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## **PUBLIC-PRIVATE PARTNERSHIP:**

### CONTROLLING ILLICIT TRADE OF TOBACCO IN THE ERA OF FAST CHANGE

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### **Final report of 5th Subprojects: Public-Private Partnership**

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## 1. Public-private partnerships (PPPs) as a (new) model of governance

PPP is not an unequivocal term, as it may be understood in many ways and analysed in different contexts. In the narrowest meaning it is understood as ‘long term contractual arrangements between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks’ (OECD, 2012). In its broadest meaning, however, PPPs are defined as ‘voluntary agreements between state and non-state actors that establish a set of norms, rules, practices, or implementation procedures that apply to multiple levels of governance. They involve joint decision-making and provision of public goods that go beyond ad-hoc interactions, lobbying, or contracting’ (Andonova, 2006) or as a ‘form of cooperation between actors from the public and the private sector that are set-up with the intention to continuously exist over a longer period of time’ (Ch. Paun, 2011). Understood in such a broad sense, PPPs may take one of the following forms (Ch. Paun, 2011):

- » collaborative PPP: collaborative provision of public services, or significant contribution thereto, where the private partners voluntarily invest significant resources beyond advice, with no remuneration from the public partner
- » contractual PPP: private provision of public services, based on a contract with a public partner that ensures payments to the private partners in return for their investment
- » advisory PPP: public partners that rely on non-paid advice from private partners for public policy decisions
- » consulting PPP: public partners that rely on paid consulting from private partners for public policy decisions
- » PPP network: a network of PPPs that differ from each other through non-identical membership or different forms of organisation, but that belong to each other by having the same management or by being a sub-group of a larger PPP or network

The **contractual PPP** is the most popular type of partnership, and – as a result – the best covered by literature. This type of PPP is based on a buyer-seller relationship and is used for infrastructure projects with a special form of participation by the private sector involving private financing. It is accepted, however, that in the context of combatting illicit trade, other types of partnerships will be more suitable, namely **advisory PPPs** and **consulting PPPs**, whereby public partners rely on non-paid advice from private partners for their public policy decisions (Ch. Paun, 2011). Depending upon the character and detailed provision of particular memoranda of understanding (MoU), a PPP may be considered an advisory or consulting PPP.

The survey of available literature and reports reveals the growing importance of the global aspect of PPPs, which are defined as **transnational PPPs**. Thus, not only is there a visible trend to enhance cooperation between the public and the private sectors, which is limited to one country only, but there is also an effort to develop cooperation within broader, transnational frameworks coordinated by groups of states or bodies established within international organisations.

The PPPs, and in particular MoUs, are usually voluntary agreements between the public and the private sector. On the one hand, MoUs may be treated as a more effective way to attain public policy objectives. On the other hand, as these are voluntary arrangements, they lack enforcement provisions, resulting in a considerable flaw. In particular, with respect to MoUs within the tobacco industry, the lack of these agreements’ enforceability is commonly criticised in literature.

## 2. Experience from other (non-tobacco) industries

### 2.1. State of play – identification of other industries affected by illicit trade

Illicit trade has already been identified in industries other than tobacco, in particular:

- » **counterfeit medicines:** defined as ones which are ‘deliberately and fraudulently mislabelled with respect to identity and/or source; counterfeiting can apply to both branded and generic products and counterfeit products may include products with the correct ingredients or with the wrong ingredients, without active ingredients, with insufficient active ingredients or with fake packaging’ (WHO, 2015);
- » **illicit narcotics,** in particular opiates, cocaine, cannabis, and amphetamine-type stimulants (UNODC, World Drug Report 2017; World Customs Organisation, 2017 Illicit Trade Report);

The estimated volume and scope, as well as the adverse consequences, have already been identified in several reports, in particular in respect of counterfeit medicines (K. Lybecker in OECD report *Illicit Trade. Converging Criminal Networks*, 2016) and the illicit narcotic trade (C. P. Clarke in OECD report *Illicit Trade. Converging Criminal Networks*, 2016).

Still, the international legal framework in the above sectors differs considerably from the international (and EU) tobacco legal framework.

### 2.2 International legal framework

The PPPs in the field of combatting illicit trade are highly influenced by standards stemming from international law. The more restrictive these standards are for States, the more reluctant they may be to establish PPPs within the industry. Thus, the scope of PPPs may be influenced by the ‘constraints’ imposed by international law.

#### » **Illicit medicines**

In respect of combatting illicit medicines, the UN Office for Drugs and Crime (UNODC) published a document in 2019 ‘*Combatting falsified medical product-related crime: a guide to good legislative practices*’, containing, in particular, guidelines for national cooperation in the field. National cooperation among all relevant stakeholders - including those in industrial and commercial sectors – is considered crucial in any legal framework aiming to comprehensively address counterfeit medical product-related crime. Thus, in the field of combatting illicit medicines, cooperation between the government and the industry is not excluded.

Combatting illicit trade in pharmaceuticals is also subject to the **Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (Moscow 28.10.2011)**

According to its Article 17, the contracting States are under specific obligations with regard to cooperation and information exchange, which shall take place between the States, namely representatives of health authorities, customs, police and other competent authorities, without explicit engagement with the industry. In addition, however, the contracting States shall also ‘ensure cooperation between its competent authorities and the commercial and industrial sectors as regards risk management of counterfeit medical products and similar crimes involving threats to public health’.

The States are also obligated to take measures to setup or strengthen mechanisms for: collection of information and data, ‘including through contact points, at national or local levels and in collaboration with private sector and civil society, for the purpose of preventing and combating the counterfeiting of medical products and similar crimes involving threats to public health’ and to ensure training for people, units or services in charge of co-operation and information exchange.

It must be emphasised, however, that the Convention came into force on 01/01/2016, but was only ratified by 6 Member States of the EU (at the time of writing the report: Belgium, Croatia, France, Hungary, Portugal and Spain).

» **Illicit drug trafficking**

Combatting illicit drug trafficking is discussed in the following international treaties:

- » United Nations Single Convention on narcotic drugs, as amended by the 1972 Protocol amending the Single Convention on narcotic drugs, 1961 (further as UN Convention 1961)
- » UN Convention on psychotropic substances, 1971 (further as UN Convention 1971)
- » UN Convention against illicit traffic in narcotic drugs and psychotropic substances, 1988 (further as UN Convention 1988)

1. According to art. 1 (1) of the UN Convention 1961, illicit traffic means ‘cultivation or trafficking in drugs contrary to the provisions of this Convention’. The actions that the Convention’s Parties shall undertake against drug trafficking are formulated in very general terms and consist in particular in:

- » planning at the national level for co-ordination of preventive and repressive action against the illicit trafficking; to this end they may usefully designate an appropriate agency responsible for such co-ordination;
- » assisting each other in the campaign against illicit narcotic drug trafficking;
- » co-operating closely with each other and with competent international organizations of which they are members with a view to maintaining a co-ordinated campaign against illicit trafficking;
- » ensuring that international co-operation between the appropriate agencies be conducted in an expeditious manner; and
- » ensuring that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel.

There are no specific limitations or restrictions concerning establishing PPPs in combatting illicit trade.

2. According to Article 21 of the UN Convention 1971 the contracting states are under obligations to:

- » make arrangements at the national level for the co-ordination of preventive and repressive action against illicit trafficking; to this end they may usefully designate an appropriate agency responsible for such co-ordination;
- » assist each other in the campaign against trafficking in psychotropic substances, and in particular immediately transmit, through the diplomatic channel or the competent authorities designated by the Parties for this purpose, to the other Parties directly concerned, a copy of any report addressed to the Secretary-General under article 16 in connection with the discovery of a case of illicit trafficking or a seizure;
- » co-operate closely with each other and with the competent international organizations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic;
- » ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner;

- » ensure that, where legal papers are transmitted internationally for the purpose of judicial proceedings, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel.

Again in this case, no further restraints on or limitations to establishing PPPs are envisaged in this convention.

3. Article 9 of the UN Convention 1988 is drafted to enhance international cooperation in the field of combatting illicit trafficking in narcotic drugs and psychotropic substances, and identifies specific forms of cooperation. According to Article 9, the contracting States are under an obligation to cooperate closely with one another, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of offences, as established in Article 3(1) of this Convention. In particular, they are under an obligation to:

- » establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences established in accordance with Article 3, Paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities;
- » co-operate with one another in conducting enquiries, with respect to offences established in accordance with Article 3, Paragraph 1, having an international character (concerning, in particular, the identity of suspected persons and movement of substances);
- » establish joint teams (in appropriate cases and if not contrary to domestic law), taking into account the need to protect the security of persons and of operations to carry out the provisions of this paragraph;
- » provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;
- » facilitate effective co-ordination between their competent agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers.

It is also envisaged that contracting States shall initiate, develop or improve specific training programmes for its law enforcement and other personnel, including customs officials, charged with the suppression of offences established in accordance with Article 3, Paragraph 1. These trainings shall specifically cover:

- » methods used in the detection and suppression of offences committed in accordance with Article 3, Paragraph 1;
- » routes and techniques used by persons suspected of being involved in offences established in accordance with Article 3, Paragraph 1, particularly in transit States, and appropriate countermeasures;
- » monitoring of the import and export of narcotic drugs, psychotropic substances and substances in Table I and Table II;
- » detection and monitoring of the movement of proceeds and property derived from narcotic drugs, psychotropic substances and substances in Table I and Table II, and instrumentalities used or intended for use in the commission of offences committed in accordance with Article 3, Paragraph 1;
- » methods used for the transfer, concealment or disguise of such proceeds, property and instrumentalities;
- » collection of evidence;
- » control techniques in free trade zones and free ports;
- » modern law enforcement techniques.

These Convention provisions do not mention third parties and set no restrictions to the PPPs.

The preliminary conclusion is that the international framework covering the eradication of illicit trade in drugs and psychotropic substances is much less restrictive for possible PPPs in this field. This may result in a conclusion that no analogy can be drawn between the drug and tobacco sectors, where the FCTC sets very restrictive and precise limitations to the PPPs within the tobacco industry.

The international provisions have been incorporated into EU law by i.a. **Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors** (OJ L 47, 18.2.2004, p. 1).

According to its Article 9, the Commission is obligated to draft and update guidelines to assist the chemical industry in order to facilitate cooperation between competent authorities, operators and the chemical industry. The guidelines shall in particular provide for: (a) information on how to recognise and notify suspect transactions; (b) a regularly updated list of non-scheduled substances to enable the industry to monitor on a voluntary basis the trade in such substances; (c) other information which may be deemed useful.

In addition, the criminal aspects of drug trafficking are covered by the **Council Framework Decision 2004/757/JHA, as amended by Directive (EU) of the European Parliament and of the Council of 15 November 2017 in order to include new psychoactive substances in the definition of ‘drug’** (OJ L 305, 21.11.2017, p. 12).

### 2.3. Examples of PPPs

In sectors other than the tobacco industry, there is no publicly-available evidence of PPPs aimed at eliminating illicit trade. It seems that the focus is on effectiveness of sanctions (OECD Governance Frameworks to Counter Illicit Trade, 2018).

Still, there is an identifiable new tendency to establish transnational PPPs, in the framework and under auspices of international organisations or bodies, dedicated to combatting transnational crime such as illicit trade.

In all of the United Nations Office on Drugs and Crime’s fields of interest, PPPs are observed and promoted. The promoted forms of PPPs take the following forms:

- » **in the field of illicit trade in cultural property:** public-private partnerships in order to promote and support training on cultural property regulations for cultural institutions and the private sector, in cooperation with relevant international organizations, including rules on the acquisition of cultural property; where the trainings would be financed by the public authorities (UN Office on Drugs and Crime, Practical assistance tool to assist in the implementation of the international guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property and other related offences, 2016).
- » **in the field of cybercrime:** public-private partnerships as forms of cooperation shall be focused on: (a) The creation of permanent and secured information-sharing channels between law enforcement authorities and the private sector. (b) The real-time sharing of information with both Computer Emergency Response Teams (CERTs) and law enforcement, related to hacking cases and to new modus operandi. (c) The sharing of experiences from investigations and prosecutions. (d) The sharing of technical prevention and protection measures. (e) The sharing of information on technological development trends and achievements. (f) The sharing of best practices related to IT education and training of end users. (g) The creation of a common cybercrime taxonomy. (h) The fostering of technology innovations and investment to meet global security challenges (World Economic Forum, Recommendations for public-private partnership against cybercrime, 2016, Recommendation 1).
- » **in the field of cybercrime:** focus on secure and trusted information-sharing mechanisms between the public and private sectors so that timely and actionable cyber alerts, classified or sensitive

information can be shared both domestically and across international borders, as well as training and research (Kim-Kwang Raymond Choo, *The Cyber Threat Landscape: Challenges and Future Research Directions*, *Computers & Security* xxx (2011) 1 e1 3)

- » **in the field of crime in general:** where Member States recognized the importance of strengthening public-private partnerships in preventing and countering crime in all its forms and manifestations, and convinced that, through the mutual and effective sharing of information, knowledge and experience and through joint and coordinated actions, Governments and businesses can develop, improve and implement measures to prevent, prosecute and punish crime, including emerging and changing challenges, (Bearing in Mind the Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, 103)
- » **in the field of crime in general:** cooperation between states and the private sector may be based on national legislation or on a voluntary basis to counter all forms of crime, including drug trafficking and terrorism (The Commission on Crime Prevention and Criminal Justice, Resolution 19/1 Strengthening public-private partnerships to counter crime in all its forms and manifestations); the specific fields or methods were not detailed.

There are also interesting examples concerning intellectual property crimes in the context of cooperation in the framework of Interpol and WCO.

- » **The Interpol IP Crime Action Group (IIPCAG, established in 2002):** including Interpol officers, representatives from the States and representatives from the relevant business associations; the group encompassed different activities, including crime fighting operations, training seminars, conferences and a database to exchange information (Ch. Paun, 2011)
- » **World Customs Organization Intellectual Property Rights Strategic Group (functioning until 2007):** organised as a collaborative PPP group with about four meetings per year and approximately eight global training seminars per year; including public international organisations, government agencies from the states and private sector associations; the funding for training seminars came not only from the private sector but also from public sector organizations such as the WIPO and EU. It is reported that when the group drafted a model law on IP enforcement that went beyond the minimum standards required by the TRIPS-Agreement, it was criticised for being too private-sector driven (Ch. Paun, 2011).
- » **World Health Organisation - International Medical Products Anti-Counterfeiting Task-force (IMPACT, founded in 2006):** is comprised of public international organizations and government agencies from WHO member countries and private sector associations; it was divided into several working groups

### 3. Comparison of the tobacco sector with other sectors facing illicit trade

#### 3.1 International legal framework

The legal framework around eradicating illicit tobacco trade consists of: EU Tobacco products Directive (EU TPD), the FCTC and the FCTC Anti-Illicit Trade Protocol. These instruments were analysed in Subproject 4.

It is still useful to recall for the purpose of this Subproject that, according to Article 5.3 of the FCTC ‘In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.’

The Contracting States are obliged to report on the implementation of the FCTC, in particular on Article 5.3. An analysis of this reporting is included below in part 3.2.

Article 5.3 of the FCTC is interpreted by WHO in a restrictive way, as advised in the ‘Guidelines for implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control’. The Guidelines are not a binding instrument, as their purpose is ‘to assist Parties in meeting their legal obligations under Article 5.3 of the Convention’. Still, the assessment of implementation of Article 5.3 of the FCTC is undertaken not only in the light of this provision as it stands, but also in consideration of the Guidelines.

For that reason, it is important to note that the Guidelines suggest that the States ‘reject partnerships and non-binding or non-enforceable agreements with the tobacco industry. The tobacco industry should not be a partner in any initiative linked to setting or implementing public health policies, given that its interests are in direct conflict with the goals of public health’.

More detailed recommendations are as follows:

- 3.1 Parties should not accept, support or endorse partnerships and non-binding or non-enforceable agreements as well as any voluntary arrangement with the tobacco industry or any entity or person working to further its interests.
- 3.2 Parties should not accept, support or endorse the tobacco industry organizing, promoting, participating in or performing in youth, public education or any initiatives that are directly or indirectly related to tobacco control.
- 3.3 Parties should not accept, support or endorse any voluntary code of conduct or instrument drafted by the tobacco industry that is offered as a substitute for legally enforceable tobacco control measures.
- 3.4 Parties should not accept, support or endorse any offer for assistance or proposed tobacco control legislation or policy drafted by or in collaboration with the tobacco industry.

The FCTC Anti-Illicit Trade Protocol also contains specific obligations concerning potential cooperation with the tobacco industry:

- » **art. 4 (2):** ‘In implementing their obligations under this Protocol, Parties shall ensure the maximum possible transparency with respect to any interactions they may have with the tobacco industry’
- » **art. 8(12):** obligations assigned to States, concerning the establishment of a global system of track and trace ‘shall not be performed by or delegated to the tobacco industry’.
- » **art. 8(13):** ‘each Party shall ensure that its competent authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of this Article’.
- » **art. 8(14):** the States may require the tobacco industry to bear any costs associated with that Party’s obligations to establish a track and trace system.
- » **art. 36(7):** ‘Parties may require the tobacco industry to bear any costs associated with a Party’s obligations to achieve the objectives of this Protocol, in compliance with Article 5.3 of the WHO Framework Convention on Tobacco Control’.

These obligations have also been at least partially included in the TPD, adopted in 2014, with a view to be implemented by all EU Member States. Namely:

1. the laboratories responsible for measurement of the tar, nicotine and carbon monoxide emissions from cigarettes, that the Member States must approve and monitor, ‘shall not be owned or controlled directly or indirectly by the tobacco industry’ (article 4(3) TPD);
2. the data storage contracts shall be concluded with an independent third party (art. 15(8) TPD).

More detailed rules for independence have been included in the implementing acts, concerning:

1. ID issuers, providers of repository services and anti-tampering devices as well as, where applicable, their subcontractors (art. 35 of Commission Implementing Regulation (EU) 2018/574 of 15

December 2017 on technical standards for the establishment and operation of a traceability system for tobacco products, OJ L 96, 16.4.2018, p. 7);

2. providers of authentication elements, as well as, where applicable, their subcontractors (art. 8 of Commission Implementing Decision (EU) 2018/576 of 15 December 2017 on technical standards for security features applied to tobacco products, OJ L 96, 16.4.2018, p. 5);
3. members of the independent advisory panel (art. 16 Commission Implementing Decision (EU) 2016/786 of 18 May 2016 laying down the procedure for the establishment and operation of an independent advisory panel assisting Member States and the Commission in determining whether tobacco products have a characterising flavour, OJ L 131, 20.5.2016, p. 79); in particular the panel members shall refrain from having any direct or indirect contact with the tobacco industry or its representatives.

Comparison of the legal framework surrounding potential cooperation between governments and the tobacco industry, with the legal framework in other sectors facing illicit trade, supports the conclusion that the regulation is much more restrictive for the tobacco industry than for other industries. This leads to the inference that the margin of appreciation of States in shaping these relations with the tobacco industry is consequently diminishing, as the States are under increasingly more stringent obligations to restrict or even cease contact with the industry. There is no such visible trend in other international regulations aimed at eradicating an illicit trade.

For that reason, drawing on experience from sectors other than tobacco may not be as useful as originally thought at the beginning of the present project. In other words, the forms of cooperation between the industry and governments, which are possible or even welcomed in other sectors, may not be allowed under strict regulations concerning eradication of the illicit trade in tobacco products.

### 3.2. State of play

The recent survey conducted by Crosbie, Bialous and Glantz (2019) is evidence that reliable information on existing MoUs in the tobacco sector is very difficult to obtain. Available information comes mostly from tobacco companies, WTO reports or media news. The MoUs which could be identified (apart from those originating in the UK or EU), originated in:

- » Hungary (BAT, 2005, no details available),
- » Romania (BAT, JTI, 2007, no details available),
- » Latvia (with Imperial, 2015, no publicly available details),
- » Ireland (JTI, 2009, containing clause on sharing information and improving cooperation), Luxembourg (JTI, 2011, containing clause on sharing information; and with Imperial, 2012, containing clause on exchange of information),
- » France (with Imperial, 2012, containing a clause on exchange information on any seized tobacco shipments, training of customs officials) (see for details, Crosbie, Bialous and Glantz, 2019).

At the same time, when reporting on the implementation of art. 5.3. of the FCTC, the Contracting Parties (<https://untobaccocontrol.org/impldb/>) are not willing to share detailed information (only EU Member States were considered):

- » these countries, which share no information at all (Belgium, Bulgaria; Romania, which has not reported in 2018),
- » countries which have admitted to not using Guidelines (Denmark, Greece, Hungary, Italy, Latvia, Sweden),
- » countries which admit to using Guidelines but without further details (Croatia, Estonia, Finland, France, Germany, Luxembourg, Malta, Netherlands, Poland, Slovakia, Slovenia, Spain).

Only a few Member States shared more detailed information:

- » **Cyprus:** is the only EU Member State which has stated that there are no partnerships or agreements with the tobacco industry.
- » **Austria:** which declared that ‘the Federal Ministry of Health is not having any direct contact as such to representatives of the tobacco industry when it comes to the drafting of law targeting the tobacco industry’s interests. Nevertheless, based on constitutional law, representatives of the industry themselves (as any other citizen too) have the right to submit their positions to draft law related to their business by means of the official evaluation procedure. The attempts of the tobacco industry to undermine the existing legal provisions prohibiting advertisement and sponsoring were rejected by the legislator and by various high court decisions’;
- » **Czech Republic:** which declared that Article 5.3 of the FCTC was promoted by the Ministry of Health during consultations of the preparation of the draft act on lobbying (in the process of preparation; the government approved draft rules in February 2018);
- » **Ireland:** which declares that raising awareness of the obligations stemming from this article is a recognised objective of the government’s Tobacco Control Strategy
- » . The Minister for Health has, over the years and as recently as November 2017, written to all Government Ministers and all Heads of Government Departments outlining their commitments under Article 5.3. The Guidelines developed in relation to Article 5.3 were also circulated. In addition, Government officials are reminded on a regular basis of Ireland’s obligations under Article 5.3 when engaging in tobacco related matters.
- » **Lithuania:** which declared that the law protecting tobacco policy making and implementation from commercial and other vested interests of the tobacco industry has been enacted;
- » **Netherlands:** which declared that the government prepared a document on interpretation of Article 5.3 and circulated it among municipalities and ministries;
- » **Portugal:** which declared that the members of the technical consultative body in the field of tobacco regulation created by the tobacco law must declare no conflict of interests with the aim of smoking prevention and control.
- » **United Kingdom:** in 2015 the government published a document ‘Tackling illicit tobacco: From leaf to light: The HMRC and Border Force strategy to tackle tobacco smuggling’, in which it declared the establishment of the Anti-illicit Joint Working Group. The purpose of the group was to engage in discussions concerning the track and trace system from 2015. The list of meetings with the tobacco industry is published from 2012. Currently, no further information concerning the agenda of the working group is publicly available.

The guidelines for implementation of Article 5.3 of the WHO FCTC were considered and incorporated into ‘Healthy Lives Healthy People: A Tobacco Control Plan for England’ and the subsequent Tobacco Control Plan ‘Towards a Smokefree Generation: A Tobacco Control Plan for England’ published in July 2017. The guidelines were also used to develop cross-government training and guidance for overseas officials as well as The Trading Standards Institute (‘TSI’) and local authority trading standards departments (‘TSDs’). One of the actions declared in ‘Tobacco Control Plan Delivery Plan 2017 - 2022’ was to limit direct contact with the tobacco industry to that necessary to discuss the implementation of regulatory provisions or operational matters, and more broadly to encourage tobacco companies to engage with the government in writing rather than by face to face discussions, email or phone so as to maximise transparency.

## 4. Conclusions

The analysis of the international legal framework and the comparison between the tobacco industry and other industries which face illicit trade leads to the conclusion that the regulation of States' obligations are much more comprehensive with respect to eradicating the illicit tobacco trade. This in turn must lead to the conclusion that drawing analogies between other sectors and the tobacco industry may not be useful for the identification of possible new means of combatting illicit trade. As was presented above, the legal obligations (established in order to combat global illicit trade in tobacco) restrict, to a considerable extent, the margin of appreciation left to States, in particular EU Member States. Taking into account the proviso of Article 5.3 of the FCTC, Guidelines for implementation of Article 5.3 of the FCTC, as well as the FCTC Anti-Illicit Trade Protocol and the Tobacco Products Directive, it may be concluded that there will be growing pressure from WHO towards Parties of these international agreements to limit (if not break) cooperation with the tobacco industry.

Furthermore, the analysis of abundant literature on eliminating illicit trade in tobacco reveals that there is a considerable body of publications which (without entering into details and without assessing its reasonableness) casts doubts on the tobacco industry's cooperation with governments and public bodies aimed at combatting illicit trade, questioning the reliability of data gathered by the tobacco industry (Allen W A Gallagher et. Al, 2018), as well as involvement of the tobacco industry in establishing the global track and trace system (see for recent assessment on this point Gilmore, Gallagher, Rowell, 2019; Crosbie, Bialous, A Glantz, 2019). This may also have impact on the reluctance of Member States to engage in new methods of cooperation with the tobacco industry.

On the other hand, the survey of the WHO database on reporting implementation of the FCTC reveals that not all Member States are aware of Article 5.3 of the FCTC, nor have they implemented internal policies in order to implement this provision. Mostly, prohibition in Article 5.3 of the FCTC is understood in a narrow way, as prohibition of interference with 'setting and implementing their public health policies', namely within the legislative process. For that reason, reporting Member States focus on the elimination of conflict of interests and on transparency of mutual relations between public bodies and the tobacco industry. Only Cyprus explicitly denied existence of agreements with the industry. It is expected that the discussion between rigorous interpretation of Art. 5.3 FCTC by WHO on the one hand, and more flexible interpretation from States on the other, may continue.

In addition, the FCTC Anti-Illicit Trade Protocol excludes interference by the tobacco industry only in the context of the track and trace system (Article 8). It is clear that there is no room for MoUs, where the States are under an obligation to introduce binding obligations on the tobacco industry actors, such as licences, approvals and control, due diligence, the track and trace system, record-keeping etc., as well as when they are obligated to introduce definitions of offences and criminal sanctions. Still, partnerships with the tobacco industry are not explicitly excluded in the context of investigative techniques (art. 19 of the Protocol) nor in the context of international cooperation (Art. 20 and forth). It seems that there may still be room for cooperation in this context, with due regard to Article 4(2) of the Protocol, which requires States to ensure 'maximum possible transparency with respect to any interactions they may have with the tobacco industry' when implementing the Protocol.

## SUBPROJECT 5, ANNEX I: LIST OF MATERIALS USED FOR DESK RESEARCH

No.	type	Title	Internet link
1	Legal act	WHO (2003). WHO Framework Convention on Tobacco Control	<a href="https://apps.who.int/iris/bitstream/handle/10665/42811/9241591013.pdf?sequence=1">https://apps.who.int/iris/bitstream/handle/10665/42811/9241591013.pdf?sequence=1</a>
2	Legal act	WHO (2013). Protocol to eliminate illicit trade in tobacco products	<a href="https://apps.who.int/iris/bitstream/handle/10665/80873/9789241505246_eng.pdf?sequence=1">https://apps.who.int/iris/bitstream/handle/10665/80873/9789241505246_eng.pdf?sequence=1</a>
3	Legal act	WHO (2008). Guidelines for implementation of Article 5.3 Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry	<a href="https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/">https://www.who.int/fctc/treaty_instruments/adopted/article_5_3/en/</a>
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