



HM Revenue
& Customs

Sanctions to tackle illicit tobacco: a discussion document

A targeted informal consultation.

Closing date for comments: 28 August 2015

Subject of this consultation:	The sanctions available across government to tackle the illicit tobacco market.
Scope of this consultation:	HMRC wishes to engage key stakeholders in dialogue on the range of sanctions available across government, their use and impact. This will enable identification of opportunities to use existing sanctions more effectively and to consider the case for strengthened or different sanctions.
Who should read this:	This is a targeted consultation and we are inviting views from other government departments and enforcement agencies, public health groups and representatives of business. This is designed to generate ideas to increase the effectiveness and deterrent effect of sanctions to tackle illicit tobacco and the impact that it has on individuals and communities.
Duration:	Views are invited by 28 August.
Lead official:	HMRC, Annie Purkis
How to respond or enquire about this consultation:	Please send email responses, requests for hard copies of this document or enquiries about the content or scope of this exercise to: tobacco.policy@hmrc.gsi.gov.uk Please send written responses to HMRC, Indirect Tax Tobacco Strategy and Policy Team, 3W Ralli Quays, Salford, M60 9 LA
Additional ways to be involved:	If you're interested in discussing this at a meeting, please send an email using the contact details above.
After the consultation:	We will aim to conclude meetings by the end of August. We will then write to respondents to confirm the outcomes and plans for further consultation on any specific options.
Getting to this stage:	HMRC has undertaken a review of its joint strategy with UK Border Force to tackle illicit tobacco. This has included dialogue with the Trading Standards Institute, Trading Standards being a key delivery partner in the UK. The review found that we need to make more effective use of sanctions across government. We also want to take stock of current sanctions and consider how we could strengthen these or consider a fundamentally changed approach.
Previous engagement:	We have not previously invited views on this topic but wish to invite views from key stakeholders to inform the development of options. We will consider the outputs of this consultation with other enforcement agencies

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1. Introduction

Since the launch of the first strategy to tackle tobacco smuggling in 2000, we have had a significant impact in reducing the illicit trade. We have reduced the illicit market for cigarettes from 22% in 2000-01 to 10% in 2013-14 and for hand-rolling tobacco (HRT) from 61% to 39% over the same period. Revenue losses have reduced from £3.4bn pa to £2.1bn a year over the lifetime of the strategy.

This is a significant achievement, but tobacco fraud remains a problem and HMRC estimate that in 2013-14, 4 billion illicit cigarettes and 4,400 tonnes of illicit hand-rolling tobacco were consumed in the UK. The fraud is dominated globally by organised criminals and the illicit trade damages legitimate business, undermines public health and facilitates the supply of tobacco to young people.

Our strategic approach has included regulatory change, new sanctions and detection technology. Tackling the threat presented by the criminality behind the fraud requires continuing collaboration across government in the UK and internationally. We work closely with other law enforcement agencies, such as Trading Standards, the police and licensing authorities, sharing and developing intelligence to support joint activity in the UK.

HMRC has a wide range of sanctions available, which have developed piecemeal over time. Focusing on the efforts across government to attack criminal activity at all levels, we need to ensure we have effective sanctions to deter participation in the fraud. To maximise the impact of sanctions in deterring and punishing those involved in the fraud, we believe that the time is right to take a fundamental look at the sanctions that HMRC and other enforcement agencies have.

HMRC wishes to further engage other government departments and enforcement agencies, public health groups and representatives of business in dialogue on the range of sanctions available across government, their use and impact.

The outputs of this exercise will be considered in light of the responses on the current HMRC consultation on penalties ('HMRC Penalties: a Discussion Document'), published on 2 February, which closed on 11 May. This invited feedback to help us consider, for example, whether we could better differentiate between deliberate and persistent non-compliers and those who might make an occasional error for whom alternative interventions might be more appropriate; and to consider how we might change the way penalties are applied as we transform HMRC to deliver more digital services, based around our customers, to make it easier for them to get things right first time.

2. Background

HMRC has reviewed its joint strategy with Border Force ('Tackling Tobacco: Building on Our Success') published in 2011. As a result of this review and to reflect changes in the fraud, on 24 March, a refreshed strategy was published, 'Tackling illicit tobacco: from leaf to light'.

A finding of the strategy review was that we were not making the fullest use of the extensive range of sanctions across government and could do more to understand and maximise the impact of sanctions to deter participation in tobacco fraud.

We are taking action in partnership with Trading Standards and Border Force to raise awareness of the range of sanctions available, better target their use and to ensure that we build on work to date to assess the deterrent effect. This will enable comprehensive deployment of sanctions targeted on factors that could make a particular sanction more effective and a more robust attack on repeat offenders. However, as we further step up our efforts to collaborate across government, we believe that we should also take the opportunity to consider the sanctions available and to progress this in parallel with more detailed assessment of the use of existing sanctions.

While there is an extensive range of sanctions available, these have developed piecemeal over time and we would like to consider our entire approach to sanctions and how we can strengthen it. This could be achieved by more effective use of the sanctions we have, developing proposals for additional sanctions and/or looking at more radical approaches to the design and use of sanctions.

This targeted informal consultation is designed to invite views from key stakeholders, to open dialogue on this and generate fresh thinking.

We are asking you to consider the existing provisions in the context of the serious problem presented by the illicit tobacco market and seek your views on areas where you think we should introduce changes. We want to generate ideas to increase the effectiveness and deterrent effect of sanctions to tackle illicit tobacco and the impact that it has on individuals and communities. Therefore, while there are specific questions, we would also welcome more general views - the key question is 'what could work better?'

Please provide your views by August 28 and, if you would like to contribute further, we will arrange meetings to discuss your views in more detail.

3. Overview of sanctions available

Tobacco control and enforcement covers a wide range of activity, regulatory frameworks and offences, including those related to evasion of duty, underage sales, trade mark and advertising breaches. Part of this exercise will be further dialogue with other enforcement agencies as our delivery partners to ensure that we fully understand their regulatory requirements, related offences and sanctions available.

Sanctions related to evasion of duty

HMRC enforces the requirement to pay UK duty on any tobacco products sold in the UK and compliance with the regulatory requirement that products bear a fiscal mark to demonstrate that UK duty has been paid.

Where excise duty has been evaded or product does not bear fiscal marks, HMRC and BF have an extensive range of criminal and civil sanctions available, which can be deployed directly or through delivery partners. These apply to various transgressions such as possession or sale of product that does not bear fiscal marks, use of premises for sale of unmarked product, handling tobacco products on which excise duty has not been paid, fraudulently evading excise duty and taking preparatory steps to evade excise duty. Sanctions for these transgressions include:

- Seizure of goods
- Seizure of vehicles and vessels
- Seizure of cash as the proceeds of crime
- Assessment for the loss of duty of up to 100% of the duty evaded
- Civil penalties of up to 100% of the duty evaded
- Civil action including winding up orders and bankruptcy
- Refusal of entry to the UK
- Publishing details of people or companies deliberately evading more than £25,000
- Criminal prosecution with a custodial sentence of up to 7 years
- Confiscation of assets as part of the proceeds of crime
- Fines of up to £5000 for selling illicit tobacco not bearing the UK duty paid fiscal markings
- Prohibition on the sale of tobacco products for up to 6 months
- Withdrawal of haulier's licence
- Withdrawal of licence to sell alcohol
- Application for the removal of a lottery terminal

In addition, HMRC has supply chain legislation that imposes a duty on manufacturers of product for legitimate supply in the UK market not to facilitate smuggling and to avoid, or reduce the risk of commercial product being obtained for these purposes. This includes a requirement for a written supply chain policy setting out the measures in place to comply with the duty with scope for additional requirements for specified product or exports to defined high risk countries. The manufacturers are required to consider seizures notified to them above specified volumes where we believe the business has manufactured the products and to identify appropriate action to address supply chain weaknesses. The supply chain legislation also includes a process to address non-compliance that can lead to a financial penalty (up to £5 million), based on a number of factors including the extent of non-compliance and volume, nature and size of notified seizures.

Sanctions for breaches of other requirements

A range of sanctions is also available for other breaches of the regulatory frameworks that apply to tobacco. These include the following areas in which Trading Standards is the enforcement agency:

- For supplying goods with a mark or logo identical or likely to be mistaken for a registered trade mark without permission from the owner of the trade mark or copyright infringements:
 - Forfeiture of goods
 - Criminal prosecution with custodial sentences of up to 10 years (on indictment), 6 months (summary conviction) and/or an unlimited fine.
 - Confiscation of assets

- For supplying product without required health warnings or copyright infringements, underage sales or advertising infringements sanctions include :
 - Forfeiture of goods
 - Criminal prosecution with a range of financial penalties
 - For underage sales, a ban on tobacco sales by either a named individual or a premises or both for up to 12 months

Some of these sanctions will be covered in more detail with specific questions below. However, this list might prompt you to consider additional or alternative sanctions that could be used by HMRC, Border Force or other enforcement agencies. Our objective is to deter participation by individuals or organisations in tobacco fraud at all levels and proportionately punish those involved in this fraud.

4. Current sanctions – inviting your views

HMRC Civil sanctions

HMRC has the power to raise penalties to encourage taxpayers to comply with their obligations, to act as a sanction for those who don't and to reassure the compliant majority that they will not be disadvantaged.

In its future administration of duties and taxes, HMRC wants to make greater use of behavioural and customer understanding and digital capability, and, as explained in the HMRC discussion document published on 2 February, our current thinking around penalties is based on the following five principles:

- The penalty regime should be designed from the customer perspective, primarily to encourage compliance and prevent non-compliance. Penalties are not to be applied with the objective of raising revenues.
- Penalties should be proportionate to the offence and may take into account past behaviour.
- Penalties must be applied fairly, ensuring that compliant customers are (and are seen to be) in a better position than the non-compliant.
- Penalties must provide a credible threat. If there is a penalty, we must have the operational capability and capacity to raise it accurately, and if we raise it, we must be able to collect it in a cost-efficient manner.
- Customers should see a consistent and standardised approach. Variations will be those necessary to take into account customer behaviours and particular taxes.

Existing financial penalties apply to evasion of duty or other wrongdoing in relation to excise goods. Under different legal provisions penalties apply to product detected in the UK or on importation to the UK from the EU or third countries.

When illicit product is detected it can be seized as can a vehicle or vessel in which it is being carried. Whether the vehicle or vessel is given back or not depends on the several factors including the quantity of goods seized and the number of offences committed over a period of time.

For product detected in the UK or smuggled from the EU, we can raise an assessment of up to 100% of the duty on the goods and charge a penalty up to the same value.

For product smuggled into the UK from third countries, we can raise a customs evasion penalty (of up to 100% of the customs duty and VAT on the goods) and a civil evasion penalty of up to the same value.

In both cases the starting level for the penalty is determined by the action leading to the seizure (e.g. whether it was deliberate evasion of duty) and the amount to be charged could then be mitigated down to reflect the level of disclosure.¹

HMRC can also take further assurance and enforcement action across all its functions (taxes and benefits) and assessments and penalties can be raised in relation to further tax liabilities discovered.

Questions

1. Do you think that the current financial penalties reflect a proportionate response to individuals and businesses smuggling tobacco into the UK for their commercial benefit?
2. Do you consider penalties are currently set at appropriate levels? If not, do you think that we should legislate to:
 - Increase penalties;
 - Introduce a sliding scale depending on the volumes of product involved;
 - Apply increased penalty levels for those who repeat the offence?
3. Should we consider removing the need for HMRC to be able to demonstrate culpability, e.g. a full penalty applies for being in possession of illicit product regardless of whether this was deliberate evasion?
4. How do you think that we can better deter repeat offenders?
5. Do you think that there is a case to lower the current threshold (£25,000) for the provision to publish details of those evading duty in civil cases involving tobacco fraud?
6. Are there other activities concerned with the illegal possession or sale of tobacco that you think should attract civil penalties?
7. With reference to the examples of sanctions in section 3 above, do you wish to suggest other financial penalties or other types of sanction, i.e. not financial penalties that you think we should introduce for tobacco evasion?

As well as the type of sanction, your views are invited on how financial penalties are administered. Currently, post detection of illicit product, cases are referred for further action and consideration of penalties and assessments. An alternative approach for some penalties might be to consider applying an 'on the spot' fine, potentially with payment required when issued, which increases the immediacy of the impact on those involved in the fraud, with the offender then having the right to appeal against the fine.

¹ Mitigation is a tool we use to encourage voluntary compliance. It enables us to discount penalties where customers come forward and tell us about something wrong in their tax affairs. The amount of mitigation allowed depends on the extent of the disclosure and whether or not it was prompted by HMRC action, thus encouraging customers to contact HMRC as soon as possible and to give us full assistance in establishing the reason for and extent to which something is wrong and the amount of tax or duty involved.

Questions

8. What are your views on 'on the spot' fines – potential benefits and drawbacks?
9. How do you think an 'on the spot' fine should work in practice?
10. If introduced, what further action would you think we should take if people refuse to pay such fines when levied in the UK or at the border?
11. What are the benefits of and obstacles/drawbacks to 'on the spot' fines?

Criminal sanctions used by HMRC

There are criminal sanctions available under various legislative provisions such as the Customs & Excise Management Act 1979 (CEMA), Fraud Act 2006, Tobacco Products Duty Act 1979 and Proceeds of Crime Acts. These have been designed to enable action against those undertaking the fraud but also those that facilitate the fraud such as those transporting product. These sanctions include:

Offence	Maximum sanction
Fraudulent evasion of duty, i.e. knowingly acquiring non-duty paid excise goods with the intention of evading payment of duty.	Forfeiture of goods, unlimited fine, 7 years imprisonment if convicted on indictment.
Taking preparatory steps for evasion of excise duty.	Forfeiture of goods, unlimited fine, 7 years imprisonment if convicted on indictment.
Possession or sale or otherwise dealing in tobacco which doesn't bear required fiscal marks ('unmarked product').	Forfeiture of goods fine of up to £5,000 on summary conviction.
Use of premises for sale of unmarked tobacco.	On summary conviction a fine of up to £5,000 and, on application, an order prohibiting the use of the premises for up to 6 months.
Possession of articles for use in fraud, e.g. carrying illicit tobacco.	Imprisonment of 12 months on summary conviction. On conviction on indictment imprisonment of 5 years.
Making or supplying articles for use in frauds	Imprisonment of 12 months on summary conviction. On conviction on indictment imprisonment of 10 years.
Financially benefitting from offending.	Courts must consider whether an order can be made to confiscate the offender's assets.

A wide range of factors is considered when courts determine the seriousness of an offence and the appropriate fines and sentences. HMRC's Press Office publishes information about cases and you can see some examples of the sanctions applied by using the following link: <http://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/search?utf8=%E2%9C%93&query=tobacco>

There are further sanctions linked with prosecution that can be used. For example, courts can:

- Remove alcohol licences for up to six months for certain offences, including sale of unmarked tobacco product.
- Deprive an offender of property used for the purposes of crime, for example of a vehicle.
- Disqualify offenders from driving.
- Order payment of compensation, which would normally equate to the amount of revenue evaded.

Additionally, following prosecution, HMRC will be working with the Crown Prosecution Service to extend its use of Serious Crime Prevention Orders, which are designed to frustrate crime. These can include requirements on an individual limiting financial, property or business dealing or holdings, working arrangements, how and with whom they can communicate, premises to which they can have access or use and on movement within the UK or between the UK and other countries.

Questions

12. What are your views on the criminal sanctions described above?
13. Do you believe that they are proportionate to the nature of the criminality behind the fraud?
14. Can you suggest additional activities specifically related to tobacco fraud which should attract a criminal sanction?
15. Can you suggest how we could increase the deterrent effect of sanctions on particular types of offender?
16. Are there specific conditions that you think we should attach to Serious Crime Prevention Orders?
17. Do you have any views on the potential use of criminal cautions to deal with tobacco offences?

5. Other options to tackle tobacco fraud

On 24 March, HMRC published a refreshed joint HMRC and Border Force strategy, "Tackling illicit tobacco: from leaf to light".

<https://www.gov.uk/government/publications/tackling-illicit-tobacco-from-leaf-to-light>

This sets out how we will continue to target, catch and punish those in the illicit tobacco trade and create an environment hostile to the fraud in the UK and internationally. This includes close partnership working with other organisations to develop and share intelligence, enforce the law and promote awareness of the nature and seriousness of the fraud. However, based on any experience you have of this issue, we would welcome your views on how HMRC can work with other organisations to deter this fraud.

Question

18. Do you have any suggestions for how HMRC and Border Force in partnership with other enforcement agencies can strengthen its attack on the criminality behind the fraud and deter participation in it?

6. Summary of Questions

1. Do you think that the current financial penalties reflect a proportionate response to individuals and businesses smuggling tobacco into the UK for their commercial benefit?
2. Do you consider penalties are currently set at appropriate levels? If not, , do you think that we should legislate to:
 - Increase penalties;
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16. Are there specific conditions that you think we should attach to Serious Crime Prevention Orders?
17. Do you have any views on the potential use of criminal cautions to deal with tobacco offences?
18. Do you have any suggestions for how HMRC and Border Force in partnership with other enforcement agencies can strengthen its attack on the criminality behind the fraud and deter participation in it?

7. Process and next steps

This discussion is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

- Stage 1 Setting out objectives and identifying options.
- Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
- Stage 3 Drafting legislation to effect the proposed change.
- Stage 4 Implementing and monitoring the change.
- Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 1 of the process. The purpose of the consultation is to seek views on the policy design and any suitable possible alternatives, before consulting later on any specific proposals.

How to respond

A number of questions are asked in section 4 and 5, summarised in section 6.

Responses should be sent by 28 August 2015, by e-mail to:

tobacco.policy@hmrc.gsi.gov.uk or by post to:

Annie Purkis, HMRC, Indirect Tax Tobacco Strategy and Policy Team, 3W Ralli Quays, Salford, M60 9LA.

Telephone enquiries should be made to Annie Purkis on 03000 510261 (from a text phone prefix this number with 18001).

All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Principles

This consultation is being run in accordance with the Government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

If you have any comments or complaints about the consultation process please contact:

Oliver Toop, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Please do not send responses to the consultation to this address.