

1. INTRODUCTION

Member States receive fiscal revenue from legal tobacco sales of over €90 billion annually. At the same time, it is estimated that the smuggling of tobacco products results in a loss of public revenue to EU budgets of more than €10 billion annually.¹ The smuggling of tobacco products undermines public health policies by making especially cigarettes available in an uncontrolled sales environment and at a substantial discount compared to legal sales channels.² Illicit trade in tobacco products is a main source of revenue for organised crime, and it has in some cases been linked to terrorist groups.³

1.1. The types of illicit trade in tobacco products in the EU

Illicit tobacco products were traditionally split into *contraband* (genuine cigarettes bought in a low-taxed country and then smuggled into and resold in a higher-taxed country in breach of the fiscal laws of the higher-taxed country) and *counterfeit* (fraudulently branded cigarettes that are manufactured illegally and sold by a party other than the brand owner). In the EU context, contraband can be sourced from outside the EU and sold within the EU without paying the applicable taxes and duties, or it can be sourced from a lower-taxed EU Member State and sold illegally in another EU Member State with higher duties and taxes.

Illicit trade in tobacco products is a clandestine activity in constant fluctuation and change. Over the last decade there has been a marked increase in the so-called cheap whites phenomenon, whereby cigarettes not originating from the major manufacturers are brought into the EU without the payment of taxes and duties and then sold outside the legal distribution network.⁴

To this evolving picture must be added that legal producers within the EU sometimes simulate fictitious exports or smuggle back their real exports without paying duties and taxes.

1 See Questions and Answers on: Fighting the illicit trade of tobacco products, 14 August 2015, https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/q_and_a_en.pdf [access:16.03.2020].

2 See [Protocol to eliminate illicit trade in tobacco products adopted by the Conference of the Parties to the WHO FCTC] *Overview*, https://www.who.int/fctc/protocol/illicit_trade/protocol-publication/en/ [access:16.03.2020].

3 See Questions and Answers on: Fighting.

4 See *Ibid*, p. 2, footnote 4.

There are also illegal factories within the EU which target the black market outright and produce cigarettes without paying applicable taxes.

1.2. The EU Commission and illicit trade in tobacco products

At the EU level OLAF, the European Anti-fraud Office, amongst many other activities, carries out investigations into tobacco smuggling that causes revenue losses to the EU and its Member States. It is an administrative investigative body, and the only one at the EU level which has a mandate in this area. In conjunction with the EU Commission it has actively addressed tobacco-related illicit trade issues over the last three decades. Its activities in this field has, amongst others, culminated in anti-fraud agreements (hereafter referred to as the ‘Industry Agreements’) which were concluded between the EU, Member States and the four major EU tobacco manufacturers between 2004 and 2010.⁵

In 2013, the EU Commission published a comprehensive strategy⁶ to combat cigarette smuggling. This strategy proposes specific actions in four key areas:

- » Measures to decrease incentives for smuggling activities;
- » Measures to improve the security of the supply chain (with specific reference to the signature of the WHO FCTC Protocol to Eliminate Illicit Trade in Tobacco Products);
- » Stronger enforcement by tax, customs, police and border authorities. Included under this heading are joint customs operations, the provision of technical and financial assistance to Member States and Non-EU countries in order to strengthen their capacities, enhancing the exchange of information at the EU and international level in order to improve cooperation, and setting up an independent laboratory for the analysis of cigarettes;
- » Deterrent sanctions for illicitly trading in tobacco products.

In the view which the Commission then held,⁷ the four Industry Agreements concluded earlier complemented this EU strategy, and as recently as 2015 it still commended the four Industry Agreements for covering more than four-fifths of EU tobacco consumption and for their global reach. It however also by then indicated that it was ‘reassessing the continued policy relevance of such contractual tools⁸’, and it eventually decided not to seek a renewal of the PMI Agreement after its expiry date.

1.3. The aim and structure of this study

The aim of this study is to consider the role which the Industry Agreements have played in addressing illicit trade in the EU, what the post-Agreement reality looks like, and what role the remaining or similar agreements, either at the EU or Member State level, could play in future. In order to do so, this study will consider the following:

⁵ The text of these Agreements can be found on the OLAF website https://ec.europa.eu/anti-fraud/home_en.

⁶ See Communication from the Commission to the Council and the European Parliament, COM(2013) 324 final. Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products - A comprehensive EU Strategy, SWD(2013) 193 final, 6.06.2013, <https://op.europa.eu/pl/publication-detail/-/publication/31038587-4530-4489-9209-11004f68e2f5/language-en> [access: 16.03.2020].

⁷ Ibid, p. 4, footnote 6.

⁸ Ibid.

- » Introduction (Section 1);
- » The history and content of the four Industry Agreements (Section 2);
- » The advantages to the parties thereto (Section 3);
- » Criticisms raised in respect of the four Agreements by the tobacco control community⁹ and other stakeholders and the Commission's responses to those criticisms¹⁰ (Section 4);
- » The Technical Assessment of the PMI Agreement by the Commission¹¹ and its justifications in respect of its final decision not to negotiate a renewal (Section 5);
- » The legal ramifications of Article 5.3 of the WHO FCTC (Section 6);
- » The political ramifications of Article 5.3 of the WHO FCTC (Section 7);
- » The status and trends on illicit trade in tobacco products in the EU (Section 8);
- » The contribution of TPD 2014 to the control of illicit trade (Section 9);
- » Recommendations on the optimal relationship between the EU and industry (Section 10);
- » Concluding remarks (Section 11).

9 A comprehensive summary can be found in: L. Joossens, A.B. Gilmore, M. Stoklosa, H. Ross, *Assessment of the European Union's Illicit Trade Agreements with the Four Major Transnational Tobacco Companies*, 'Tobacco Control' 2016, vol. 25, iss. 3, pp. 254-260, www.doi.org/10.1136/tobaccocontrol-2014-05221 [not registered], <https://tobaccocontrol.bmj.com/content/25/3/254.citation-tools> [access: 17.03.2020].

10 See Questions and Answers on: Fighting; *Tobacco Agreements. Follow-up Written Questions to Commissioner Georgieva*, https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/epq_tobacco_en.pdf [access: 17.03.2020].

11 See Commission Staff Working Document. Technical assessment of the experience made with the Anti-Contraband and Anti-Counterfeit Agreement and General Release of 9 July 2004 among Philip Morris International and affiliates, the Union and its Member States, SWD(2016) 44 final, 24.2.2016, <https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/SWD-2016-44-F1-EN-MAIN.PDF> [access: 17.03.2020].