

Guidance to support Trading Standards in complying with article 5.3 of the Framework Convention on Tobacco Control

Prepared by Trading Standards officers and the Illicit Tobacco Partnership

Endorsed by:



Public Health
England



CANCER
RESEARCH
UK

Section One: Why has this guidance been produced?

This guidance has been developed by the Illicit Tobacco Partnership (coordinated by Fresh) in consultation with colleagues in the endorsing organisations and it is designed to help Local Authority Trading Standards Services (LATSS) deliver tobacco control policies in line with the UK's obligations as a Party to the WHO [Framework Convention on Tobacco Control](#) (FCTC- the first global health treaty) and to the Illicit Trade Protocol to the FCTC. Article 5.3 of the FCTC requires the UK Government and public bodies to protect our public health policies with respect to tobacco control 'from commercial and other vested interests of the tobacco industry'. This document sets out the legal obligations placed on public authorities by the Treaty and illustrates established best practice for those working in this sector.

This guidance has been updated following:

- Implementation of the Standardised Packaging of Tobacco Products Regulations 2015
- Implementation of the Tobacco and Related Products Regulations 2016 in May 2017
- The adoption of EU-wide systems of traceability and security features for tobacco products to address the issue of illicit trade to be implemented by 20 May 2019 for cigarettes and hand rolling tobacco and 20 May 2024 for other tobacco products
- The coming into force of the Protocol to Eliminate Illicit Trade in Tobacco Products in October 2018.

It will be further updated when more information is available in relation to the practical elements around the track and trace provisions.

Section Two: General principles for best practice

2.1 How should LATSS react if the tobacco industry offers support?

LATSS should refuse offers of support from the tobacco industry if they are to comply with the guidelines accompanying Article 5.3 of the WHO FCTC and commit to the delivery of evidence-based tobacco control. Sometimes it is not always clear that it is the tobacco industry that is making the approach – industry funded groups such as the Tobacco Retailers Alliance and public relations agencies have also been known to make contact with local authorities¹. PR agencies seeking to make contact with Trading Standards on this issue should always be asked to disclose their clients in case they are working on behalf of a tobacco company.

In some limited and clearly defined cases, interaction with the tobacco industry is necessary for the purpose of investigating cases of counterfeit tobacco. The following principles, adapted from the legal advice sought by CTSI, should be considered when engaging with representatives of the tobacco industry:

- a. Local authorities should ensure that the nature of such engagement is as transparent as reasonably possible.
- b. Local authorities should ensure that the scope of such arrangement is as narrow as possible to achieve the goals and policies which the LATSS has in mind.
- c. It would be worthwhile recording in a document, if only for internal use, the decision making process relating to the engagement. This could show that the Guidelines were taken into account, and set out the reasons why it was felt that continuing with some form of engagement for certain limited ends would aid the implementation of the relevant public health policies.
- d. Particular care must be taken to ensure the potential risks which led to the recommended ban on partnerships in the Guidelines are taken into account. So for example it should be made clear to any contacts in the industry (if to any extent this does not already happen) that they should not describe any engagement they have with a local authority as ‘partnership’ or use such engagement to promote themselves or bolster their image, either in public or with other policy makers and public bodies.

2.2 Common scenarios and guidance

See below for some common scenarios along with guidance on responding to any offers that are received. This guidance does not preclude local authorities from going further in terms of protecting public health from tobacco industry interference, and advice in some scenarios can apply to others. This guidance should be read in conjunction with the ASH toolkit on Article 5.3 (link in section 6).

The general principles for best practice are:

- Decline offers of support from the tobacco industry.
- The tobacco industry’s only role in tackling illicit tobacco is limited and clearly defined: when seized illicit tobacco products are suspected to be counterfeit and a Section 9 statement is required for prosecution.
- Be transparent - document and make publicly available any contact with the tobacco industry, and the decision-making process involved, with the exception of a request for a Section 9 statement which should be recorded internally.

¹ [Tobacco Tactics](#) has a list of tobacco-related front groups and individuals associated with the tobacco industry including former police officers. The Tackling Illicit Tobacco for Better Health partnership has also produced a [briefing](#) on the tobacco industry and illegal tobacco.

- Any contact should be as narrow as possible to achieve the goals required. For instance tobacco-related intelligence offered by the tobacco industry can be submitted via the Regional Intelligence Analyst through secure channels and should never be delivered during a meeting.
- Make it a requirement of any contact that the industry cannot use any engagement for promotional purposes either in public, or with policy makers or public bodies.
- Let public health colleagues know about any approaches from the tobacco industry.

The tobacco industry requests a meeting with your local Trading Standards department

Unless a meeting is absolutely necessary, decline the request citing conflict with the guidelines on the implementation of Article 5.3 (and also state the Local Government Declaration if your authority has signed this) as the reason which states *“Parties should interact with the tobacco industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products”*.

- In the extremely rare situation where it is necessary to interact with the tobacco industry in order to effectively regulate them and their products, local authorities should ensure that such interactions are conducted transparently. Whenever possible, interactions should be conducted in public, for example through public hearings, public notice of interactions, and disclosure of records of such interactions to the public.

The tobacco industry approaches your local authority with offers of support to tackle illicit tobacco

- Decline the offer citing conflict with the guidelines on the implementation of Article 5.3 and the Local Government Declaration if your local authority has signed it.
- Be aware that the only instance in which the tobacco industry has a role in tackling the illicit tobacco trade is when the illicit tobacco products concerned are counterfeit, see section 2, above.
- If the offer relates to the provision of training by the tobacco industry on trademarks, or any other issue, refuse the request; training needs can be met through the Regional Co-ordinator or through the Chartered Trading Standards Institute without recourse to the tobacco industry. It is inappropriate to accept training from the tobacco industry and the industry’s interest relates only to protection of their brands. There are many other issues which LATSS are faced with when tackling illicit tobacco which are not brand-related, for example, Organised Crime Group networks, continually developing Modus Operandi, complex and deliberately opaque supply chains, legislation, track and trace provision, security features and so on.

The tobacco industry offers intelligence on illicit tobacco

- Tell them to submit it to the Trading Standards Regional Intelligence Analyst where it can be put on the intelligence database, checked for cross-local authority border links and considered along with all other intelligence received. This way, LATSS do not need to handle the intelligence, saving local authority time and providing protection from claims of partnership working with the industry.

The tobacco industry approaches your local authority with offers of support to tackle underage sales

- Remind the industry that the enforcement of age restricted sale legislation under the Children and Young Persons Act 1933 (as amended by the Children and Young Persons (Protection from Tobacco) Act 1991) places a duty on the local authority to consider annually the extent to which it is appropriate to carry out a programme of enforcement action. Therefore it is the function of the LATSS to take the lead in the gathering of any intelligence and taking of any requisite action.

You are asked to provide a quote by the tobacco industry/media to accompany an article promoting the tobacco industry role in tobacco control

- Alert Fresh and ASH if you need advice. Fresh has also produced a free open accessible handy PR guide on effective messaging on illicit tobacco: <https://www.illicit-tobacco.co.uk/resources/illegal-tobacco-pr-guide/>.

- Alert colleagues in your local public health team.
- Ask to see a copy of the press release and any quotes that have already been received from other spokespeople.
- Be wary of the purpose of the article – it could be reporting on a dubious piece of research from the tobacco industry.
- If a quote is offered, it could state that all tobacco kills, that at least one in two long term smokers will die early as a result of their addiction² and that nationally the size of the illicit tobacco market is declining. A PR guide on messages to use and messages to avoid is available on the [Illicit Tobacco Partnership](#) website.
- Be aware also of the continued involvement of the tobacco industry itself in facilitating the illicit trade in tobacco. A 2015 article in *The Lancet* outlined how the tobacco industry, despite its long history of involvement in the illicit tobacco trade, has over the last 15 years used its vast resources in its efforts to control every aspect of the debate over the illicit tobacco trade^[1] The tobacco industry has been manipulating the problem of tobacco smuggling for policy gain, using multiple tactics including extensive use of Third Party Techniques.
[http://tobaccotactics.org/index.php?title=Tobacco_Industry_Attempts_to_Undermine_the_FCTC_Illicit_Trade_Protocol_\(ITP\)](http://tobaccotactics.org/index.php?title=Tobacco_Industry_Attempts_to_Undermine_the_FCTC_Illicit_Trade_Protocol_(ITP))

The tobacco industry reports that it has been working in partnership with your local authority

- If this is inaccurate, correct the perception that you have been working in partnership and make it clear the circumstances through which this misperception may have arisen e.g. by holding a transparent and documented meeting.

In all cases, it is recommended that you let your public health colleagues know about the approach that has been made and your response.

Section Three: Background information

3.1 Impact of tobacco use on public health

Tobacco continues to have a big impact on community health and wellbeing. Tobacco use remains the leading cause of premature death and preventable disease and the cost of tobacco hits poor communities hardest, where rates of smoking are highest. In England every year there are around 80,000 premature deaths caused by tobacco with smokers losing years of active life through tobacco-related diseases³. Cigarettes are the only legal consumer product that kills when used as intended, with at least half of all lifetime users dying prematurely from their addiction⁴. Despite this death toll, tobacco companies have pledged that their core business remains tobacco. In annual statements to their shareholders they forecast growth in profits from sales of tobacco products for decades to come.

A recent development has been witnessed by Phillip Morris International in its establishment of the “Foundation for a Smokefree World” with the stated aim that it is “an independent, non-profit organisation created to accelerate global efforts to reduce health impacts and deaths from smoking, with the goal of ultimately eliminating smoking worldwide”.

An open letter to PMI dated 14 September 2017 and signed by 123 health groups urged the company, if it were serious about ‘designing a smoke-free future’, to “immediately cease the production, marketing and

² Doll R, Peto R, Wheatley K, Gray R, Sutherland I. Mortality in relation to smoking: 40 years observations on male British doctors. *British Medical Journal* 1994; 309:901-911

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213757/dh_124960.pdf

⁴ Doll R, Peto R, Wheatley K, Gray R, Sutherland I. Mortality in relation to smoking: 40 years observations on male British doctors. *British Medical Journal* 1994; 309:901-911

sale of cigarettes”.^[44] PMI responded by an open letter claiming that if it were to stop selling cigarettes, smokers would not quit smoking but switch to its competitors’ brands.^[45] “Indeed, our paramount business strategy is to replace cigarettes with less-harmful, smoke-free alternatives. That’s what we call a smoke-free future...” Subsequently this means a smoke-free future that is not based on smoking cessation, but on smokers switching from cigarettes to another tobacco product.

In 2018, tobacco companies have continued to approach local authorities – and local Trading Standards teams in particular – with offers to support their tobacco control strategies. This guidance specifically addresses how to handle offers related to enforcement primarily around tackling illicit tobacco but also in relation to other areas of enforcement including age-of-sale regulations. Local authorities are recommended to examine such offers critically in the light of Article 5.3 and its guidelines and only to engage with the tobacco industry where this is considered strictly necessary in order to effectively fulfil its obligations.

3.2 Guidelines to Article 5.3 of the WHO FCTC

The World Health Organisation has drafted FCTC guidelines to the convention, although not legally binding in themselves, illustrate how best practice should be adopted. If a local authority decides to diverge from the guidelines it is suggested the reasons for doing so should be documented. The [guidelines to Article 5.3](#) state that *“There is a fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests.”*

There are two key principles which run through the guidelines: that public authorities should maximise transparency in their interactions with the tobacco industry, and should as far as possible *“interact with the tobacco industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products.”*

Guidelines to Article 5.3 highlight in particular the need for parties to ensure that the tobacco industry are prevented from influencing tobacco control initiatives: *“Parties should not accept, support or endorse the tobacco industry organizing, promoting, participating in, or performing, youth, public education or any initiatives that are directly or indirectly related to tobacco control.”*

3.3 Responsibilities of Local Authorities

Since 1st April 2013 local authorities in England have been responsible through their statutory responsibility to public health, for improving the health of their local population. As smoking is the leading driver of premature death and health inequalities, strategies to reduce smoking prevalence are clearly central to delivery on this responsibility. LATSS play a significant role in this, enforcing tobacco-related legislation including age-of-sale regulations, point of sale legislation and packaging and labelling requirements.

Local authorities are autonomous bodies with elected members playing a pivotal role in the development of policy. Each authority should consider carefully how they protect the interests of public health policy development and may wish to take a stance which is different to this advice. Given the autonomy of local authorities, officers should be guided by local policy as well as this and other guidance that is available:

- The government’s Tobacco Control plan for England, led by the Department of Health and Social Care, published in July 2017 states that: *“There is a fundamental and irreconcilable conflict between public health and the interests of the tobacco industry. Under Article 5.3, the WHO FCTC includes an obligation for all countries that have ratified the treaty to protect public health policies from the commercial and other vested interests of the tobacco industry. The government will continue to uphold its obligations under the WHO FCTC. Local authorities are also responsible for meeting the treaty obligations set out in the WHO FCTC to protect their public health policies from the commercial and vested interests of the tobacco industry.”*

- The Chartered Trading Standards Institute published a policy in January 2014 on engagement with the tobacco industry which states that: *“TSI contact with the tobacco industry will be limited to the purpose of tackling counterfeit tobacco and we will engage in a transparent and open way. TSI, therefore, has made changes to ensure that we are compliant with FCTC and will continue to review this.”* <https://www.tradingstandards.uk/media/documents/policy/briefing-notes/tsi-fctc-policy-final-jan-14.pdf>
- Many local authorities have also signed the [Local Government Declaration on Tobacco Control](#) which includes the pledge that: *“We commit our council to protect our tobacco control work from the commercial and vested interests of the tobacco industry by not accepting any partnerships, payments, gifts and services, monetary or in kind or research funding offered by the tobacco industry to officials or employees.”*

In addition this guidance should be read in conjunction with the Chartered Trading Standards Institute legal advice on Article 5.3 which concludes that Article 5.3 FCTC is likely to be directly effective in UK law. This means it could be relied upon in legal proceedings brought by an individual or other non-state body against a public authority. An authority that does not act in compliance with the FCTC may be exposed to risk of judicial review. If a local authority decides to diverge from the guidelines it is suggested the reasons for doing so should be documented.

Section Four: When do Trading Standards need to work with the tobacco industry?

A popular tobacco industry ‘route in’ to local authorities is the assertion that, as brand holders, they are experts in tackling the illegal tobacco trade. In fact, their role is limited and clearly defined. Aside from their obligation to co-operate when their products are diverted into illicit channels, the only aspect of tackling illegal tobacco that the tobacco industry can reasonably participate in is when the products concerned are counterfeit, governed under the provisions of the Trade Marks Act 1994, which places a statutory duty on the LATSS to respond and deal with such matters.

In these circumstances a specific tobacco company or their assigned agent can, as the holder of the relevant trade mark, state categorically that a specific product is a genuine brand manufactured by them or a counterfeit version of their own product after a seizure has been made. Such a witness statement, known as a Section 9 statement, supported by the related Trade Marks Certificate, would be required for prosecution and can be obtained in most cases by posting seized products to the company concerned.

Best practice recommends that it is unnecessary for a brand holder or other tobacco industry representative to be present during warrants or to visit local authority officers in order to examine the seizures: after a seizure has been made, sample packs can be posted to the brand holder for examination. This will safeguard the local authority against the perception of a real or potential partnership or cooperation with the tobacco industry.

It is worth noting that there are a range of alternative offences to the Trade Marks Act which can be pursued, including using regulations relating to Reduced Ignition Propensity cigarettes, the new labelling and packaging requirements under the Tobacco and Related Products Regulations 2016 and the Standardised Packaging of Tobacco Regulations 2015 or one of the banned practices under Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and licensing provisions. These alternative offences do not require tobacco industry involvement.

Section Five: What are the risks of working with the tobacco industry?

LATSS continue to have a crucial role in the delivery of local public health strategies, the objectives of which are diametrically opposed to those of the tobacco industry. If a LATSS works with the tobacco industry on tackling illicit tobacco, experience has shown that:

- The local authority may lose control of any publicity associated with the exercise despite any pre-agreed arrangements, and the results may include inaccurate claims being made, for example that illicit tobacco is inherently more dangerous by containing e.g. rat droppings, floor sweepings and higher levels of harmful toxins. In view of the extreme damage to health caused by genuine, regular tobacco, this claim is misleading at best.
- The industry could use this as an opportunity to refer to 'working in partnership' with the local authority, jeopardising a local authority's perceived compliance with Article 5.3.

Examples of tobacco industry attempts to demonstrate partnership working to tackle the illicit tobacco trade include:

- Positive reporting of partnership working between the tobacco industry and local authorities to tackle illicit tobacco in the Intellectual Property Office Crime and Enforcement Report 2016/17
- Case studies featured in the Tobacco Manufacturers' Association briefing on tackling the illicit tobacco trade highlighting work with local authorities which overlapped the role of the tobacco industry.
- Imperial Tobacco offering advice to LATSS about the forthcoming track and trace and security feature provisions being introduced by the Tobacco Products Directive, despite the fact that these are still to be formalised and are being led by HMRC.

Section Six: What can be done to strengthen your approach to tobacco control?

If your local authority has not already done so encourage it to:

- Join the [Smokefree Action Coalition](#)
- Sign the [Local Government Declaration](#). If your local authority has signed up to the Declaration, use it to keep tobacco control a priority for your local authority.
- Undertake the CLear assessment tool on local tobacco control, and in 2019 a 'deep dive' tool on illicit tobacco action will be published by Public Health England:
<https://www.gov.uk/government/publications/clear-local-tobacco-control-assessment/the-clear-improvement-model-excellence-in-tobacco-control>
- A toolkit for Local Authorities to help them meet their obligations as parties to the World Health Organisation treaty on tobacco, the Framework Convention on Tobacco Control (FCTC – article 5.3) and to the Local Government Declaration on Tobacco Control is available [here](#). This includes a useful webinar which sets out some clear practical advice around trading standards and protection from tobacco industry vested interests
- If there is a local tobacco control alliance/partnership in your area, keep Trading Standards fully engaged in its discussions and the development of its action plan.

Appendix A: Update on the Protocol to Eliminate Illicit Trade in Tobacco Products: This 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 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.

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.

For more information visit: <http://www.who.int/fctc/protocol/about/en/>

More information for LATSS on the implications of the Protocol above including tracking and tracing provisions will be shared in due course.