

## Chair's Text for INB-3

### Offences, Penalties and Enforcement

1. This briefing sets out FCA's overall position on how the protocol should deal with offences, penalties enforcement and related cooperation, and how the protocol should be linked with other international agreements and agencies, and in particular to the UN Convention on Transnational Organised Crime (UNTOC), and the UN Office on Drugs and Crime.
2. The FCA strongly believes that Parties must treat engagement in serious forms of illicit trade in tobacco products as a serious crime. There is no question that the relatively light sentences imposed for engagement in illicit trade in tobacco products, and the low priority often given to enforcement action against the illicit trade in tobacco by comparison with illegal drugs and other goods, is a major incentive to organised crime to engage in this activity. FCA therefore seeks a protocol that will be of practical benefit in encouraging, supporting and assisting Parties in investigation of and enforcement against illicit trade. FCA will also continue to campaign on the need for action on illicit trade by Parties, including holding Parties to account where there is evidence that they do not treat illicit trade in tobacco products as a sufficient priority for investigation and enforcement by customs and law enforcement agencies.
3. However, FCA has serious concerns that Parts IV and V require considerable simplification and focus if they are to contribute to an effective protocol and to a serious effort on enforcement against illicit trade.
4. Recent cases demonstrating the engagement of organised crime in tobacco smuggling, and its relationship to the funding of terrorism and conflict, include:
  - A case now being prosecuted by the United States Attorney's office in the Southern District of Florida, after a long investigation involving a partnership between US customs agents and the European Union anti-fraud office OLAF <sup>1</sup>. According to the indictment and an affidavit filed with the complaint, the investigation revealed that an organisation smuggling cigarettes operated out of Spain, Great Britain, Ireland and Miami, Florida. US Customs agents have told the Miami court that they were able to trace the intended destination of the Dublin shipment to associates of dissident Irish republicans. According to the affidavit: "*during the course of the investigation, evidence has indicated that some of these associates were connected to the group Real IRA. Real IRA, a paramilitary organisation, is an illegal organisation in Ireland and is designated as a terrorist organisation in the United Kingdom and the United States*".

---

<sup>1</sup> See: [http://www.usdoj.gov/usao/fls/ PressReleases/090306-02.html](http://www.usdoj.gov/usao/fls/PressReleases/090306-02.html) for details of the indictment.

- A case currently being tried in Switzerland, where nine defendants are alleged to be part of an international crime ring, which also included members of the organised crime groups the Camorra of Naples, the Sacra Corona Unita of Apulia <sup>2</sup>.
5. Article 12.1 of the Chair's text proposes that Parties ensure that manufacturing, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products without the appropriate licence, or without payment of taxes and duties, are treated as criminal offences, as well as counterfeiting of tobacco products and manufacturing equipment, and other forms of engagement in illicit trade.
  6. Other Articles of the Chair's text related to enforcement appear to be contingent on 12.1. including Article 16 (confiscation and seizure of assets) Articles 25 (protection of sovereignty), 26 (jurisdiction), 30 (mutual legal assistance), 31 (measures to ensure prosecution or extradition), 32 (prosecution of alleged offenders) and 33 (extradition of alleged offenders).
  7. However, Parties have widely different legal systems and therefore draw the line between criminal and non-criminal offences in different places. Also, illicit trade is broadly defined in the protocol, and engagement in illicit trade therefore implies a wide range of behaviours of varying degrees of seriousness. Therefore, FCA considers that the prospects of reaching a timely agreement on a substantial list of offences to criminalise are low.
  8. In view of the role and remit of the World Health Organization, and the functions and resources of the FCTC Secretariat, their capacity to deal with criminal justice issues is necessarily limited. For example, it is difficult to see how a secretariat under the WHO could effectively support work on the drafting of criminal law provisions, extradition or mutual legal assistance.
  9. There is also a serious tautology in the current Chair's text. Article 14.1 says that Parties *"shall ensure that offences punishable by a maximum deprivation of liberty of at least four years or a more serious penalty are considered as serious crime"*. However the definition of serious crime in Article 1.14 is *"conduct constituting an offence punishable by maximum deprivation of liberty for at least four years or a more serious penalty"*.
  10. Other international treaties overlap at least in part with the current draft of the protocol, particularly UNTOC (although it is recognised that not all Parties to the FCTC are also Parties to UNTOC). UNTOC provisions, for example, on confiscation and seizure, international cooperation for purposes of confiscation, disposal of confiscated proceeds of crime or property, extradition, transfer of sentenced persons and mutual legal assistance apply to the illicit trade in tobacco if:

---

<sup>2</sup> See Swiss Federal Criminal Court (German, French, Italian) <http://www.bstger.ch>

- It involves offences punishable by a maximum penalty of imprisonment of at least four years or a more serious penalty
  - It is transnational in nature
  - It involves an organised criminal group (defined for this purpose as a structured group of three or more persons, existing for a certain period and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with UNTOC in order to obtain, directly or indirectly, a financial or other material benefit).
11. For all these reasons, FCA would recommend the simplification of the existing articles related to offences, penalties, enforcement and related cooperation and in particular that Article 12 should still feature a list of offences, but not specify that some offences should be made criminal. This list must also be inclusive, since if some violations of laws or regulations required by the protocol are specifically mentioned and some are not, as is the case with the existing list, this might create a problematic hierarchy. We would also recommend that as far as possible issues of international criminal justice that are not specific to illicit trade in tobacco but that are common to many sorts of organised crime should be dealt with through close cooperation with UNODC, using the processes set up by UNTOC. FCA therefore broadly supports the approach set out in Article 2.3 of the Chair's text, namely that Parties to the protocol that are also Parties to UNTOC should apply relevant provisions of that convention to illicit trade in tobacco products, while Parties to the protocol that are not Parties to the protocol should "*consider applying*" (or in FCA's preferred wording "*endeavour to apply*") relevant provisions.
12. FCA also recommends revisions to the Chair's text, to provide for the establishment of most forms of illicit trade as serious crime, ensuring that the relevant provisions of UNTOC are engaged:
- Each Party shall, within three years of the entry into force of the protocol for that Party, ensure that the most serious forms of illicit trade in tobacco are treated as offences punishable by a maximum penalty of imprisonment of at least four years or a more serious penalty
  - Each Party shall provide copies of laws that give effect to relevant provisions of the protocol to the convention secretariat, and notify the Convention Secretariat of any subsequent changes to such laws. The information provided to the Secretariat should be public and reviewed at Meetings of the Parties to the protocol.
13. FCA supports the obligation set out in Article 14.2 of the Chair's text that "*each Party shall ensure that legal and natural persons held liable for offences established in accordance with Article 12 are subject to effective, proportionate and dissuasive sanctions*", but recommends including a specific list of possible sanctions, including licence suspension or cancellation, monetary sanctions and imprisonment.
14. A detailed set of proposed amendments to relevant articles in the Chair's text are included in the side by side commentary to the text attached to this brief.