High Level Conference on

The Illicit Trade of Tobacco Products

European Parliament, 27 June 2017

Organised by

Co-hosted by the MEPs

Karin Kadenbach
Françoise Grössetete
Bart Staes
The Smoke Free Partnership is a coalition of NGOs working exclusively on EU policy analysis linked to the implementation of the Framework Convention on Tobacco Control (FCTC). Since its creation in 2006, SFP has helped lead campaigns on a number of important EU tobacco control policy areas, including smoke-free policies, the EU Tobacco Tax Directive, FCTC Article 5.3 Guidelines, FCTC Article 6 Guidelines, and the revised Tobacco Products Directive. The World Health Organisation recognised the SFP for its tobacco control work by awarding it a World No Tobacco Day Award in 2011. SFP was also awarded the 2015 Luther L. Terry Award for outstanding global achievement and exemplary leadership in Tobacco Control. 

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Background and objectives

On 27 June 2017, the Smoke Free Partnership (SFP) organised a High Level Conference on the implementation of the EU tracking and tracing system for tobacco products in the context of the Protocol to Eliminate Illicit Trade in Tobacco Products (ITP), ratified by the EU on 24 June 2016. The European Commission is drafting implementing and delegated acts, foreseen under Articles 15(11), 15(12) and 16(2) of the Tobacco Products Directive 2014/40/EU on EU standards, for a system for tobacco traceability and security features.

The Conference was organised in the European Parliament and hosted by the MEPs Karin Kadenbach, Françoise Grössetete, and Bart Staes. It aimed to examine illicit tobacco demand and supply, and to promote effective action on illicit trade in tobacco and international cooperation, starting with the forthcoming EU system. The discussions were held by an eminent panel of speakers (in alphabetical order):

- Ms Deborah Arnott, Chief Executive, ASH (UK) (Moderator)
- Mr Filip Borkowski, European Commission, DG SANTE
- Dr Vera Luiza da Costa e Silva, Head of the Convention Secretariat, WHO FCTC
- Ms Alison Cox, Director for Cancer Prevention, Cancer Research UK (Chair)
- Prof. Anna Gilmore, Professor of Public Health and Founding Director of the Tobacco Control Research Group (TCRG), University of Bath
- Dr Katharina Kummer Peiry, Senior Legal Advisor to the FCTC Secretariat, WHO
- Prof. Hana Ross, Principal Research Officer, Professor at the University of Cape Town, South Africa, and Emory University, Rollins School of Public Health
- Mr Francis Thompson, Executive Director, Framework Convention Alliance (FCA)

Ms Karin Kadenbach, MEP, opened the conference with an introduction emphasising that tobacco is the largest single cause of preventable disease in Europe and that it is of paramount importance to EU public health and to law enforcement, to establish an EU tracking and tracing system in line with the International Protocol. She recalled the European Parliament’s role in ensuring that the tobacco industry does not control this system, and committed to continue to monitor the negotiation process on the EU tracking and tracing system to ensure it is transparent.

In his keynote speech, Mr Filip Borkowski welcomed the wide interest in the public and stakeholder consultations on the EU tracking and tracing system. He presented the legal framework of the implementing and delegated acts, and affirmed the European Commission’s commitment to give due regard to the Protocol in their drafting. He then presented the general architecture of the system, explaining the roles and responsibilities of each operator in the supply chain. He emphasised the independent third parties operating in this structure: the Unique Identifier (UI) issuer, the verification/authentication provider, and the repositories (data storage). He stressed that independence criteria would be strict and that, as a matter of principle, the only responsibility placed on manufacturers would be to affix the UI and the security...
feature on packs. He emphasised the need for data to be recorded in near-real time, and to ensure easy and rapid access to the data should Member State authorities and OLAF carry out investigations.

In her intervention, Dr. Katharina Kummer Peiry stated that, as the EU system will inevitably be a model for the rest of the world, it is crucial that it is discussed at length. She also emphasised that global measures are needed to fight effectively against illicit trade, and recalled the reasons for governments to ratify the Protocol: to protect public health, in particular vulnerable groups, by reducing the scope of tobacco products available; to protect revenues and security, by reducing the amount of tax-evading products and depriving criminal networks of revenues from illicit trade; and to promote an international framework for cooperation in response to the global challenge of illicit tobacco. She expressed hope that by July 2018, 40 Parties will have ratified the Protocol, therefore allowing the first Meeting of the Parties to be organised in October 2018, and called for the EU’s leadership and support in this respect.

In his introduction, Francis Thompson recalled that the origins of the Illicit Trade Protocol lie in a pattern of bad behaviour by the tobacco industry, which had been, at the end of the 1990s, the subject of multiple investigations worldwide for involvement in smuggling of its own products. Many of these investigations resulted in guilty pleas such as in Canada, or out-of-court settlements such as the EU-PMI agreement of 2004. Based on available evidence, the tobacco industry became involved in illicit trade to drive down tobacco taxes or prevent increases, to penetrate closed markets, or to gain market share from competitors. Its more recent behaviour also includes new strategies such as presenting the controls it was forced to accept (because of investigations) as examples of cooperation and good will. It also focuses enforcement officials’ attention on the issues of counterfeit and...
competition from small players (“cheap whites”), and offers its own counterfeit-control systems (such as Codentify) as a complete solution to illicit trade. He also expressed concern about the ways in which some provisions of the Tobacco Products Directive that refer to the tracking and tracing system may not be compatible with the Protocol – namely the responsibility of manufacturers to provide technology for recording transactions (Art 15.7), as well as to conclude data storage contracts as part of the tracking and tracing system (Art 15.8). He also expressed concern about the separation of the Unique Identifier for tracking and tracing and the security feature and recalled the Protocol obligation to ensure that the UI is secure. He concluded by urging the EU to consider the international implications for its own credibility and for the future of the Protocol, and avoid adopting provisions that could lead to an industry-driven tracking and tracing solution.

Panel discussion

A panel discussion ensued, chaired by Alison Cox and moderated by Deborah Arnott, with panellists Dr da Costa e Silva, Prof. Anna Gilmore, and Prof. Hana Ross joining the discussion. After a brief introduction, Alison Cox gave the floor to the expert panellists to explore in detail some of the concerns expressed in the previous session.

Has the nature of illicit trade changed, and what are its implications on the tracking and tracing system?

Prof. Gilmore responded that while it is difficult to get accurate figures on illicit trade, all the data sources, including the tobacco industry’s own studies, World Customs Organisation, and government data, concur that tobacco company products account for the majority of the illicit tobacco market. That suggests quite clearly one of two scenarios: either they are failing to control their supply chain, or they could still be involved in smuggled cigarettes. This means that a tracking and tracing system that primarily addresses tobacco industry products and aims to reduce the illicit supply, as well as ensuring that the system is fully independent, remains vital.

What is the role of the tracking and tracing system in the fight against illicit trade of tobacco, and how does it address the issue of illicit whites and counterfeit?

Mr Borkowski described how the EU system will be able to detect anomalous fluctuations in supply, leading to in-depth checks of the supply chain. He stressed that it is erroneous to claim that controlling the legal supply chain does not solve the problem of the illegal supply chain. In fact, he expressed his belief that by observing the legal market one can gather information about the illicit market.

What is the difference between a security feature and a secure Unique Identifier? How can the UI be secure?

Mr Borkowski explained that the legislative act (TPD) separates the UI and the security feature. However, he expressed his conviction that the overall system has a high degree of security, as it includes multiple checks along the chain.

Mr Thompson expressed concern that the separation of the security feature (which could be based e.g. on a tax stamp) from the UI could complicate the process of ensuring that, for example, manufacturers do not duplicate the same identifiers by running additional shifts as was discovered in Brazil. He also expressed concern about whether packs could, in practice, be scanned at every step in the chain.

Mr Borkowski responded that the system will have a wealth of data that ensures that the system is secure overall, and that once “uniqueness” is ensured, then security will by definition also be a part of that. In response to a comment by Prof. Gilmore, he said that “unique” can also mean “secure from fraud” in the sense that the system will flag duplicates. Responding to Prof. Ross, he stated that it would be difficult, in the current system design,
to envisage ways in which duplicates could escape detection by the system if they attempted to infiltrate the legal supply chain. He also added that it would be preferable to discuss different applications of the UI, rather than tax stamps, as these have a fiscal purpose and are not used in all the Member States.

Is the EU TPD compliant with the Illicit Trade Protocol?

Mr Borkowski stated that Article 15 of the TPD, as implemented through the implementing and delegated acts, is in line with the Protocol. Mr Thompson added that in addition to concerns about the role of manufacturers, which in the TPD could give rise to responsibilities prohibited by the Protocol, there are also important parts of the Protocol which are not covered in the EU TPD, such as due diligence and penalties.

Indeed, Mr Borkowski confirmed that the issue of penalties is a Member State competence, many of which have penalties in place. He also stated that OLAF is currently working on other parts of Protocol implementation.

How can the EU ensure consistency across Europe in the implementation of the tracking and tracing system?

Prof. Gilmore stated that elements of a clear and easy to operationalise definition of independence could include: no personal or financial links with the industry for 5 years; regular checks over time, and a need to understand the concept of conflict of interest as the system opens many opportunities for conflict. In addition, the auditors in the process must be independent, without links to the tobacco industry.

Dr da Costa e Silva agreed that the system offers many possibilities for conflicts of interests to arise. Civil servants should be aware of these and implement safeguards, such as open agendas, public meetings, meeting reports, and ensuring that the industry does not use its interactions with public officials to increase its influence. Because the EU is setting up the first regional tracking and tracing system, there is an important role for UN agencies such as the World Customs Organisation as well as for civil society to become involved in wide discussions.

Mr Thompson emphasised that it is also important for the EU system to be seen as a model, but not necessarily as a ready-made system for the rest of the world, because its complexity may not be manageable in other jurisdictions.

Concluding remarks

Concluding the meeting, Françoise Grōssetete MEP emphasised the need for policy-makers to be more involved in these discussions despite the technicalities, as a lack of scrutiny will only benefit the tobacco industry. As required by the Protocol, the system should be practical to work with, open source, and interoperable; it should cover all operators and be independent from tobacco producers. She called for a system free of links, past or present, with the tobacco industry. It is also important to recognise that reducing the discussion to an either/or debate fails to take into account the varied technologies available. She reaffirmed her commitment, along with that of many colleagues in the European Parliament, to the adoption of fully independent standards for the system.
Next steps
On 4 September 2017, the European Commission published draft implementing and delegated acts for public consultation. Over 130 responses were received before the deadline of 2 October. Revised drafts will continue to be discussed with Member States at the technical and political levels with a view to adopting the final acts before the end of 2017.

Evening reception
On the evening of 27 June 2017, a reception was held, featuring keynote speeches from Dr Vera Luiza da Costa e Silva, Head of the Framework Convention Secretariat, Aurelijus Veryga, Minister of Health of Lithuania, and Martin Seychell, Deputy Director-General for Health and Food Safety.