of tobacco manufacturing equipment? If not, do you have any alternative proposals?

Yes. CTSI believes that an effective licensing system should control the import and export of tobacco manufacturing equipment. The system should place a **positive obligation** on all producers to obtain a licence for the supply of tobacco machinery and a responsibility to dispose of such in a secure manner to prevent the equipment from being used in the manufacture of illicit product.

Q.10 Do you think a 'licence' system is the most effective way of controlling the import and export of tobacco products? If not, do you have any alternative proposal?

CTSI believe that a robust positive licensing scheme should cover all stages of the commercial supply of tobacco products; we believe that such a scheme will actively support the protection of honest, legitimate businesses. The following motion was put to the CTSI AGM in September 2015:

"for all possible action be taken to denormalise the use and availability of tobacco products and campaign for a robust, positive, licensing system for tobacco retailers"

The motion was carried with a majority vote of 76.9%.

We stress, however, that regard must be had to the diverse nature of businesses involved in the legal and illicit tobacco supply chain, ranging from large multinational companies to small family owned single outlet retailers in the legal trade and OCGs, to small time smugglers in the illicit trade. This requires a system capable of meeting a wide variety of business models.

We do not support a registration system. Feedback from TSS colleagues in Scotland suggests that the registration scheme is not the best possible solution, paying little or no regard to the fitness of the applicant to supply tobacco, and with a lack of upfront funding to support effective enforcement programmes or administration.

Further we do not consider that this sends a suitably strong enough message to all those in the supply chain regarding the importance of their obligations under tobacco control laws.

Q11. What conditions should be applicable for obtaining a licence or equivalent?

The retail environment is the primary focus for TSS. Fundamentally, we believe that applicants for a licence must be a "fit and proper" person; this is a familiar test used in other licensing systems. Effectively this would exclude any business with a history of non-compliance with tobacco control regulations.

We suggest that, at retail level, this should include the widest range of non-compliance for example, illegal sales to under 18s, breaches of the tobacco display regulations as well as the supply of illicit tobacco products. We strongly suggest that licences should be regarded as a privilege and not an automatic right.

Q12. What reasonable sanctions/penalties do you think should be applied to businesses for non-compliance?

We are guided in making a response to this question by Article 23.3 of the TPD.

This requires that:

“Member States shall lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures that are necessary to ensure that these penalties are enforced. The penalties provided for shall be effective, proportionate and dissuasive. Any financial administrative penalty that may be imposed as a result of an intentional infringement may be such as to offset the economic advantage sought through the infringement”.

Sanctions must be proportionate to the nature of the non-compliance. Given the wide variety of businesses engaged in the supply chain this is an important consideration.

For example, non-compliance might include:

1. Technical infringements by legitimate businesses due to oversight or errors. A recently expired licence for example ,through to
2. The deliberate avoidance of holding a licence by those involved in smuggling and criminal supply chains (OCGs)

At the very least, we believe that consideration should be given to the following sanctions:

- Fixed penalty notices available to deal with minor infringements where some form of penalty is justified, and the business accepts that they have acted unlawfully
- Fines proportionate to the size of the commercial entity that is in breach of licence conditions
- Temporary or permanent deprivation of licence

For the OCGs that operate outside the licensing system, the criminal offence of supplying tobacco, or to possess or supply products, without a licence should be a criminal offence, punishable at Level 5 on the standard scale, (an unlimited fine or up to six months in prison) . Consideration should also be given to the seizure of assets under the Proceeds of Crime Act 2002.

CTSI has for some time held the view that the sanctions currently available to TSS to tackle the supply of illicit tobacco are inadequate. We also therefore welcome the announcement in the Budget 2016 that *“HMRC will consult on strengthening sanctions to tackle tobacco fraud”*, and we will be responding to this consultation in due course.

We further recommend that the Sentencing Council is engaged to develop guidelines for Magistrates designed to ensure that these offences are dealt with in the appropriate manner given the degree of harm and culpability involved in the commission of these offences.

Q14. We welcome your views on 4.1 – 4.10, and specifically:

a) What is your view on a licensing system? Do you think a 'licence' system is appropriate? If not, do you have any alternative proposals?

CTSI supports the development of an appropriate licensing system that is developed specifically for the tobacco supply chain. We do believe that a system should be attached to any existing licensing scheme, and we do not support the development of a registration scheme; which is the obvious alternative.

An effectively drafted and implemented licensing system, covering the whole supply chain, could be used to assist in the regulation of the supply of tobacco (and persons involved in its supply). We also see this as a supportive mechanism for legitimate businesses.

b) Do you think a licence system (or equivalent approval) should apply to all businesses in the chain? i.e. retailer, wholesaler, warehouse owners, brokers etc.

Yes, all parts of the supply chain should be included.

c) If you feel a licensing system (or alternative proposal) is not appropriate, do you have any alternative suggestions to tackling illicit trade in tobacco products?

CTSI supports the development of a licensing system to achieve the following principle outcome:

- To drive out those involved in the criminal supply of illicit tobacco at all levels of the supply chain and to assist TSS in compliance monitoring and enforcement activity.
- CTSI will also respond at the appropriate time to the consultation on strengthening sanctions as we feel that this should run in parallel with this current consultation on the licensing of equipment and the supply chain.

d) If you think a licence system is appropriate, what type of licence system do you think would work best?

Any proposed system must be straightforward and simple, yet provide sufficient penalties and present sufficient barriers to the illegal trade in order to eradicate it.

We are aware that some local authorities have suspended or revoked alcohol premises licences on the strength of tobacco related offences. Whilst this demonstrates commitment by the local authority to take strong action, it is in our view, entirely unsatisfactory that the alcohol licensing system is used as an enforcement mechanism for

tobacco-related offences by virtue of the limited and weak sanctions available under tobacco legislation.

CTSI does not consider that it is desirable to “piggy back” a tobacco licence onto any existing licensing system. We do not believe that this is appropriate or indeed workable given the large number and the variety of businesses that supply tobacco. There are, however, undoubtedly lessons that can be learned from existing systems. If a licensing system is to be developed then it would be advisable to explore existing schemes as part of the development process.

CTSI supports a licensing scheme that has an appropriate fee attached. The fees should be set at a level that is appropriate to cover *both* administrative *and* enforcement costs. This could provide valuable financial resources for TSS with a view to ensuring that enforcement of all legislation relating to tobacco control continues at a local level.

e) If you think a licence system (or equivalent proposal) is appropriate, do you have any views on how this should fit with the existing and planned Registers in Scotland, Wales and Northern Ireland?

Although we consider registration schemes in these three jurisdictions as an important step forward, we do not consider them to provide the full range of desirable controls / sanctions for the regulation of the tobacco supply chain.

Key issues with such schemes are:

- Registration does not allow for any prior assessment of whether a tobacco retailer is a fit and proper person to sell tobacco; CTSI considers this to be an essential requirement
- If tobacco can be sold without the need to demonstrate compliance with licensing conditions, this sends the message that tobacco control laws are less significant than, for example, alcohol
- There may be no fee, and therefore no consequent revenue stream to support administration and enforcement programs

The question of how a licensing scheme would fit with existing registration schemes is one that will require further consideration during the development of any licensing system.

f) What do you see as the potential benefits of a licensing system in tackling the illicit trade in tobacco and evasion of Tobacco Products Duty?

The illicit trade is linked with organised crime groups that bring criminality to local communities; illicit tobacco sellers do not ask for proof of age / ID thus providing young people with access to affordable but unregulated products.

CTSI consider that an effective licensing scheme should offer the following benefits:

- Improved intelligence about the supply of tobacco in each local authority area; licensed premises will be known to the authority;

- Straightforward removal of ANY tobacco whether legitimate or not if found on unlicensed premises;
- Support for legitimate businesses compliant with tobacco control legislation
- Removal of the source of “affordable” tobacco. The availability of cheap tobacco undermines efforts of those that want to quit and allows young people easier access

g) Do you see any other potential benefits of introducing a licence system to the supply chain other than tackling illicit tobacco?

If the licence application is based upon the fit and proper person test then it will focus the mind of the business in terms of compliance with wider tobacco related regulatory requirements. For example, it would be in the interest of the licence applicant to pay greater attention to the age of sale requirements.

A recent study carried out by CTSI⁶ found that of businesses tested, 18% sold tobacco illegally to test purchasers under the age of 18 years. An illegal sale to a young person under 18 years could be considered a breach of an existing licence OR a barrier to obtaining a licence in the first instance.

CTSI believe that a licence system will assist in the removal of the supply of tobacco via social networking sites. We are concerned that this supply route appears to be growing and it is very difficult to monitor. A requirement for a licence would give TSS greater powers to deal with the matter with the sites themselves.

Q16. What reasonable sanctions/penalties do you think should be applied to businesses for non-compliance if a licensing system were to be implemented?

See response to Q 12.

The sanctions available must be capable of reflecting the nature of different potential offences committed by a wide variety of businesses.

TSS operate a proportionate , risk based approach to enforcement and thus a genuine business that makes a mistake is extremely unlikely to find itself the subject of enforcement action .

Q18. Do you think a fee for licences under this protocol should be levied? Please provide further comment, if applicable.

Yes. CTSI supports the principle of a licence fee. It is essential that sufficient income is raised from fees to support an effective enforcement regime. There is little point in having a licence system if it has “no teeth” and is not capable of tackling the non-licensed trade in tobacco.

⁶ Enhancing Local Tobacco Control : preventing underage sales of tobacco (2015) published by Chartered Trading Standards Institute available at : <http://www.tradingstandards.uk/policy/Improvingthehealthofsociety.cfm> accessed online 13th April 2016

This raises an important issue. 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 40% in their budgets since 2010 and staff numbers have fallen by 50% in the same period.

Operation Henry demonstrated that trade in illicit product is widespread, and that organised crime groups have moved into this sector. The investigation of offences and subsequent enforcement action has become more complex for all agencies involved. The need to work collaboratively is essential; TSS are an integral part of this collaborative effort but are under severe pressure.

Q19. Do you have any general comments or views on paragraphs 3-5 of the Protocol?

We note the apparent difference between Article 6 of the ITP that requires only that a tracking and tracing system records details of *“the first customer who is not affiliated to the manufacturer”* and the *“identity of any known subsequent purchaser”* but that Article 15 of the revised EU Tobacco Products Directive requires information to be recorded about *“all purchasers from manufacturing to the first retail outlet”*. CTSI finds the TPD requirement preferable and recommends that this be the required standard in relation to any licencing system.

We believe that an effective, whole system licencing regime could make a major contribution to the elimination of all forms of illicit trade in tobacco products.

Q20. Are there potential wider consequences of any of the proposals that we have not identified in this consultation?

As mentioned in response to Q14 , CTSI is concerned that in any future development of a licencing system for the tobacco supply chain that the resourcing issue for local authority trading standards services is addressed. Any new licencing system must be capable of being administered and monitored in a consistent manner across the UK.

Q21 Do you have any information that could inform the Impact Assessment?

The impact of a licencing system on the protection of honest businesses is a major consideration. The benefits of a whole system approach will help to drive out illicit supply, this will support those businesses that comply with the law. The cost of administering and monitoring a licencing system must be carefully considered in order not to place any additional burden, particularly on small businesses.