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**DEATH CLOCK**

SINCE THE OPENING OF THE  
FIRST WORKING GROUP FOR  
THE FRAMEWORK CONVENTION  
ON TOBACCO CONTROL ON  
25 OCTOBER 1999

**58,432,327**

PEOPLE HAVE DIED FROM  
TOBACCO-RELATED DISEASES.  
(AS OF 9AM GENEVA TIME  
ON 3 APRIL 2012)

## COUNTERFEITING: RESISTING THE PRESSURE TO USE A PUBLIC HEALTH PROTOCOL TO DEFEND INTELLECTUAL PROPERTY RIGHTS

Yesterday saw another round of spirited discussions about counterfeiting – particularly with respect to the mentions in draft Article 12.

Late in the evening, Parties did agree to withdraw the mention of counterfeiting from Article 20 (General information sharing), but at last report, had not returned to the question of whether counterfeiting should be mentioned as an unlawful act under 12.1(c)(i).

One reason for the ongoing controversy is doubtless the ambiguity of the term “counterfeit”. In the case of medicines, it can mean both adulterated, substandard drugs, which are a significant public health hazard, and “knock-off” drugs, manufactured in violation of some countries’ trademark or other intellectual property rules. The former is a health issue; the latter is a commercial issue.

**All Cigarettes Kill**

In the case of tobacco products, however, there is not much profit to be made in making “adulterated” products – the “unadulterated” versions are very cheap to produce. There is also no indication of any significant difference in level of harm to health – “legal” cigarettes are as bad for you as illegally manufactured ones. So “counterfeit” or “falsified” (which have the same Spanish-language equivalent, by the way: falsificado) means exclusively cigarettes sold under a particular trademark, without the permission of the trademark holder.

Another proposal is to replace the term “counterfeiting” with “illegal manufacturing”. This idea has some potential, in that it would capture phenomena such as the production of unbranded cigarettes for black-market sale.

However, it is potentially circular to include “illegal manufacturing” in the list of acts that Parties are required to make unlawful, as this amounts to an obligation to ban that which is illegal. To escape this circularity, Parties would need to define the term “illegal manufacturing”, for example to mean manufacturing without a licence. But manufacturing without a licence is already covered by draft 12.1(a).

In short, frustrating as it may be to all the Parties seeking a compromise with the European Union, the most logical solution remains simple deletion of 12.1(c)(i), and amendment of 12.1(c)(ii) to eliminate references to counterfeiting tobacco products.

**Is There a Rationale?**

Talking of the European Union – missing from their statements to date has been any public health rationale of extending the scope of the Protocol to the protection of the tobacco industry’s intellectual property.

When counterfeiting is associated with failure to pay taxes, it must already be made unlawful as per 12.1(b). When counterfeiting is associated with unlicensed manufacturing, it is covered by 12.1(a).

So the only additional acts that might be caught by the reference to “counterfeiting tobacco products” in 12.1(c)(i) would be violations of trademark on tax-paid sales. This type of violation does indeed occur. As we noted last week, the World Customs Organization mentions this issue on its website: “Counterfeit cigarettes are sometimes declared to Customs as genuine ones at the point of entry. In this way, counterfeit cigarettes are introduced into the licit market and... duties and taxes are paid...”

*continued on page 2*

# FRANCE : DÉPUTÉS LOBBYISTES DE L'INDUSTRIE DU TABAC

Les députés français Binetruy, Dumont et Lazaro ont déposé, le 5 octobre 2011, leur rapport d'information sur les « Conséquences fiscales des ventes illicites de tabac »<sup>1</sup>, qu'ils ont produit pour le compte de la Commission des finances du Parlement français. L'industrie du tabac et les buralistes ont été largement consultés : les parlementaires ont auditionné pas moins de dix représentants des fabricants de cigarettes (trois de BAT, deux d'Imperial Tobacco, deux de JTI, deux de Philip Morris, un de Republic technologies - fabricant de papier à rouler) ainsi que sept représentants des buralistes.

En revanche, les représentants de la santé publique n'ont pas eu réellement voix au chapitre : en tout et pour tout, un représentant du ministère de la santé et deux représentants de l'Observatoire français des drogues et toxicomanies (OFDT) ont été auditionnés. La mission parlementaire n'a pas daigné entendre ne serait-ce qu'un seul représentant des associations impliquées dans la santé publique et la prévention du tabagisme en France.

On ne sera donc pas surpris de constater que les conclusions du rapport sont pour l'essentiel alignées sur les positions des industriels du tabac. Les députés recommandent notamment (Recommandation No. 8) de « *refuser le paquet générique* » et se prononcent contre la vente sous le comptoir car, disent-ils, ces mesures « *paraissent de nature à favoriser le trafic illicite* », sans autre forme d'explication, tout en déclarant qu'elles « *ne semblent pas rencontrer l'assentiment des organismes de lutte contre le tabagisme* ».

## Crédit d'impôt aux buralistes

En revanche, le rapport recommande d'accorder des facilités de crédit d'impôt aux buralistes pour leur permettre de « *renover les linéaires* » (Recommandation

No. 4), c'est-à-dire pour mieux mettre en valeur les produits du tabac.

Se disant motivé par un objectif de santé publique, le rapport propose de lancer une vaste campagne nationale d'information sur les dangers ... de la contrefaçon (Recommandation No. 6). En prise directe avec les arguments de l'industrie du tabac, la mission parlementaire se dit préoccupée « *des conséquences désastreuses pour la santé publique du développement de la contrefaçon* ». Il est précisé que la campagne préconisée « *devra être conduite par le Gouvernement, mais également par les fabricants* », offrant ainsi une formidable tribune publicitaire à l'industrie.

Tout en constatant qu'« *un cahier des charges est en cours d'élaboration par les services de la DGDDI [Direction générale des douanes] qui imposera aux fabricants le principe d'une solution technique permettant l'identification de l'origine et l'authentification des produits* », le rapport exprime le souhait que « *cette solution soit adoptée rapidement car les solutions techniques existent aujourd'hui*. » Il s'agit probablement de prendre de vitesse les décisions qui pourraient émaner du Protocole sur le commerce illicite du tabac – protocole qui n'est mentionné nulle part dans le rapport.

## Des chiffres faux

La mission parlementaire a aussi entendu Pierre Delval, le directeur général de la World Anti Illicit Traffic Organization (appelée aussi « Fondation WAITO »)<sup>2</sup>, ONG créée en décembre 2010 et basée à Genève. Il est abondamment cité dans le rapport. On peut notamment lire, page 29, le passage suivant : « *Sur le plan mondial, M. Pierre Delval a estimé devant la mission d'information que sur 1000 milliards de cigarettes produites chaque*

*année, plus de 300 milliards disparaissent du marché licite pour réapparaître dans le marché parallèle* ». La mission parlementaire ne remet pas en cause cette estimation malgré le caractère évidemment faux de ces chiffres : on sait que la production mondiale de cigarettes se situe autour de 5 600 milliards d'unités et toutes les estimations sérieuses du commerce illicite de cigarettes le situent autour de 12%.

La mission parlementaire a été conduite au mépris de l'obligation qu'a la France de protéger sa politique de santé publique contre l'ingérence de l'industrie du tabac, conformément à la CCLAT. Le rapport et ses recommandations unilatérales illustrent parfaitement les effets néfastes de l'emprise des compagnies cigarettières sur des élus politiques. En invitant massivement les industriels du tabac à s'exprimer, et en excluant les organisations de santé publique et de prévention du tabagisme, la mission parlementaire s'est exposée à la désinformation et a d'emblée pris le parti d'un rapport partial, qui favorise les intérêts commerciaux particuliers des fabricants et des vendeurs de tabac, au détriment de la santé publique, c'est-à-dire de l'intérêt général.

La leçon que nous pouvons tirer de cette mésaventure française est simple : en matière de commerce illicite, comme en matière de santé publique, il est crucial de prendre toutes les mesures nécessaires pour protéger les politiques publiques de l'influence de l'industrie du tabac. Et la meilleure façon d'y parvenir, c'est d'appliquer strictement l'article 5.3 de la CCLAT et ses directives. ■

**Pascal Diethelm**  
**Président, OxyRomandie, Suisse**  
**Vice-président, CNCT, France**

<sup>1</sup> Voir <http://www.assemblee-nationale.fr/13/pdf/rap-info/i3786.pdf>

<sup>2</sup> Voir <http://www.waitofoundation.org>

## COUNTERFEITING

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Sometimes this involves knock-off products manufactured in clandestine factories.

Sometimes this may involve legally manufactured product from one country that is sold in another country in violation

of trademarks – in particular, when one multinational owns a brand in one country, but its competitor owns the rights to that same brand in a neighbouring country. For example, the brand Benson & Hedges belongs to British American Tobacco, Philip Morris or

Japan Tobacco, depending on the country.

Why would resources for implementation of a public health protocol be spent investigating the sale of BAT Benson & Hedges in a Japan Tobacco or Philip Morris market? ■



# A CONCURRENT COP AND MOP, IMAGINED

## COP6/MOP1 Agenda

[Note that we are holding the COP and the MOP concurrently.]

### Day 1

Opening plenary and adoption of the agenda

Opening statements by government delegations

### Day 2

Relationship of the Protocol to the FCTC

Relationship of the Protocol to other legal instruments

Licensing

### Day 3

Customer identification and verification

Tracking and tracing

### Day 4

Sale by Internet, telecommunication or any other evolving technology

Free zones

### Day 5

Duty Free Sales

Closing plenary

Narnia 3/13/12 7:01 PM  
**Comment:** We're not a member of the MOP yet, but I guess it doesn't cost us anything extra, so no problem

Narnia 3/13/12 6:57 PM  
**Comment:** Will this really take the entire first day?

FCS 3/13/12 7:07 PM  
**Comment:** Yes

Narnia 3/13/12 7:19 PM  
**Comment:** Excellent, this is very important.

Narnia 3/14/12 1:37 PM  
**Comment:** Seems like you're not leaving much time for COP issues. Only two days left.

Narnia 3/13/12 7:15 PM  
**Comment:** Does this include smart phone apps? I think we should include those.

Narnia 3/13/12 7:15 PM  
**Comment:** Wait, this is all Protocol business, what about the FCTC?

FCS 3/13/12 7:15 PM  
**Comment:** Sorry, people have flights to catch.

Narnia 3/13/12 7:17 PM  
**Comment:** But we're not even a member of the MOP.

FCS 3/13/12 7:17 PM  
**Comment:** We'll get to FCTC matters at the next meeting.

Narnia 3/13/12 7:17 PM  
**Comment:** But that's in two years!



## DIRTY ASHTRAY AWARD



Watch this space!

## ORCHID AWARD



To all Parties who persist in deleting references to counterfeit.



The Framework Convention Alliance (FCA) is a global alliance of NGOs working to achieve the strongest possible Framework Convention on Tobacco Control. Views expressed in the Alliance Bulletin are those of the writers and do not necessarily represent those of the sponsors.

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# BIG TOBACCO'S 'GET OUT OF JAIL FREE' CARD

Even the Tobacco Industry has to accept the evidence that smoking kills and is highly addictive, putting it under a moral obligation to support effective measures to reduce the uptake of smoking amongst young people. Clearly, however, supporting measures to reduce smoking is not in the interests of an industry whose products kill half of all long-term users – a total of 6 million people worldwide each year – and whose fiduciary responsibility to its shareholders is to expand sales.

The way the industry gets round this is to argue that the tobacco regulatory measures core to the WHO Framework Convention on Tobacco Control, such as reducing affordability by increasing taxation, tobacco advertising bans, smokefree laws, health warnings on packs, display bans and plain packaging, are either ineffective or unnecessary or both.

But there is a flaw in Big Tobacco's logic. For if it is correct, and these measures are ineffective, then surely they can't harm business, the other core strand of its arguments against government regulatory measures. The solution to this conundrum is to assert, as it always does, that regulation leads to increased smuggling.

Big Tobacco peddles myths which can seem plausible, but the objective evidence disproves their arguments time and time again: Everywhere in the world where government has introduced comprehensive tobacco control measures it has resulted in major declines in smoking and youth uptake.

### Taxes Up, Smuggling Down

Tax increases are a good example. Year in and year out the tobacco industry argues that any and every tax increase will lead to inevitable increases in smuggling, from Australia to Panama, the United Kingdom to South Africa and everywhere in between. The UK disproves this lie, as in the last decade taxes have risen and at the same time smuggling has been reduced significantly by strong enforcement measures.

It is certainly the case that using tax to reduce affordability in the 1990s was undermined by the growth of smuggling, which gave smokers access to cheap illicit tobacco. During that decade the illicit market in tobacco ballooned, making smoking more affordable and reducing the incentive to quit. The tobacco industry

argued that this increase was due to tax increases and that taxes should be cut.

In fact, the increase in smuggling was strongly associated with a dramatic growth in UK manufacturers' exports of cigarettes. Products smoked in significant quantities only in Britain were being exported to jurisdictions where there was no end market, and smuggled back to the UK.

### Crooked or Stupid?

To quote the current Chancellor, then a member of the Public Accounts Committee questioning the Imperial Tobacco CEO, and members of his senior management team about this:

"One comes to the conclusion that you are either crooks or you are stupid, and you do not look very stupid.

"How can you possibly have sold cigarettes to Latvia, Kaliningrad, Afghanistan and Moldova in the expectation that those were just going to be used by the indigenous population ... and not in the expectation they would be smuggled? You must know - you only have to read a newspaper every day, a member of the public could tell you - these are places which are linked to organised crime."

Following the Government's implementation of a tough anti-smuggling strategy from 2000 onwards the size of the illicit market for cigarettes was cut in half in less than a decade. Despite this, the tobacco industry continues to assert that tax increases above inflation will lead to an increase in smuggling again. This is not borne out by the revenue collection data published by Her Majesty's Revenue and Customs, which shows that when tobacco taxes went up above inflation in 2009, tax revenues held up and have continued to do so since an escalator above inflation was re-introduced in 2010.

The lesson is clear: the tobacco industry's arguments that any regulation will lead to an increase in the illicit trade are self-serving and duplicitous, and should be ignored by all Parties. Illicit trade is a major and growing global problem but the solution is not to keep tobacco taxes low. The real solution is a well-crafted illicit trade protocol. ■

**Deborah Arnott**  
Chief Executive, ASH (UK)