

**COMMENTS AND RECOMMENDATIONS ON
THE DRAFT GUIDELINES FOR
IMPLEMENTATION OF ARTICLE 6 OF THE
WHO FRAMEWORK CONVENTION ON
TOBACCO CONTROL
(FCTC/COP/6/7 OF 27 MARCH 2014)**

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and Policy
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INTRODUCTION

Price and tax measures are widely recognized as an effective and important means to reduce tobacco consumption and should be implemented as provided in Article 6 of the WHO Framework Convention on Tobacco Control (hereinafter FCTC). We appreciate the continuous efforts that the Parties of the FCTC have made for developing the Guidelines for the implementation of Article 6 of the FCTC. We are particularly delighted to see the recent issuance of the “Draft Guidelines for Implementation of Article 6 of the WHO Framework Convention on Tobacco Control” of 27 March 2014 (FCTC/COP/6/7) (hereinafter “Guidelines”) that presents the Report of the open-ended inter-sessional drafting group. We expect that the elaborated version of the Guidelines would assist the policy-makers of countries in the designing and implementing of effective tax and price systems on tobacco products in furtherance of the objectives and obligations

under Article 6 of the FCTC.

The Asian Center for WTO & International Health Law and Policy of National Taiwan University College of Law is an academic research center for international trade law and international health law and policy. It is our view that tobacco control issues reflect a universal common interest and are vital to the advancement of global public health. It is commendable that the Guidelines were made available to comments from the Parties to the FCTC. Along this line, we would also like to continue to offer our inputs in this field so that diversified views from outside the drafting group and Parties will also be shared and considered.

This is the fifth time we have provided the booklet specifically on the issue to be presented to the Conference of the Parties (COP). We consider that the adoption of an advanced and workable Guideline for implementing price and tax policy is significant and will genuinely guide national authorities of all countries to set good and efficient initiatives that will reduce tobacco consumption. We sincerely hope that our comments and recommendations in this booklet could make a constructive contribution to the perfection and completion of the Guidelines.

Draft Guidelines for Implementation of Article 6 of the WHO Framework Convention on Tobacco Control

1. COMMENTS ON INTRODUCTION

Relevant Texts of Introduction

1. INTRODUCTION

Purpose of the guidelines

Consistent with other provisions of the WHO Framework Convention on Tobacco Control (WHO FCTC) and the decisions of the Conference of the Parties, these guidelines are intended to assist Parties in meeting their objectives and obligations under Article 6 of the WHO FCTC. They draw on the best available evidence, best practices and experiences of the Parties that have successfully implemented tax and price measures to reduce tobacco consumption.

Guiding principles

...

The following guiding principles underpin the implementation of Article 6 of the WHO FCTC.

...

1.2 Effective tobacco taxes significantly reduce tobacco consumption and prevalence

...

1.3 Effective tobacco taxes are an important source of revenue

...

1.4 Tobacco taxes are economically efficient and reduce health inequalities

Tobacco taxes are generally considered to be economically efficient as they apply to a product with inelastic demand. Low- and middle-income population groups are more responsive to tax and price increases; therefore consumption and prevalence are reduced in these groups by

greater magnitudes than in higher-income groups, resulting in a reduction in health inequalities and tobacco-related poverty

1.5 Tobacco tax systems and administration should be efficient and effective

Tobacco tax systems should be structured to minimize the costs of compliance and administration while ensuring that the desired level of tax revenue is raised and health objectives are achieved.

...

1.5 Tobacco tax policies should be protected from vested interests

...

Scope of the guidelines

These guidelines focus mainly on tobacco excise taxes since these are the primary tool for raising the price of tobacco products relative to the prices of other goods or services. ...

... However, tobacco taxes do not exist in a vacuum and should be implemented as part of a comprehensive tobacco-control strategy alongside other policies undertaken in line with other articles of the WHO FCTC. ...

... Illicit trade in tobacco products undermines price and tax measures designed to strengthen tobacco control and thereby increases the accessibility and affordability of tobacco products. Curbing illicit trade enhances the effectiveness of tobacco tax and price policies in reducing tobacco use and in achieving the public health and revenue goals of tobacco taxation.

COMMENTS

1. With respect to the purpose of the Guidelines provided in the textbox above, it is stated that the Guidelines draw on the best available evidence, best practices and experiences of the Parties, without referring to the prevalence of tobacco use as appeared in the earlier version of draft guidelines (FCTC/COP/5/8). However,

there are many places that mention the prevalence in the Guidelines. For instance, the Guiding principles 1.2 refers that effective tobacco taxes significantly reduce tobacco consumption and “prevalence”. The statements of Guiding principles 1.4 speak of “consumption and prevalence are reduced.” The second paragraph of the scope of the guidelines contains the wording relevant to “prevalence.” Part 2 of the Guidelines also recognizes that taxes and prices affect the prevalence of tobacco use. Therefore, we suggest that the “prevalence” of tobacco use should be included in the purpose of the Guidelines to be consistent with the objective of the FCTC as enshrined under Article 3 of the FCTC, where the continuous and substantial reduction of the prevalence of tobacco use by the Parties is desirable through the implementation of the FCTC.

2. The Guiding principles 1.3 highlights effective tobacco taxes are “an important source of revenue.” Given tobacco taxation mainly purports to achieving public health by reducing tobacco consumption, we are of the view that the amount of tobacco tax collected and its possible contribution to an increased government revenues or the revenue goals of tobacco taxation should not be placed as particular emphasis. It seems to us that if there is an inappropriate connection between tobacco tax and the source of national revenue, the role of tobacco taxes would become less clear and the ground for justifying the raising of tobacco taxes at the national level might be weaker. In this regard, we suggest that the Guiding principles 1.3 on “Effective tobacco

taxes are an important source of revenue” should be revised to “Effective tobacco taxes are an important source *for tobacco control*”, which indicates that tobacco taxes should contribute to tobacco-related expenditure for the purpose of public health. Following this, the current statements focusing on government revenues increase under the Guiding principles 1.3 should also be changed on the basis of tobacco control consideration.

3.Regarding the Guiding principles 1.4, it is stated that tobacco taxes are economically efficient and reduce health inequalities. We also have some concerns.

(1) The inclusion of “economically efficient” in relation to tobacco taxation might possibly raise a concern regarding the revenue goals of tobacco taxation, and thus resulting in a deviation of the very purpose of tobacco control.

(2) The first statement provides that “[t]obacco taxes are generally considered to be economically efficient as they apply to a product with inelastic demand.” However, the second sentence states that “[l]ow- and middle-income population groups are more responsive to tax and price increases.” It seems to us that there exists certain inconsistency between these two sentences by outlining tobacco product’s inelastic demand on the one hand, and more responsiveness of tax and price increases might occur for certain population groups on the other.

(3) There is no definition regarding the term “low- and middle-income population groups.” Besides, the distinction made

between “low- and middle-income population groups” and “higher-income group” does not seem sensible and necessary in a broader perspective of tobacco control policy.

(4) The meaning of “tobacco related poverty” is vague and equivocal; and how “tobacco related poverty” relates to the concept of “health inequalities” also needs more clarifications.

4. Guiding principle 1.5 outlines that tobacco tax systems and administration should be efficient and effective in its subtitle. In order to reflect the health objectives to be achieved by tobacco tax increases, as stated in the paragraph 1, we suggest the Parties to consider changing Guiding principle 1.5 to “tobacco tax systems and administration should be efficient and effective for tobacco control.”

5. The section of the scope of the Guidelines states that “[i]llicit trade in tobacco products undermines price and tax measures designed to strengthen tobacco control and thereby increases the accessibility and affordability of tobacco products.” In our view, issues on illicit trade in tobacco products should fall into the scope of Article 15 of the FCTC and the Protocol to Eliminate Illicit Trade in Tobacco Products. There seems no need to cover the illicit trade issue in the Guidelines. Also, it merits attention that such inclusion might be easier to trigger the debates as to the link between an increase in tobacco tax and an increase in illicit trade, by which the tobacco industry stands in constant opposition to raising tobacco tax.

6. We also suggest that the objectives of the Guidelines should be included alongside the other Guidelines undertaken under the other provisions of the FCTC.

2. COMMENTS ON SECTION 2 REGARDING RELATIONSHIP BETWEEN TOBACCO TAXES, PRICE AND PUBLIC HEALTH

Relevant Texts of Section 2

2 RELATIONSHIP BETWEEN TOBACCO TAXES, PRICE and PUBLIC HEALTH

...The inverse relationship between price and tobacco use has been demonstrated by numerous studies and is not contested.

2.1 Relationship between price and consumption/prevalence (price elasticity)

...

...

In all settings, studies have shown that the price elasticity of demand is higher (in absolute terms) in the long term, meaning that consumption will fall even more in the long term. People with lower socioeconomic status are more responsive to tax and price changes because such changes have a greater impact on their disposable income.

As regards the effect of higher taxes and prices on tobacco use by young people, it is estimated that young people are two to three times more responsive to tax and price changes than older people...

Equally important, higher taxes and prices reduce the demand for tobacco most sharply in lower- income population groups...

An increase in tax rates generally leads to an increase in revenues earned by governments...

2.2 Taxation and affordability (income elasticity)

Increases in income generally result in increasing tobacco consumption and prevalence, particularly in low- and middle-income countries...

Without price increases above the growth in income, tobacco products will inevitably become more affordable over time...

Some tax policies can make some tobacco products more affordable to vulnerable segments of the population (young people and lower-income groups). Increases in tobacco use in these populations can increase inequalities in health, increase poverty and result in other consequences. Tobacco tax policies that reduce affordability may lead to proportionately larger reductions in tobacco use in vulnerable

populations, given the greater price sensitivity of these populations.

Recommendation

When establishing or increasing their national levels of taxation Parties should take into account – among other things – both price elasticity and income elasticity of demand, as well as inflation and changes in household income, to make tobacco products less affordable over time in order to reduce consumption and prevalence. Therefore, Parties should consider having regular adjustment processes or procedures for periodic revaluation of tobacco tax levels.

COMMENTS

1. The third paragraph of section 2.1 uses “price elasticity” of demand to explain the relationship between tobacco price and consumption. However, section 2 also states that the “inverse relationship” between price and tobacco use has been demonstrated by numerous studies and is not contested. From these statements, it seems unclear as to the links between price and tobacco use. It is suggested that more clarifications are needed regarding how tobacco price would affect tobacco consumption.

2. Paragraphs 4 and 5 of section 2.1 highlight different sensitivities to tax and price change from different consumer groups. It is stated that young people and lower- income population groups are much easier to reduce their tobacco consumption as prices increase. In our view, it will be more useful and clearer if the connection between the specific consumer groups and the “price elasticity” of demand could be further elaborated. Also, we do not consider that the effect of revenues

increases as a result of higher tobacco tax should be stressed in the paragraph 6.

3. Particular emphasis on distinctions between rich and poor populations in terms of income is placed in several paragraphs of section 2.2. Along with the concept of the “health inequalities” contained in the Guiding principle 1.4, we consider that whether it is in line with the public health objective to be achieved under the FCTC remains to be clarified.

4. The recommendation section mentions certain factors that Parties should take into account in establishing or increasing the national levels of taxation to make tobacco products less affordable, such as price elasticity, income elasticity of demand, inflation and changes in household income. There appears to lack strong links between the recommendation and its prior statements in section 2.1 and 2.2. In our view, how “price elasticity” would influence different consumer groups and the establishment of tobacco taxation by different countries with various circumstances should be elaborated. In addition, we believe that inflation and changes in household income should not be used as an excuse by the government to refrain from increasing the national level of taxation or decreasing tax rates. Regular adjustment process or the periodic revaluation of tobacco tax levels should not be implemented in a way that results in diminishing the effectiveness of tax policies on public health, such as the decrease of tobacco taxes. We suggest these concerns should be addressed in the

recommendation.

3. COMMENTS ON SECTION 3 REGARDING TOBACCO TAXATION SYSTEMS: SECTION 3.1

Relevant Texts of Section 3.1

3.1.2 Specific excise taxes

Specific taxes can either be uniform or tiered. Uniform specific taxes create a price floor (minimum price). Furthermore, uniform specific taxes tend to lead to relatively higher prices, even on low-priced brands.

Uniform specific taxes compared to ad valorem taxes may reduce incentives for consumers to switch to lower-priced brands because they generate smaller price differences between lower- and higher-priced brands.

A uniform specific tax is easy to implement and administer, because only the volume, and not the value, of the product needs to be ascertained. Since tax revenues are based on volumes rather than on prices, revenues from a uniform specific tax are easier to forecast, more stable, and less dependent on industry pricing strategies. However, the real value of the specific tax will be eroded unless it is regularly increased at least in line with inflation.

...

3.1.4 Mixed specific and ad valorem excise taxes

Mixed (or hybrid) excise tax structures apply both specific and ad valorem excise taxes. Mixed systems usually combine a uniform specific tax (which has relatively more impact on less expensive brands) and an ad valorem tax (which has a greater absolute impact on more expensive brands). In a mixed system, the emphasis placed on either the ad valorem or the specific element depends on national circumstances and the policy objectives being pursued. While the ad valorem component increases absolute price differences and consequently promotes use of cheaper brands – undermining public health objectives – the specific component reduces the relative price differences between cheap and expensive brands and contributes to minimizing the variability of prices.

A mixed tax structure seeks to combine the advantages of pure specific and pure ad valorem taxes. It is more complex to implement and administer than a uniform specific tax structure, because both the volume and the value of the product need to be ascertained.

A mixed tax structure is less susceptible to product undervaluation than

a pure ad valorem system. To further reduce susceptibility to undervaluation, a minimum specific tax floor can be applied. The use of a minimum specific tax floor ensures that a certain minimum excise tax will be collected on all brands, regardless of their retail selling price.

Since tax revenues are based on both volumes and prices, revenues from a mixed tax structure are more difficult to forecast, less stable, and more dependent on industry pricing strategies than tax revenues under a uniform specific tax structure. However, the real value of the total tax will be less eroded over time by inflation than under a uniform specific tax structure.

3.1.5 Other taxes on tobacco products

Other taxes that are not uniquely levied on tobacco products (e.g. GST or VAT) are outside the scope of these guidelines. Although they are applied to tobacco products and have a significant impact on retail prices of tobacco products, generally they do not affect the price of tobacco products relative to the prices of other goods and services and, consequently, have less impact on public health.

Some countries do not impose excise taxes on tobacco products and usually rely on other taxes such as import duties. Those countries should consider introducing excise taxes on tobacco products in order to effectively reduce tobacco use through price and tax policies.

Recommendation

Parties should implement the simplest and most efficient system that meets their public health and fiscal needs, and taking into account their national circumstances. Parties should consider implementing specific or mixed excise systems with a minimum specific tax floor, as these systems have considerable advantages over purely ad valorem systems.

COMMENTS

1. With respect to section 3.1.2

(1) Under section 3.1.2, specific excise taxes on tobacco products are preferably uniform or tiered. However, there seems to be no further statement as to what constitutes tiered specific taxes and how it functions in practice. Also, it is

suggested that the differences between the uniform specific taxes and tiered specific taxes in terms of tobacco control objectives should be further elaborated for Parties to take into account.

(2) A uniform specific tax might not reduce the consumption of more expensive brands, such as cigar, because only smaller price differences between lower-and higher-priced brands could generate. In this regard, it is suggested that Parties might consider applying a minimum specific tax floor or similar price-related measures specifically for high-priced brands so as to reduce the consumption.

2. Section 3.1.4 provides that a mixed tax structure generally combines the advantages of specific and ad valorem taxes. Some issues compared to pure specific and pure ad valorem taxes are addressed, such as the complexity of the implementation and administration; the susceptibility to product undervaluation and the uncertainty of revenue collections. However, no observation seems to have been made from the perspective of the promotion of public health goal. Also, in order to facilitate Parties' consideration as to whether to introduce such a mixed structure, we suggest that the details of the mixed tax structure applicable to tobacco product should be provided. For instance, whether the specific and ad valorem excise duties should be applied to the tobacco product simultaneously; or whether ad valorem tax should be applied to more expensive brands and a specific tax should be applied to less expensive brands.

3. Section 3.1.5 excludes other taxes that are not uniquely levied on tobacco products from the Guideline since they have lesser impact on public health. We believe general taxes applicable to tobacco products that constitute a part of tobacco taxation in certain countries are of practical value. It is suggested that the Guideline should include them and provide more elaborations.

4. The text of “Recommendation” suggests that specific or mixed excise systems with a minimum specific tax floor are preferable systems for the Parties to implement tobacco taxes. We are of the view that the connection between these systems and the public health objective to be achieved, instead of fiscal or budgetary needs, should be more elaborated. Also, given certain countries might need to make regulatory adjustments from their existing taxation system towards a new specific or mixed excise tax system, it is best to add some suggestions for those countries that are in need to take measures during the transition period.

4. COMMENTS ON SECTION 3 REGARDING TOBACCO TAXATION SYSTEMS: SECTION 3.2

Relevant Texts of Section 3.2

3.2 Level of tax rates to apply

...

When it comes to the most effective calculation base for the share of taxes in retail prices, the concept of “weighted average price” is preferred.

...

In addition, the share of taxes in tobacco product retail prices differs enormously around the world. Large differences in taxes and prices within regions or between neighbouring countries create incentives for product substitution, cross-border shopping and bootlegging and countries with relatively low tobacco product prices could consider raising taxes in order to raise prices to reduce such incentives.

Recommendation

Parties should establish coherent long-term policies on their tobacco taxation structure and monitor on a regular basis including targets for their tax rates, in order to achieve their public health and fiscal objectives within a certain period of time.

Tax rates should be monitored, increased or adjusted on a regular basis, potentially annually, taking into account inflation and income growth developments in order to reduce consumption of tobacco products.

COMMENTS

1. The second paragraph of section 3.2 only briefly mentions that when it comes to the most effective calculation base for the share of taxes in retail prices, the concept of “weighted average price” is preferred. We suggest that in this paragraph it should give more detail about “weighted average price” and its pros and cons in terms of tobacco control perspective.

2. The fourth paragraph of section 3.2 states that large differences in taxes and prices within regions or between neighbouring countries create incentives for product substitution, cross-border shopping and bootlegging. We share the view that the difference in price of the same tobacco product between countries could be the key factor contributing to cross-border flows. In this regard, in order to promote the public health objective, we recommend some textual recognition that encourages the Parties to take the neighbouring countries' tax rate into consideration while deciding the level of tobacco tax rate should be included.

3. With regard to the recommendation, we believe that Parties should be strongly recommended to review their taxation policies and tax rate annually and the wording "potentially" should be deleted. Also, we suggest that the factor of inflation or income growth developments should not be used as an excuse from raising tax rate on tobacco product. In no event shall the rate of tobacco tax be allowed to adjust downward, which constitutes a deviation from the purpose of the FCTC and the Guidelines.

5. COMMENTS ON SECTION 4 REGARDING TAX ADMINISTRATION: SECTION 4.1

Relevant Texts of Section 4

4.1 Authorization/licensing

Controlling the tobacco supply chain is important for efficient and effective tax administration.

Licensing, equivalent approval or control systems should be applied to relevant entities for the control of the supply chain, in line with Article 6 of the Protocol to Eliminate Illicit Trade in Tobacco Products.

Recommendation

Parties should ensure that transparent licence or equivalent approval or control systems are in place.

COMMENTS

1. No definition or elaboration regarding the meaning and extent of “supply chain” are provided in section 4.1. Consequently, we think Article 1.12 of the Protocol to Eliminate Illicit Trade in Tobacco Products should be of great relevance. We also suggest that the relationship between Article 6 of the Protocol to Eliminate Illicit Trade in Tobacco Products and the second paragraph of section 4.1 of the Guidelines should be further clarified. For instance, whether the authorization and licensing requirements provided in the Protocol to Eliminate Illicit Trade in Tobacco Products should also be applied for the purpose of the section 4.1.

2. On the recommendation part, it is stated that Parties should ensure that transparent license or equivalent approval or

control systems are in place. However, we believe that the transparent aspect of the control systems of supply chain is not the primary concern of section 4.1. Instead, the emphasis seems to lie on the alignment between controlling the tobacco supply and relevant provisions of the Protocol to Eliminate Illicit Trade in Tobacco Products. Therefore, we suggest that Parties might consider reflecting on it in the recommendation.

6. COMMENTS ON SECTION 4 REGARDING TAX ADMINISTRATION: SECTION 4.2

Relevant Texts of Section 4.2

4.2 Warehouse system/movement of excisable goods and tax payments

Since controls need to be carried out in production and storage facilities in order to ensure that the tax debt is collected, it is necessary to maintain a system of warehouses, subject to authorization by the competent authorities, for the purpose of facilitating these controls. Many countries oblige and authorize natural or legal persons (as authorized warehouse keepers) to produce, process, hold, receive and dispatch products subject to excise duty in the course of their businesses, under suspension of the excise duty. Guarantees can be requested from warehouse keepers to secure the payment of taxes. Features of such a system may include: strict criteria for granting authorization; warehouse pre- authorization visits; adequate stock control measures; checking the origin of excise products and the entire production process; and coding and marking products. Monitoring movements of excise goods under suspension of excise duty via a computerized system can also be used as a control tool.

Recommendation

Parties are urged to adopt and implement measures and systems of storage and production warehouses to facilitate excise controls on tobacco products.

....

Tax payments should be required by law to be remitted at fixed intervals or on a fixed date each month and should ideally include reporting of production and/or sales volumes, and price by brands, taxes due and paid, and may include volumes of raw material inputs.

...

COMMENTS

We are of the view that controlling production and storage

facilities of tobacco products are of practical importance for tobacco tax's collection. However, it seems to us that controlling "warehouse system" and "the movement of the excisable goods and tax payment" on tobacco product involve separate regulatory dimensions and should be addressed differently. In addition, it seems less clear as to the term "tax payment" in the recommendation part and need more clarifications. It is therefore suggested that the concept of "tax payment" and its successful collection should be set as the main concern of this section, where the warehouse system to be carried out is covered as a part of the system of collecting tax payment.

7. COMMENTS ON SECTION 4 REGARDING TAX ADMINISTRATION: SECTION 4.3

Relevant Texts of Section 4.3

4.3 Anti-forestalling measures

In some cases, changes to taxes can be anticipated by manufactures or importers. This may be because taxes are indexed to inflation or known benchmarks. In anticipation of tax increases, manufacturers or importers may attempt to take advantage of the current or lower tax and increase production or stock of products (known as forestalling).

To prevent this from occurring, and to ensure that authorities receive the extra revenue from tax increases, rather than producers or importers, Parties should consider implementing anti-forestalling measures, such as:

- restricting the release of excessive volumes of tobacco products immediately prior to a tax increase;
- levying the new tax on products already produced or kept in stock, and not yet supplied to the final consumer, including those in retail (known as a floor-stock or inventory tax).

Recommendation

In anticipation of tax increases Parties should consider imposing effective anti-forestalling measures.

COMMENTS

1. Section 4.3 suggests that Parties should take anti-forestalling measures to address the possible increases in production or stock of tobacco products by manufacturers or importers before a tax increase. On the implementation level, we thought imposing the new higher tax on tobacco products already produced or kept in stock but not yet supplied to the final consumer might raise a concern regarding the legitimacy of applying disadvantageous tax retroactively to products produced

or sold already by manufacturers or importers in certain jurisdictions. For certain countries, it might involve the issue of the protection of legitimate expectation of persons or firms in their domestic legal systems. It is said that the tobacco firms or the retailers' decisions on the production or sale of tobacco products are based on the current or lower tax.

2. Regarding the restrictive measure on the release of excessive volumes of tobacco products immediately prior to a tax increase, as set out in second paragraph in section 4.3, we are of the view that how to determine and evaluate the "excessive volumes" might incur a practical problem. Also, what constitutes as "immediate" period as well as what possible measures can contribute to restricting the release of excessive volumes of tobacco products are issues suggested for further elaboration.

3. It is our view that the transition period between the current tax and a change to a higher tax is of temporary nature. It seems to be a common practice in the market economy that consumers would be inclined to purchase more products with the anticipation of a higher rate of tax is to be implemented in the near future. The natural consequence will be that productions and sales of products would increase. Therefore, we suggest that Parties might consider the feasibility of the anti-forestalling provision in light of advancing tobacco control objective.

8. COMMENTS ON SECTION 4 REGARDING TAX ADMINISTRATION: SECTION 4.4

Relevant Texts of Section 4.4

4.4 Fiscal markings/tracking and tracing

Using fiscal markings is generally considered to be an appropriate tool to increase compliance with tax laws through monitoring of production and importation. Moreover, fiscal markings can help in distinguishing between illicit and legal tobacco products. Markings include tax stamps, enhanced tax stamps (also known as banderols) and digital tax stamps.

Fiscal markings are usually applied at the pack level at specified positions on the pack. Setting a certain standard pack size facilitates the application of fiscal markings and increases the efficiency of tax administration. In line with Article 15 of the WHO FCTC, the development of a tracking and tracing system including marking of tobacco products with a unique identifier may further secure the distribution system and assist in investigations of illicit trade.

Recommendation

Where appropriate, Parties should consider requiring the application of fiscal markings to increase compliance with tax laws.

COMMENTS

1. The establishment of fiscal markings and track and tracing system could contribute to tobacco products being adequately taxed and address the illegal trade in tobacco product. We consider that the fiscal markings system might operate as a complement to the implementation of anti-forestalling measures in section 4.3. By virtue of having a special design for the fiscal markings, it might increase the feasibility to distinguish the date of production and the date of tax levied so that relevant authorities can determine whether tobacco manufacturers release products

with the intention of avoiding a new tax before a tax increase.

2. The fiscal markings are used for fiscal purposes. Therefore, we suggest that the color, design, and size of the fiscal markings or stamps affixed on the pack of tobacco product should not create an erroneous impression about the characteristics and quality of the tobacco product guaranteed by the authority.

3. With respect to the “track and tracing system”, we consider Article 8.3 of the Protocol to Eliminate Illicit Trade in Tobacco Product is of useful relevance. As provided, Parties shall require unique identification markings, such as codes or stamps, be affixed to or form part of all unit packets and packages and any outside packaging of cigarettes to ensure that such markings are difficult to be counterfeited. In addition, Article 8.4 of the said Protocol which requires the information be available in the fiscal markings is also useful.

9. COMMENTS ON SECTION 4 REGARDING TAX ADMINISTRATION: SECTION 4.5

Relevant Texts of Section 4.5

4.5 Enforcement

...
...

Penalties for non-compliance with tax laws usually include suspension or cancellation of licence or the application of more stringent conditions on the licence, fines and/or jail, forfeiture of products, forfeiture of equipment used in the manufacture or distribution of products including machinery and vehicles, cease and desist orders, and other administrative remedies as appropriate. Penalties and interest are applied to the late payment of taxes, and back taxes and punitive taxes are applied to the non-payment of taxes.

Recommendation

Parties should clearly designate and grant appropriate powers to tax enforcement authorities.

Parties should also provide for information sharing among enforcement agencies in accordance with national law.

In order to deter non-compliance with tax laws, Parties should provide for an appropriate range of penalties

COMMENTS

1. Paragraph 3 of Section 4.5 provides a range of penalties for non-compliance with tax laws for Parties to consider, which includes administrative or criminal penalties. We are of the opinion that certain terms might have different meanings in terms of different legal systems. For instance, “*punitive*” taxes might point to “administrative fine” or punitive compensation for damage caused in different jurisdictions. The term “*jail*” may refer to criminal imprisonment or administrative custody with different nature. We suggest that there should be a need for

further clarification.

2. In our view, establishing effective remedy against any act of non-compliance with tax laws so as to deter to further infringements is of importance. However, the remedies to be applied should not create an excessive effect. Imposing criminal penalties for non-compliance with tax laws might raise a concern under the rule of proportionality in certain jurisdictions.

3. We believe that using forfeiture of equipment used in the manufacture or distribution of products as a penalty for mere non-compliance with tax laws is unconvincing. However, forfeiture of equipment used in the manufacture or distribution of products might be useful to prevent further infringement in the case of illicit trade in tobacco product. Therefore, we suggest that remedies should be provided in light with different acts of infringement.

10. COMMENTS ON SECTION 5 ON REGARDING USE OF REVENUES – FINANCING OF TOBACCO CONTROL

Relevant Texts of Section 5

Use of Revenues – Financing of Tobacco Control

According to Article 6.2 of the WHO FCTC, Parties shall retain their sovereign right to determine and establish their taxation policies. An integral part of each Party's sovereign right is to decide how the revenue stemming from tobacco taxation is used.

...

Parties could consider, while bearing in mind Article 26.2 of the WHO FCTC, and in accordance with national law, dedicating revenues to tobacco-control programmes. Some Parties dedicate tobacco tax revenues to tobacco-control programmes, while others do not apply such an approach.

Recommendation

Parties could consider, while bearing in mind Article 26.2 of the WHO FCTC, and in accordance with national law, dedicating revenue to tobacco-control programmes, such as those covering awareness raising, health promotion and disease prevention, cessation services, economically viable alternative activities, and financing of appropriate structures for tobacco control.

COMMENTS

We are of the view that the revenue collected from tobacco taxation or a large portion of it should be dedicated to tobacco-control programmes so as to achieve the basic objective of using tobacco taxes as a tobacco control instrument. In this regard, we suggest that certain wordings such as “in order to better achieve the objective of Article 6 of the FCTC and the Guidelines, Parties are encouraged to dedicate revenue collected from tobacco taxation or the large portion of it to tobacco-control programmes” should be considered in section 5. Also, while we think that Parties' sovereign right to establish their taxation policies should

be respected, it is unnecessary to restate this concept too many times in the Guidelines, because it might inappropriately prevent Parties from using revenue from tobacco taxation for tobacco control programmes.

11. COMMENTS ON SECTION 6 REGARDING TAX-FREE/DUTY-FREE SALES

Relevant Texts of Section 6

Tax-free/Duty-free sales

...

Tax- and duty-free sales generally erode the effects of tax and price measures aimed at reducing the demand for tobacco products, since tax-free tobacco products are cheaper and more affordable than those which are taxed. This is counterproductive to the health purpose behind taxation and harms public health by encouraging personal consumption. Moreover, these sales can adversely affect government revenues by creating a loophole in the tax structure as tax- or duty-free products can be the origin of illicit trade. There is growing evidence that governments are taking action to prohibit or restrict tax- or duty-free sales.

International actions to ban tax- or duty-free sales are built around three basic options:

1. Prohibiting tax- or duty-free sales of tobacco products;
2. Applying excise taxes on tobacco products sold in tax- or duty-free stores; or
3. Limiting travellers' allowances for tobacco products to restrict private imports of tax- or duty-free tobacco products, such as by applying quantitative limits.

Recommendation

Parties should consider prohibiting or restricting the sale to and/or importation by international travellers, of tax-free or duty-free tobacco products.

COMMENTS

1. Section 6 states that tax- and duty-free sales bring about cheaper and more affordable tobacco products which would undermine the effects of tax and price measures aimed at reducing the demand for tobacco product. In order to advance public

health, we are of the view that Parties might need to consider implementing stricter rules on tax- and duty-free sales. For instance, Parties should be encouraged to decrease tax- and duty-free stores on the basis of a reasonable time-frame in light of national circumstances or to impose prohibition of new or more tax-and duty-free stores.

2. Limiting international travellers' allowances for tax- or duty-free tobacco products is not uncommon in practice. In certain countries, tax- or duty-free store could be established in downtown city, not in airports. In such a case, the verification of the identities of international travellers by checking passports or other effective measures would become more important so as to prevent non-travellers from buying tax- or duty-free tobacco products, which will increase the risk of illicit trade.

3. Apart from section 6 of the Guideline, Article 13 of Protocol to Eliminate Illicit Trade in Tobacco Products rules on tax- or duty-free sales. It is our view that the Guidelines and the Illicit Trade Protocol should apply consistently for Parties to the FCTC. In addition, it is noted that certain international regulations also provide for the matters of duty free sales. For instance, Article 3 of the Convention Concerning Customs Facilities for Touring (Convention of touring) and Article 16 of the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention). How

the FCTC rules with respect to tax- or duty-free might need to be considered by Parties.

12. COMMENTS ON SECTION 7: INTERNATIONAL COOPERATION

Relevant Texts of Section 7

International Cooperation

International cooperation in scientific and legal fields, provision of related expertise, and exchange of information and knowledge are important means of strengthening the capacity of Parties to meet their obligations under Article 6 of the WHO FCTC ...

The periodic reports of the Parties according to Article 21 of the WHO FCTC represent another important tool for international exchange and collaboration under the Convention. Article 6 of the WHO FCTC stipulates that the Parties shall provide rates of taxation for tobacco products, and trends in tobacco consumption in their periodic reports, in accordance with Article 21. ...

International cooperation would also help to ensure that consistent and accurate information related to global, regional and national trends and experiences in relation to tax and price policies is provided, particularly through the global treaty implementation database maintained by the Convention Secretariat. Parties may also consider reviewing the reports of other Parties, and the data and trends deriving from global progress reports presented to each regular session of the Conference of the Parties, to enhance their knowledge of international experiences with respect to tax and price policies.

...

Parties should cooperate in reviewing and, if necessary, updating these guidelines, according to a mechanism and timeline to be established by the Conference of the Parties, to ensure that they continue to provide effective guidance and assistance to Parties in establishing their tax and price policies with respect to tobacco products.

COMMENTS

1. It is our view that in order to be in line with the objective of the FCTC and increase the effectiveness of the Guidelines, non-Parties to the FCTC should be included into the international

collaboration network in relation to tax and price policies. From a practical perspective, non-Parties can contribute to closer cooperation in scientific and legal fields, provision of related expertise, exchange of information and knowledge or practical experiences. They could also help to establish comprehensive and accurate information related to global, regional and national trends and experiences in relation to tax and price policies.

2. Parties should cooperate in reviewing and updating the Guidelines. We suggest that a more specific periodical review schedule should be considered and integrated into the Guidelines, with the expectation to continue to provide effective guidance to Parties and help them in establishing good practices of tax and price policies with respect to tobacco products.

3. Given international cooperation is the key to enhance the capacity of Parties to meet Article 6 of the FCTC and establish consistent and accurate information related to trends and experiences in relation to tax and price policies, the Guidelines should propose “Recommendation” to Parties for actions in section 7 as provided in other sections.

DRAFTING MEMBERS
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THE COMMENTS AND RECOMMENDATIONS

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