

## WHO Framework Convention on Tobacco Control and Protocol to Eliminate Illicit Trade in Tobacco Products

There are two international treaties currently in force that set out legal obligations for parties with the overall goal of curbing the tobacco epidemic: the WHO Framework Convention on Tobacco Control (WHO FCTC) and the Protocol to Eliminate Illicit Trade in Tobacco Products (Protocol). The WHO FCTC provides a framework of comprehensive, multisectoral tobacco control measures in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke. The Protocol builds on the WHO FCTC and focuses on the elimination of illicit trade in tobacco products through supply chain controls and other measures.

Parties' implementation of measures under the WHO FCTC may have significant effects on cross-border trade. These include demand reduction measures, such as price and tax measures, packaging and labelling regulations, and measures to ban cross-border tobacco advertising, promotion and sponsorship, as well as supply reduction provisions such as measures to combat illicit trade in tobacco products. The Protocol, on the other hand, expressly sets out several measures that may affect export regulations and controls, including the establishment of a global tracking and tracing regime for all products manufactured in or imported into a party, as well as obligations for parties to make the export of tobacco products subject to a licence or equivalent approval or control system.

WTO members that are parties to the WHO FCTC have used it to justify quantitative restrictions on import trade. WTO members may also find reference in future notifications to the WTO that may be made by parties to the Protocol with respect to import and export of tobacco products and tobacco manufacturing equipment. This chapter provides a brief introduction to these two treaties and discusses how implementation by parties of the obligations they contain could have an impact on certain aspects of cross-border trade in tobacco products.

## Background

Tobacco use and exposure to tobacco smoke kills over 8 million people globally each year.<sup>1</sup> The cost of smoking – including related health expenditures and productivity losses – has been estimated at over US\$ 1.4 trillion annually.<sup>2</sup> Due to the heavy global toll of the tobacco epidemic and the need for a concerted response and international cooperation, the WHO Framework Convention on Tobacco Control (WHO FCTC) was adopted unanimously in 2003 by the 56<sup>th</sup> World Health Assembly – the governing body of the World Health Organization (WHO) – and entered into force in 2005. The WHO FCTC was quickly and widely embraced.

In recognition that the elimination of all forms of illicit trade in tobacco products is an essential component of tobacco control, the Protocol to Eliminate Illicit Trade in Tobacco Products (Protocol) was adopted in 2012 by the Conference of the Parties (CoP), the governing body of the WHO FCTC, and entered into force in 2018. As of the time of writing, there are 182 parties to the WHO FCTC. The Protocol has 67 parties. The Meeting of the Parties (MoP) is the governing body of the Protocol and comprises all parties to the Protocol.

## WHO Framework Convention on Tobacco Control

The WHO FCTC aims to address the global tobacco epidemic and reaffirms the right of all people to the highest standard of health. It is the first treaty that was negotiated under the auspices of the WHO, and as stated in its preamble, was developed in response to the “concern of the international community about the devastating worldwide health, social, economic and environmental consequences of tobacco consumption and exposure to tobacco smoke”. The obligations articulated in the WHO FCTC comprise a series of demand and supply reduction measures, as well as provisions relating to criminal and civil liability and to scientific and technical cooperation and exchange of information – all of which seek to address comprehensively the complex factors that facilitate the spread of the tobacco epidemic globally.

The objective of the WHO FCTC and its Protocol, articulated in Article 3, is to:

“... protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.”

Article 4 sets out its guiding principles and calls for comprehensive multisectoral implementation of tobacco control measures, while requiring in its general obligations (Article 5) that parties protect their public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry (defined in Article 1(e) as “tobacco manufacturers, wholesale distributors and importers of tobacco products”).

### ***Demand reduction provisions***

The core demand reduction provisions of the WHO FCTC are found in Articles 6 and 7-14:

- price and tax measures (Article 6);
- non-price measures to reduce demand, such as protection from exposure to tobacco smoke (Article 8);
- regulation of the contents of tobacco products and tobacco product disclosures (Articles 9 and 10);
- packaging and labelling of tobacco products (Article 11);
- education, communication, training and public awareness (Article 12);
- bans on tobacco advertising, promotion and sponsorship (Article 13);
- measures to address tobacco dependence and cessation (Article 14).

### ***Supply reduction provisions***

The core supply reduction provisions of the WHO FCTC are found in Articles 15-17:

- commitment of parties to eliminate all forms of illicit trade in tobacco products (Article 15– expanded upon in the Protocol);
- regulation of sales to and by minors (Article 16);
- provision of economically viable alternatives for tobacco workers and growers (Article 17).

### ***Other provisions***

Other articles seek to protect human health and the environment from the impact of tobacco cultivation and manufacture (Article 18), to provide for criminal and civil liability to enforce measures (Article 19), as well as establish mechanisms to promote scientific and technical cooperation and exchange of information (Articles 20-22).

In addition to the provisions of the WHO FCTC, the parties have adopted guidelines for implementation of several articles that further elaborate on evidence-based measures to assist parties in meeting their obligations.<sup>3</sup>

Some of the obligations contained in the WHO FCTC and the overall determination of parties “to give priority to their right to protect public health” may have an effect on cross-border trade. These provisions could include measures related to control of the supply chain to eliminate illicit trade in tobacco products under Article 15 (including

licensing to control or regulate the production and distribution of tobacco products). The implementation of the Convention by a party will involve regulatory measures applicable to the tobacco industry.

## Protocol to Eliminate Illicit Trade in Tobacco Products

The Protocol is an international treaty elaborated by the parties to the WHO FCTC further to Article 15, which aims to eliminate all forms of illicit trade in tobacco products through the implementation of a package of measures with an emphasis on international cooperation. The Protocol was developed in response to illicit trade in tobacco products, including both domestic and cross-border trade, and covering tobacco, tobacco products and tobacco manufacturing equipment.

Illicit trade in tobacco products is a serious threat to public health because it fuels the tobacco epidemic by increasing the accessibility and affordability of tobacco products. Moreover, illicit trade undermines tobacco control policy by reducing the impact of key tobacco control measures like price and tax increases, thus also causing substantial losses in government revenues, as well as circumventing labelling and packaging requirements and other important demand reduction measures. Illicit trade in tobacco products also contributes to the funding of transnational criminal activities.

### *Supply chain related provisions in the Protocol*

The Protocol seeks to secure the supply chain of tobacco products through a series of key measures to prevent, deter, detect, investigate and prosecute illicit trade. These include obligations on the parties to implement a licensing (or equivalent approval) or control system with regard to the manufacture of tobacco products and manufacturing equipment, as well as for the import or export of such products and equipment (Article 6), with the addition of due diligence requirements (Article 7).

A key element of the Protocol is the obligation to establish a global tracking and tracing regime, comprising national and/or regional tracking and tracing systems for all products manufactured in or imported into the party, and a global information sharing focal point enabling parties to make enquiries and receive relevant information (Article 8). Additional measures to effect supply chain control include:

- obligations with regard to record-keeping (Article 9);
- security and preventive measures (Article 10);
- measures to regulate effectively sales through the Internet (Article 11);
- free zones and international transit (Article 12);
- duty-free sales (Article 13).

### ***Other provisions in the Protocol***

Additional provisions relate to:

- establishment, investigation and prosecution of offences (Articles 14-19);
- international cooperation, including general and enforcement information sharing (Articles 20-22);
- assistance and cooperation (Articles 23-29);
- extradition (Articles 30 and 31).

As noted above, several provisions of the Protocol contain obligations on parties to implement measures with regard to the import and export of tobacco, tobacco products and tobacco manufacturing equipment. The following include key obligations under the Protocol that may have significant implications on export regulations and controls.

### ***Licence, equivalent approval or control***

Article 6 (Licence, equivalent approval or control system) requires parties to make the manufacture, import and export of tobacco products and manufacturing equipment subject to a licence or equivalent approval system. Article 6 outlines the measures that parties shall take with a view to ensuring an effective licensing system, including measures to:

- establish or designate a competent authority to issue, renew, suspend, revoke and/or cancel licences;
- require that each application for a licence contains requisite information about the applicant, such as identity, manufacturing locations and capacity, details of the tobacco products and manufacturing equipment, description of the intended use and intended market of sale of the tobacco products, and other relevant information;
- monitor and collect licence fees and consider using them in effective administration and enforcement of the licensing system or for public health;
- prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system;
- undertake periodic review, renewal, inspection or audit of licences;
- establish a time frame for expiration of licences and subsequent requisite reapplication; and
- oblige the licensed natural or legal person to inform the competent authority in advance of any change of location of their business or any significant change, and of any acquisition or disposal of manufacturing equipment.

Article 6 also indicates that five years after the entry into force of the Protocol, the MoP (the governing body of the Protocol) will take action to identify any “key inputs” that are essential to the manufacture of tobacco products and can be subject to an effective control mechanism, then consider the necessary action.

### ***Tracking and tracing***

Article 8 (Tracking and tracing) requires a global tracking and tracing regime to be established within five years of entry into force of the Protocol, for purposes of further securing the supply chain and to assist in the investigation of illicit trade in tobacco products. This regime will have a “global information sharing focal point” accessible to all parties and enabling them to make inquiries and receive relevant information.

Parties are obliged to establish national and regional tracking and tracing systems, controlled by the party for all tobacco products that are manufactured in or imported into its territory taking into account their own national or regional specific needs and available best practice. Each party will also have to ensure that all unit packets and packaging and any outside packaging of cigarettes bear unique, secure and non-removable identification markings, such as codes or stamps, within five years of the Protocol entering into force for that party; for other tobacco products, the deadline is ten years from entry into force.

### ***Record-keeping***

Article 9 (Record-keeping) obliges parties to require all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment to obtain and store information on all relevant transactions, and which should be made available to the authorities. These records include shipment date, shipping routes and destination, mode of transportation, intended market of retail sale or use, and other relevant information.

### ***Unlawful conduct***

Article 14 (Unlawful conduct including criminal offences) details what conduct should be considered unlawful subject to the principles of the domestic law of each party. Parties have discretion in deciding which of the unlawful conduct would constitute a criminal offence and shall notify the Secretariat which of the unlawful conduct that party has determined to be a criminal offence. Such conduct includes:

- exporting tobacco, tobacco products or manufacturing equipment without paying the applicable duties, taxes and other levies or without bearing applicable fiscal stamps and unique identification markings, or attempts to smuggle such products;
- exporting illicitly manufactured tobacco, illicit tobacco products, products bearing false fiscal stamps and/or other required markings or labels, or illicit manufacturing equipment;
- failing to keep records required in the Protocol or maintaining false records.

### **Information sharing**

Article 20 (General information sharing) requires parties to report on matters relevant for purposes of achieving the objectives of the Protocol, including details of seizures of tobacco products and taxes evaded, and exports of tobacco, tobacco products or manufacturing equipment.

Article 21 (Enforcement information sharing) requires parties to exchange information such as records of licensing, investigations and prosecutions, and records of payment for export of tobacco, tobacco, products or manufacturing equipment, on their own initiative or on the request of a party that provides due justification that such information is necessary for the detection or investigation of illicit trade.

### **Considerations in relation to WTO agreements**

WTO members that are parties to the WHO FCTC have used it to justify quantitative restrictions on the import and export of tobacco products. To date, four notifications<sup>4</sup> to the WTO have used the WHO FCTC as a justification for quantitative restrictions on import trade. None has listed the WHO FCTC as a justification for quantitative restrictions on export trade flows. Justifications for restrictions with regard to tobacco or tobacco products have focused instead on GATT 1994 Article XX(b), which refers to the protection of human life or health, in addition to existing national legislation.

On the other hand, the Protocol envisions control of the tobacco product supply chain to eliminate illicit trade in tobacco products and covers the import and export of tobacco products and manufacturing equipment specifically. Hence, it may find reference in notifications to the WTO in the future with regard to the import and export of tobacco products and tobacco manufacturing equipment.

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## Endnotes

- 1 See <https://www.who.int/news-room/fact-sheets/detail/tobacco>.
- 2 Goodchild *et al.* (2018).
- 3 Available at <https://fctc.who.int/who-fctc/overview/treaty-instruments>.
- 4 See: *Notification pursuant to the Decision on Notification Procedures for Quantitative Restrictions*, WTO documents G/MA/QR/N/MYS/1, 6 October 2020; G/MA/QR/N/MUS/4, 14 September 2018; G/MA/QR/N/MUS/5, 24 September 2020; and G/MA/QR/N/MUS/6, 5 October 2022.