

## **OFFENCES (PART IV) AND INTERNATIONAL CO-OPERATION (PART V)**

### **Key recommendations**

- If Parties decide to retain significant provisions on mutual legal assistance (Article 30) and extradition (Articles 30 and 31), the text should be as close as possible to existing conventions (primarily UNTOC) in order to avoid weakening them;
- Article 12 (c) should be modified to remove references to the counterfeiting of tobacco products – that is, the violation of tobacco industry trade marks. As drafted, the provision risks diverting scarce investment resources into intellectual property issues that are outside the purpose of this Protocol;
- Article 12 should also be modified to create more certainty as to when or when not mutual legal assistance and extradition obligations are triggered.

### **Introduction**

There has been lengthy discussion at past INBs, and most recently in the informal working group, on criminal justice issues. In particular, Parties have discussed which elements of involvement in illicit trade need to be made illegal, which need to be criminalised, and how mutual legal assistance (MLA) and extradition provisions should function.

In the past, FCA has argued that extensive provisions on MLA and extradition are unnecessary if the Protocol is drafted so as to trigger the relevant provisions of the UN Convention on Transnational Organized Crime (UNTOC). Based on the report of the informal working group (FCTC/COP/INT-IT/5/3), it appears Parties will not follow this recommended course, in part because of concerns that it would leave out Parties to the ITP who are not UNTOC Parties. However, the working group agreed that it is essential that the language used in earlier conventions should not be departed from.<sup>1</sup> This is an important principle, as it would be very unfortunate if the ITP actually reduced access to MLA and extradition for countries that are Parties to both the ITP and UNTOC.

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<sup>1</sup> See Proposal 3 in report from informal working group – FCTC/COP/INT-IT/5/3.

## Article 12: unlawful conduct including criminal offences

As the draft Protocol now stands, MLA and extradition provisions (Articles 30-32)<sup>2</sup> would be triggered by the commission of criminal offences “established in accordance with... Article 12.” Article 12 was not referred to the informal working group for discussion, and unfortunately the present wording is problematic in several respects.

Draft Article 12.1 includes an enumeration of actions that Parties are obliged to establish as unlawful. FCA has previously provided extensive commentary<sup>3</sup> on this list. The most urgent matter to fix, in our view, is 12.1.(c). Counterfeiting of tobacco products is relevant to this Protocol only to the extent that trade in such products undermines public health, in particular through evasion of taxation (which is dealt with by 12.1(a) and 12.1(b)). **Public health resources should not be used for protection of tobacco manufacturers’ intellectual property rights, which are dealt with by other international instruments**, such as the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). The same applies to counterfeit packaging – presumably this is a reference to producing packaging with a trademark, without the permission of the trademark owner. And it is unclear what it might mean to counterfeit manufacturing equipment.

In our view, 12.1.(c)(i) can and should be deleted in its entirety – the reference to “counterfeiting...applicable fiscal stamps” is unrelated to the rest of the provision, which is about private intellectual property rights, and at any rate is covered in more detail in 12.1.(c)(iii).

All of this would logically mean modifying 12.1(c)(ii) also – modified wording could read “wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting forged or falsified fiscal stamps or unique identification markings, or any other required markings or labellings.”

In draft Article 12.3, there is a long-standing drafting problem: as worded at present, this provision would appear to require establishing as criminal offences the proceeds of *any* type of crime, **whether or not it is related to illicit trade in tobacco**. Article 12.5 appears to have been designed to narrow the scope of Article 12.3 (which is largely copied from UNTOC), but on its literal meaning simply requires Parties to *include* certain types of offences amongst the predicate offences for proceeds of crime provisions. To solve this drafting problem, FCA suggests:

- In 12.3(a), (b) and (c), replace the phrase “proceeds of crime” with “proceeds of a criminal offence established in accordance with paragraph 2 or 4 of this article”; and
- Delete 12.5.

A more difficult matter to fix is the interaction between the criminal offences established in accordance with 12.2, 12.3 and 12.4 and the rest of Parts IV and V. As it stands, individual Parties are given almost complete discretion as to which forms of unlawful conduct they wish to classify as criminal offences. This discretion could be seen as a form of flexibility needed to draft language acceptable across a wide range of legal systems. However, it means, first, that the scope of obligations under Parts IV and V will be different from Party to Party (those who

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2 A number of other articles also depend on Article 12, including Article 16 on seizure and confiscation and Article 26 on jurisdiction.

3 See “Comments on the Negotiating text for a protocol to eliminate illicit trade in tobacco products and Proposals of Drafting Groups 1 and 2 (Documents FCTC/COP/INB-IT/3/5 Rev.1; FCTC/COP/INB-IT/4/3; FCTC/COP/INB-IT/4/4)\*”. Available on-line at: <http://tinyurl.com/7f2ep6t>.

criminalise more unlawful acts will have greater obligations), and, second, that a Party requesting assistance will have no easy way to know whether it is entitled to receive assistance.

There are three possible solutions to this difficulty:

1. Try to get agreement on which forms of unlawful conduct must be classified as criminal offences. This approach is highly unlikely to succeed in the short negotiating time available at INB5;
2. Try to introduce some measure of certainty by relying on draft article 1.14 (which defines “serious crime”). International co-operation provisions in Part V could be explicitly linked to serious crime only, in line with the practice in most extradition treaties. The informal working group suggested (point iii under Proposal 3) that Parties could be given the choice of the “serious crime” threshold (maximum sentence of at least four years), or some lower threshold, of which they would have to notify the Secretariat.
3. Remain with the current arrangement, but require all Parties to notify the Secretariat about which of the forms of unlawful conduct in 12.1 they consider to be criminal offences, in order to enable other Parties to know when they can expect co-operation. Some consideration would need to be given to the possible administrative burden involved.

In FCA’s view, use of the “serious crime” threshold, i.e. the second option, is the most practical approach, matching that used in other international instruments.