

The Protocol to Eliminate Illicit Trade in Tobacco Products: an overview

Background

The Protocol to Eliminate Illicit Trade in Tobacco Products is an international treaty with the objective of eliminating all forms of illicit trade in tobacco products through a package of measures to be taken by countries acting in cooperation with each other: it is a global solution to a global problem.

The Protocol was developed in response to the growing illegal trade in tobacco products, often across borders. Illicit trade poses a serious threat to public health because it increases access to – often cheaper – tobacco products, thus fueling the tobacco epidemic and undermining tobacco control policies. It also causes substantial losses in government revenues, and at the same time contributes to the funding of international criminal activities.

These matters were seen as so serious that the Parties to the **WHO Framework Convention on Tobacco Control** (WHO FCTC) decided that a protocol – a new international treaty – was needed to specifically address the illicit tobacco trade. The Protocol is based on Article 15 of the WHO FCTC, which refers to the threats posed by the illicit trade and measures countries have to take to prevent it. The Protocol was negotiated by the Parties to the WHO FCTC over several years and was adopted by them in November 2012.

In accordance with its Article 45, the Protocol shall enter into force on the 90th day following the date of deposit of the 40th instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.

The Protocol was opened for signature from 10 January 2013 until 9 January 2014. By that date, 54 Parties to the WHO FCTC had signed the Protocol.

On 27 June 2018, with 41 Parties¹, the conditions for the entry into force of the Protocol were met. Accordingly, the new international treaty will enter into force on 25 September 2018.

Objective and key elements of the Protocol

The objective of the Protocol is the elimination of all forms of illicit trade in tobacco products. “Illicit trade” in tobacco products in the context of the Protocol means any practice or conduct related to producing, shipping, receiving, being in possession of, distributing, selling or buying tobacco products and that is prohibited by law.

In order to prevent this illegal trade, the Protocol aims to make the supply chain of tobacco products secure through a series of measures by governments. It requires the establishment of a global tracking and tracing regime within five years of entry into force of the Protocol, comprising national and regional tracking and tracing systems and a global information sharing point located in the Secretariat of the WHO FCTC. Other provisions to ensure control of the supply chain include licensing, record keeping requirements, and regulation of Internet-sales, duty-free sales and international transit.

To address illicit trade that has occurred, the Protocol establishes offences, addresses liability and seizure payments as well as the disposal of confiscated products.

Other obligations aim to boost international cooperation, with measures on information sharing, technical and law enforcement cooperation, mutual legal and administrative assistance, and extradition.

The Protocol’s obligations cover tobacco, tobacco products and manufacturing equipment (machinery to make tobacco products), not all of which are covered by every provision of the Protocol.

¹ For the status of ratification, please see <http://www.who.int/fctc/protocol/en/>.

In light of the irreconcilable conflict between the **tobacco industry's** interests and public health interests, the Protocol contains particular obligations regarding the tobacco industry. Parties have to ensure that any interaction with the tobacco industry is carried out with maximum transparency, and in relation to tracking and tracing, Parties must not delegate any of their obligations to the tobacco industry.

Any Party to the WHO FCTC may become a Party to the Protocol. The Protocol will enter into force on the 90th day following the deposit of the 40th instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary. The Meeting of the Parties (MOP) will be the governing body of the Protocol once it enters into force, and will be made up of all Parties to the Protocol.

The implementation of the Protocol will require close cooperation between the Parties and international organizations with expertise in the relevant areas (including customs and international crime) and, at the national level, among different sectors of government. This intersectoral and international collaboration will be crucial to the successful achievement of the objective of the Protocol.

The Protocol is divided into sections, which are briefly explained below.

PART I

Introduction

- In **Articles 1 and 2** the terminology and the relationship between the Protocol and other agreements and legal instruments are established.
- In Article 3, the **objective** of the Protocol is asserted as being: “to eliminate all forms of illicit trade in tobacco products, in accordance with the terms of Article 15 of the WHO Framework Convention on Tobacco Control”.

PART II

General obligations

- **Article 4** lays down the **general obligations** of Parties to the Protocol, including:
 - to adopt measures to control the supply chain of tobacco, tobacco products and manufacturing equipment;
 - to cooperate with one another to enhance law enforcement;
 - to exchange information;
 - to increase the effectiveness of relevant authorities and services;
 - to ensure that the necessary assistance, technical support and capacity building are provided to enable the objective of the Protocol to be reached.
- **Article 5** requires Parties to protect **personal data** of individuals in implementing the Protocol.

PART III

Supply chain control

- **Article 6, on licences**, requires Parties to make the manufacture, import and export of tobacco products and manufacturing equipment subject to a licence. Other activities, such as growing tobacco or transporting and wholesaling tobacco products, should be licensed where possible, given national circumstances. The article then outlines the measures to be taken so that the licensing system is effective. It also indicates that five years after the entry into force of the Protocol, the MOP will take

action to identify any “key inputs” that are essential to the manufacture of tobacco products and then take the necessary action.

- **Article 7, due diligence**, explains what Parties must do to ensure that all individuals/businesses involved in the supply chain of tobacco, tobacco products and manufacturing equipment conduct due diligence concerning their business relationships. The article details due diligence requirements, which include comprehensive customer identification.
- **Article 8, tracking and tracing**, requires an international tracking and tracing regime (which will be vital to investigations of illicit trade) to be established within five years of entry into force of the Protocol, with a “global information sharing focal point” in the Secretariat; Parties will also have to establish national/regional tracking and tracing systems, and national focal points will form the link between national systems and the global information sharing focal point; each Party will also have to ensure that cigarette packages bear unique identification markings (containing essential information regarding the products) within five years of the Protocol entering into force for that Party; for other tobacco products, the deadline is 10 years.
- **Article 9** describes the kinds of information that Parties must require individuals/businesses involved in the supply chain to obtain and store, and which may have to be provided to the authorities. This **record keeping** includes date and location of manufacture, manufacturing facility, information on the first customer, intended market of retail sale and intended shipment route. The article also explains how Parties should aim to share with each other the information recorded.
- **Article 10, on security and preventive measures**, explains how all individuals/businesses subject to licensing under Article 6 must take the necessary measures to prevent the diversion of tobacco products into illicit trade channels, to ensure that all financial transactions and payments are subject to certain conditions, and to ensure that contraventions are subject to appropriate criminal, civil or administrative procedures and effective, proportionate and dissuasive sanctions.
- **Article 11** requires that any transactions by **Internet** or similar means are subject to the same obligations as any others covered by the Protocol, and that Parties should consider banning retail sales by Internet.
- **Articles 12** states that Parties must implement effective controls of manufacturing and transactions in tobacco and tobacco products in **free zones**, including prohibiting tobacco products from being intermingled with non-tobacco products. Parties also have to take measures to ensure that **international transit** and transshipment is in line with the provisions of the Protocol.
- **Article 13**, which covers **duty-free sales**, explains that Parties must implement effective measures to subject such sales to all relevant provisions of the Protocol.

PART IV

Offences

- **Article 14** explains what **conduct** should be considered **unlawful** subject to the principles of domestic law of each Party. Such conduct includes manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment without paying the applicable taxes, and other attempts to smuggle such products. Parties have discretion in deciding which of the unlawful conduct would constitute a **criminal offence**.
- **Article 15** explains that each Party must take measures to establish the **liability of legal persons** for the unlawful conduct established under Article 14. Subject to the legal principles of each Party, the liability may be criminal, civil or administrative.
- **Article 16, on prosecutions and sanctions**, requires each Party (in accordance with national law), to take measures to ensure that natural and legal persons held liable for the unlawful conduct established under Article 14 are subjected to effective, proportionate and dissuasive criminal or non-criminal sanctions.

- In **Article 17**, on **seizure payments**, Parties are encouraged to consider adopting measures to authorize competent authorities to levy an amount proportionate to lost taxes and duties from those involved in the illicit trade.
- **Article 18** states that all confiscated tobacco, tobacco products and manufacturing equipment shall be **destroyed**, using environmentally friendly methods to the greatest extent possible, or **disposed of** in accordance with national law.
- **Article 19** explains that Parties should take measures to allow for the appropriate use of controlled delivery and, where it deems it appropriate, for the use of other **special investigative techniques**, such as electronic surveillance and undercover operations, to combat the illicit trade. Parties are encouraged to cooperate with each other in helping to build capacity in this area.

PART V

International cooperation

- **Article 20** on **general information sharing** covers Parties' reporting requirements. In conjunction with WHO FCTC reporting, Parties will have to report on details of seizures of tobacco products and taxes evaded, the quantity or value of the production of tobacco products, and methods used in illicit trade. Parties have to cooperate with each other in building capacity to collect such information (which is confidential).
- **Article 21** covers the exchanges of **information concerning enforcement** of the Protocol (subject to domestic law or relevant international treaties) between Parties. It explains that such information may be requested when it is necessary for the purposes of detection or investigation of illicit trade. It includes licensing records, information needed for identification, monitoring and prosecution of persons involved in illicit trade, records of investigations and prosecutions, records of payment for import, export or duty-free sales, and details of seizures.
- **Article 22** describes how Parties should go about sharing and ensuring **confidentiality of information** shared.
- **Article 23** requires Parties to assist each other with **training, technical assistance and cooperation in scientific, technical and technological matters**, directly or through international and regional organizations. This may include transfers of expertise or technology for information gathering, law enforcement, tracking and tracing, etc.
- **Article 24** explains how Parties must take all necessary measures to strengthen **cooperation for the prevention, detection, investigation, prosecution and punishment** of persons/businesses engaged in illicit trade, including through multilateral, regional or bilateral arrangements.
- **Article 25** makes it clear that Parties must carry out their obligations under the Protocol consistent with the principles of **sovereign equality and territorial integrity of States** and that of non-intervention in the domestic affairs of other States.
- **Article 26** describes the measures each Party should take to establish its **jurisdiction** over the criminal offences (established under Article 14).
- **Article 27** requires Parties to exchange **information concerning criminal offences** under the Protocol, including through cooperation among the relevant authorities, such as customs and police forces; cooperate in conducting enquiries; provide evidence and exchanges of personnel; and establish channels of communication through bilateral or multilateral agreements.
- **Article 28** explains how Parties, in line with their domestic legal and administrative systems, must provide each other with **mutual administrative assistance**, to help ensure the proper application of customs and other relevant law in the prevention, detection, investigation, prosecution and combating of illicit trade. Such information may include new customs and other enforcement techniques of demonstrated effectiveness, new trends, means or methods of engaging in illicit trade, goods known to be the subject of illicit trade, or any other data that would assist designated agencies in risk assessment for control and other enforcement purposes.

- **Article 29** describes how Parties must provide each other with **mutual legal assistance** in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with Article 14. Mutual legal may be requested, for example in taking evidence or statements from a person or executing searches and seizures.
- **Article 30, extradition**, outlines the situations in which extradition may apply to criminal offences established in accordance with Article 14.
- **Article 31** describes the measures to be taken to **ensure extradition**, and the entitlements of the person to whom the measures apply.

PART VI

Reporting

- In Article 32 Parties are required to **report on the status of their implementation of the Protocol**, and this article explains the format and content of their reports. The reports will form part of Parties' other, regular reports on implementation of the WHO FCTC, which are one of the obligations under the WHO FCTC, and should not duplicate those reports.

PART VII

Institutional arrangements and financial resources

- Articles 33-36 cover such matters as the governance of the Protocol (the establishment, organization and duties of the MOP), the Secretariat of the Protocol (which is the same as the Secretariat of the WHO FCTC with added functions), relations between the MOP and intergovernmental organizations, and the financial resources required to achieve the objective of the Protocol.

PARTS VIII-X

Settlement of disputes, development of the Protocol and final provisions

- The articles in these sections cover settlement of disputes between Parties, and matters such as ratifying the Protocol, its entry into force, and amending the Protocol,