International Legal Framework on the Fight Against Illicit Tobacco Trade: An Overview

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Abstract This chapter addresses binding legal provisions referring to combating illicit tobacco trade in international law and EU law. Analysis covers first the relevant provisions of the World Health Organisation Framework Convention on Tobacco Control. More detailed provisions in this regard are provided for in the Protocol to Eliminate Illicit Trade in Tobacco Products to the Convention. EU legal instruments as well as other relevant international instruments are also examined, even though they do have a penal character.

1 Introduction

This chapter examines the existing legal framework that has developed on the international level to govern the tobacco trade. Given the overall goal of this research, the analysis will be focused mainly on penal issues.

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At the outset, it must be noted that international regulations related to tobacco are recent. Even though tobacco has been a part of human life for a long time, it has only lately become known that cigarettes cause diseases. This scientific discovery contributed to the emergence of an international legal framework on tobacco. Therefore, it comes as no surprise that the World Health Organisation (WHO) has engaged in a variety of activities, including the elaboration of a global legal instrument aimed at controlling tobacco,¹ to minimise the use of tobacco worldwide. As a result of multilateral negotiations, on 21st May 2003, the World Health Assembly adopted the WHO Framework Convention on Tobacco Control (WHO FCTC). This global Convention entered into force on 27 February 2005, and it currently has 182 states parties.²

The approach taken by the WHO differs from other international legal instruments related to drug control in that it focuses more on the reduction of demand,³ and less on supply. Also, tobacco use is perceived by the FCTC as a health issue and subsequently, its control is based on the states' right to protect public health.⁴ To fulfil their duty to protect citizen health, states have agreed to adopt a twofold approach. On the one hand, they are reducing demand, and on the other, reducing supply.

The FCTC provides for two types of measures aimed at reducing demand. The first category, mentioned in Article 6 FCTC, includes price and tax measures. The rationale behind this approach is straightforward. Price and tax policies should be implemented to reduce tobacco consumption to achieve health goals.

Non-price measures vary. They include protection from exposure to tobacco smoke; regulation of the contents of tobacco products; regulation of tobacco product disclosures; packaging and labelling of tobacco products; education, communication, training and public awareness; tobacco advertising, promotion and sponsorship and demand reduction measures concerning tobacco dependence and cessation.

The second general category of measures provided for by the FCTC to control tobacco refers to the reduction of the tobacco supply. State parties are first obligated to implement provisions on the prohibition of tobacco sales to and by minors, *i.e.* persons under the age of eighteen (Art. 16 WHO FCTC). They are also obligated to provide support for economically viable alternative activities for tobacco workers, growers and individual sellers (Art. 17 WHO FCTC). Finally, they are obligated to fight against the illicit tobacco trade.

¹On the genesis of the WHO FCTC see: Roemer et al. (2005), p. 936.

²Including all six Eu member states covered by this study: Germany, Italy, Lithuania, Poland, Romania and Slovakia.

³As confirmed by Art. 3 FCTC, "The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke".

⁴As stated in the Preamble to the FCTC.

2 Illicit Trade of Tobacco Products in the Light of the WHO FCTC

The WHO's fight against the illicit tobacco trade honours states' obligation to reduce the supply of tobacco products. Since the illicit tobacco trade is a transnational challenge, states have justly recognized in the Preamble to the WHO FCTC that cooperative action is necessary to eliminate all forms of illicit trade related to cigarettes and other tobacco products, including smuggling, illicit manufacturing and counterfeiting.

Art. 1 WHO FCTC defines illicit trade comprehensively: "any practice or conduct prohibited by law and which relates to the production, shipment, receipt, possession, distribution, sale or purchase including any practice or conduct intended to facilitate such activity". Based on the wording of this provision, states wanted to cover all stages of the illicit trade, from its manufacturing through transfer to acquisition. The definition refers not only to direct participation in the prohibited process but also to the facilitation of the illicit trade.

A substantive provision referring to the illicit trade of tobacco products is provided for in Art. 15 WHO FCTC. According to Art. 15.1, "the elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to subregional, regional and global agreements, are essential components of tobacco control", thus making the provision at hand a confirmation of the need to tackle illicit tobacco trade. The following provisions in Art. 15 FCTC obligate states to adopt different measures, mainly of legislative, executive and administrative authority, to ensure detailed markings of tobacco products, enabling states to "control the movement of tobacco products and their legal status" (Art. 15.2 FCTC). These measures will be enforced preferably by a tracking and tracing regime. However, states are required only to consider the development of such a system.

It is worth noting that Art. 15 FCTC contains only a few provisions mentioning criminal law measures. The adopted text is the outcome of negotiations over a text that had originally contained more penal provisions.⁵ It has been diluted.⁶ The states decided against the inclusion of criminal law references in an international treaty on health.

Currently, Art. 15.4 (b) is a primary penal provision of the FCTC, as it stipulates that parties shall "enact or strengthen legislation, with appropriate penalties and remedies, against illicit trade in tobacco products, including counterfeit and contraband cigarettes". The wording of the provision makes it clear that states are must provide an appropriate legislative framework to govern the illicit tobacco trade. This framework must include criminal law sanctions or "penalties". The FCTC also

⁵See Boister and Burchill (2002), p. 44.

⁶Boister and Burchill (2002), p. 47.

mentions confiscation of manufacturing equipment, counterfeit and contraband cigarettes, other tobacco products and proceeds derived from the illicit tobacco trade.

Fragments of Art. 15 FCTC contain the remnants of the draft convention. They refer to cooperation “between national agencies, as well as relevant regional and international intergovernmental organizations as it relates to investigations, prosecutions and proceedings, with a view to eliminating illicit trade in tobacco products”.

The WHO FCTC is not a penal treaty. It does not criminalise the illicit tobacco trade. However, its importance lies in the fact that, as a framework convention, it was the first international legal instrument, of binding force, that emphasised the necessity to tackle the illicit tobacco trade, at national and transnational levels.

3 Protocol to Eliminate Illicit Trade in Tobacco Products: General Issues

The WHO FCTC is a general instrument that as a framework convention, has been designed to be complemented by protocols that address specific issues.⁷ As described in Annex 2 to the Protocol to Eliminate Illicit Trade in Tobacco Products already in 2006, “at the first meeting of the Conference of the Parties following entry into force of the WHO FCTC, the parties discussed possible protocols to the Convention. One of the areas in which they agreed that a protocol could be established was illicit trade in tobacco products”.

Therein lies the origin of the Protocol to Eliminate Illicit Trade in Tobacco Products. It was adopted on 12 November 2012 and entered into force on 25 September 2018. The Protocol currently counts 61 parties.⁸

According to Art. 3, the objective of the Protocol is “to eliminate all forms of illicit trade in tobacco products, in accordance with the terms of Article 15 of the WHO Framework Convention on Tobacco Control”.

The Protocol adopted a standard structure of a penal convention in the parts that refer to offences as well as international cooperation. However, its scope goes

⁷Such a possibility was foreseen by state parties to the Convention in Art. 33, which stipulates as follows: “1. Any Party may propose protocols. Such proposals will be considered by the Conference of the Parties. 2. The Conference of the Parties may adopt protocols to this Convention. In adopting these protocols every effort shall be made to reach consensus. If all efforts at consensus have been exhausted, and no agreement reached, the protocol shall as a last resort be adopted by a three-quarters majority vote of the Parties present and voting at the session. For the purposes of this Article, Parties present and voting means Parties present and casting an affirmative or negative vote. 3. The text of any proposed protocol shall be communicated to the Parties by the Secretariat at least six months before the session at which it is proposed for adoption. 4. Only Parties to the Convention may be parties to a protocol. 5. Any protocol to the Convention shall be binding only on the parties to the protocol in question. Only Parties to a protocol may take decisions on matters exclusively relating to the protocol in question. 6. The requirements for entry into force of any protocol shall be established by that instrument.”.

⁸Including three of the six countries covered by this research: Germany, Lithuania and Slovakia.

beyond criminal law, as it tackles the illicit trade comprehensively. The Protocol also contains provisions on supply chains. Following the *ultima ratio* principle, criminalisation sets in after preventive and administrative measures fail to control illicit tobacco flows.

This two-step perspective is expressed in Art. 4, which lays out a set of obligations for states. One set of obligations is the adoption and implementation of effective measures to control or regulate the supply chain of goods covered by this Protocol. The implementation and control measures should “prevent, deter, detect, investigate and prosecute illicit trade in such goods”. The following obligations are intended to increase the effectiveness of national authorities responsible for preventing, deterring, detecting, investigating, prosecuting and eliminating all forms of illicit trade in goods. These obligations also include cooperation with national authorities in other states and regional and international intergovernmental organizations.

Supply chain⁹ control includes a range of measures which, ideally, will prevent the illicit trade of tobacco products. National and/or regional tracking and tracing systems and a global information sharing-point located in the Convention Secretariat should exist within 5 years of the Protocol implementation. Other provisions cover licensing, due diligence, record-keeping, security and preventive measures, reflecting the obligations to prevent and detect money laundering. Additional measures refer to Internet and telecommunication-based sales, duty-free sales, free zones and international transit.

4 Protocol to Eliminate Illicit Trade in Tobacco Products: Penal Aspects

In terms of criminal responsibility, Art. 14 of the Protocol seems the most important. It defines several behaviours that are considered unlawful under the national law of the states. It is worth noting though that the parties to the Protocol are at liberty to decide which of the actions described in Art. 14.1 “or any other conduct related to the illicit trade in tobacco, tobacco products and manufacturing equipment shall be criminal offences”.¹⁰ Such wording of the provision of Art. 14.2 indicates that states

⁹Which—pursuant to Art. 1 p. 12—is to be understood as ‘the manufacture of tobacco products and manufacturing equipment; and import or export of tobacco products and manufacturing equipment; and may be extended, where relevant, to one or more of the following activities when so decided by a Party: (a) retailing of tobacco products; (b) growing of tobacco, except for traditional small-scale growers, farmers and producers; (c) transporting commercial quantities of tobacco products or manufacturing equipment; and (d) wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment’.

¹⁰In other treaties dealing with penal issues one typically finds an obligation bearing on state parties to adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law. Also, this is not what was proposed by representatives of the international law doctrine—see Boister and Burchill (2002), p. 48.

may choose not to criminalise behaviours, may criminalise some of them or criminalise all of them. The option to criminalise unwanted behaviours in within states is the main difference between the Protocol and other penal treaties. In this regard, the contents of the Protocol do not necessarily resemble other international legal instruments designed to combat a certain type of offence. Furthermore, if unwanted behaviours are to be considered only unlawful under national laws but not treated as criminal, the responsibility for these actions is watered down considerably and so is the national legislature's responsibility for implementation. Such wording was politically more acceptable for some of the states.¹¹ However, this wording may lead to an uneven harmonisation of the national legal systems with the Protocol's provision and eventually contribute to ineffective international investigation and prosecution of the illicit tobacco trade.

The catalogue of behaviours prohibited by Art. 14.1 of the Protocol covers very different types of actions. The first prohibited activity, as mentioned in Art. 14.1(a), is of a general character and consists of manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment contrary to the provisions of this Protocol.

Art. 14.1 mentions unlawful behaviours related to taxation¹² and custom duties,¹³ as well as to forging and falsifying products and markings.¹⁴ This Article clarifies that avoiding transparency in the supply chain process¹⁵ constitutes tax and customs duty evasion.

The Protocol provides detailed rules on using the Internet and any new evolving technology-based sales models, as well as on licensing,¹⁶ thus Art. 14.1 also covers behaviours contrary to the said rules.

¹¹See Burci (2013), p. 367.

¹²Manufacturing, wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting tobacco, tobacco products or manufacturing equipment without the payment of applicable duties, taxes and other levies or without bearing applicable fiscal stamps, unique identification markings, or any other required markings or labels.

¹³Any other acts of smuggling or attempted smuggling of tobacco, tobacco products or manufacturing equipment.

¹⁴Any other form of illicit manufacture of tobacco, tobacco products or manufacturing equipment, or tobacco packaging bearing false fiscal stamps, unique identification markings, or any other required markings or labels; wholesaling, brokering, selling, transporting, distributing, storing, shipping, importing or exporting of illicitly manufactured tobacco, illicit tobacco products, products bearing false fiscal stamps and/or other required markings or labels, or illicit manufacturing equipment.

¹⁵Mixing of tobacco products with non-tobacco products during progression through the supply chain, for the purpose of concealing or disguising tobacco products; intermingling of tobacco products with non-tobacco products in contravention of Article 12.2 of this Protocol.

¹⁶Using Internet-, telecommunication- or any other evolving technology based modes of sale of tobacco products in contravention of the Protocol; obtaining, by a person licensed in accordance with Article 6, tobacco, tobacco products or manufacturing equipment from a person who should be, but is not, licensed in accordance with Article 6 of the Protocol.

Art. 14.2 of the Protocol establishes states' obligation to recognise the laundering of proceeds from criminal offences as unlawful. There is a relationship between the illicit tobacco trade and money laundering of proceeds. Therefore, the prohibition of money laundering and criminalization of such activity, curb illicit trade.

Other behaviours that are to be recognised as unlawful by national legal systems apply to public officials in these states. Obstructing any authorized personnel,¹⁷ misleading and misinforming them¹⁸ or hindering controls, including by falsifying documents,¹⁹ should rightly be condemned as facilitating the illicit tobacco trade.

Regarding the modalities of responsibility for unlawful conducts analysed above, Art. 16 of the Protocol provides requires states to ensure that "natural and legal persons held liable for the unlawful conduct including criminal offences established in accordance with Article 14 are subjected to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions". This provision draws from similar provisions in many penal treaties, as well as EU legal instruments. It requires states to provide for effective, proportionate and dissuasive sanctions. However, the Protocol does not require states to institute criminal sanctions. Since states may choose to forego criminalisation of certain behaviours considered unlawful, they may impose non-criminal sanctions on the perpetrators.

The liability of individuals for unlawful conduct mentioned in the Protocol is self-evident. However, it seems important to note that the Protocol also requires the establishment of liability of legal persons. The liability of legal persons varies from one legal system to another. Art. 15 of the Protocol leaves it up to the state parties to determine whether this liability will be criminal, administrative or civil liability.

In addition to the provisions on unlawful conduct and sanctions regarding natural and legal persons, the Protocol contains supplementary provisions referring to penalties and criminal prosecution. The first one tackles the financial side of the illicit tobacco trade, as it obligates states to consider adopting measures "to levy an amount proportionate to lost taxes and duties from the producer, manufacturer, distributor, importer or exporter of seized tobacco, tobacco products and/or manufacturing equipment". This provision covers one of the aspects of the said

¹⁷Obstructing any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment.

¹⁸Making any material statement that is false, misleading or incomplete, or failing to provide any required information to any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment and when not contrary to the right against self-incrimination.

¹⁹Mis declaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment or any other information specified in the protocol to: (a) evade the payment of applicable duties, taxes and other levies, or (b) prejudice any control measures for the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment; failing to create or maintain records covered by this Protocol or maintaining false records.

activity most detrimental to the public finance. It therefore only seems natural that the countries had taken it into consideration when negotiating the Protocol.

Furthermore, international community confirmed the detrimental results of the illicit tobacco trade by agreeing to allow the use of controlled delivery and “other special investigative techniques, such as electronic or other modes of surveillance and undercover operations, by its competent authorities on its territory for the purpose of effectively combating illicit trade in tobacco, tobacco products or manufacturing equipment”. Often, the detection of the illicit tobacco trade may be challenging, as the perpetrators are very creative. Therefore, the use of techniques that facilitate the detection and further prosecution may be beneficial. However, while using them, states should be mindful of human rights, including the privacy of the persons concerned.

The last provision, related to the criminal prosecution of illegal trade, refers to the disposal or destruction of illicit tobacco. According to Art. 18, all confiscated tobacco, tobacco products and manufacturing equipment should be destroyed, using environmentally friendly methods to the greatest extent possible, or disposed of according to national law.

5 Protocol to Eliminate Illicit Trade in Tobacco Products: International Cooperation and Jurisdiction

As mentioned above, the Protocol follows the example of other penal treaties and so it contains an elaborate chapter on international cooperation, with solutions like those in other international instruments. It is the longest chapter of the Protocol.

The provisions on international cooperation refer to different measures, from the least to the most advanced form of cooperation. They include general information sharing; enforcement information sharing; assistance and cooperation (training, technical assistance and cooperation in scientific, technical and technological matters, as well as investigation and prosecution of offences); law enforcement cooperation; mutual administrative assistance; mutual legal assistance and extradition.

As with any other penal convention, the Protocol refers to jurisdiction over the criminal offences. They are typical and based on the *aut dedere aut judicare* principle. The mandatory jurisdiction covers the territory of the state party and board of a vessel that is flying the flag of that state or an aircraft that is registered under the laws of that state at the time the offence is committed. Optionally, states may also establish their jurisdiction over offences committed against that state by a national of that state or a stateless person who has his or her habitual residence on its territory or an offence which is one of those established in accordance with Article 14 and is committed outside its territory with a view to the commission of an offence established in accordance with Article 14 within its territory.

6 European Union's Position on Illicit Trade of Tobacco Products

The European Union evolved from the European Economic Community (EEC), which was established as the Economic Cooperation Organisation. Originally, the EEC had shown interest in tobacco only as an element of agriculture and even subsidised tobacco growth. However, in 1985 the European Council adopted two resolutions and established the “Europe against Cancer” program comprised of informational, and later preventive, measures. Since then, the EU's interest in tobacco control has grown.

Historically, the Union's competence on health issues has been contested.²⁰ However, at present, as stipulated in Art. 168 of the Treaty on the functioning of the European Union, the jurisdiction over and expertise on health issues are shared between the Member States and the Union. It should however be emphasised that this competence refers to public health only and is aimed at “orienting the EU action away from action on health services”.²¹

The Union's commitment to tobacco control has been most visible when it has participated in negotiations over the draft FCTC and in its subsequent accession after its adoption in 2005. In 2016 the EU has also confirm its accession to the FCTC Protocol. Yet, the legality of EU's action undertaken with regard to tobacco control has been legally challenged on various occasions,²² amounting up to the point of annulling a first advertising tobacco directive 20 years ago.²³

Today, the EU's position on tobacco control is mainly²⁴ expressed in the Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014, on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC. The Directive refers to a multitude of measures aimed at controlling tobacco, which, as stated in the Preamble to the Directive, are necessary to implement the WHO Framework Convention on Tobacco Control (FCTC) of May 2003. The provisions are binding on the Union and its Member States. The FCTC provisions on the regulation of the contents of tobacco

²⁰Mamudu and Studlar (2009), p. 7.

²¹*Everything you always wanted to know about European Union health policies but were afraid to ask*, 2nd ed. European Observatory on Health Systems and Policies, 2019, 63–64, <http://www.euro.who.int/en/about-us/partners/observatory/publications/studies/everything-you-always-wanted-to-know-about-european-union-health-policies-but-were-afraid-to-ask-2019>.

²²See more on the limited EU competence in Alemanno and Garde (2015), p. 259 ff.

²³ECJ, 5 October 2000, *Germany v European Parliament and Council*, C-376/98, EU:C:2000:544.

²⁴There are other EU legal instruments relative to tobacco control. One should mention: Council Recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control (2003/54/EC); Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products; Council Recommendation of 30 November 2009 on smoke-free environments.

products, the regulation of tobacco product disclosures, the packaging and labelling of tobacco products, and the advertisement and illicit trade in tobacco products are particularly relevant.

One of the main features introduced by the 2014 Directive is the EU-wide systems of traceability and security features for tobacco products to address the issue of illicit trade. The systems became operational on 20 May 2019.²⁵ The special European Commission Implementing Regulation (EU) 2018/574 of 15 December 2017, articulates standards for the establishment and operation of the traceability system for tobacco products.

Neither the Directive nor any other EU legal instrument refers, however, to penal issues. Although, it is conceivable that, if not combatted, over time, the illicit tobacco trade will become such a problem for the Union and EU Member States they will use the clause in Art. 83 TFUE. This clause allows the European Parliament and the Council to establish minimum rules concerning the definition of criminal offences. It also allows the European Parliament and Council to establish sanctions and regular policing, with a cross-border dimension, against serious crime.²⁶

Additionally, since the illegal tobacco trade is considered criminal in national policy of the EU Member States, states can cooperate on criminal matters based on the EU general legal framework on cooperation. European institutions may also be involved in the process. Following OLAF Regulation No 883/2013,²⁷ OLAF may conduct on-the-spot checks and inspections when there is suspicion of activity detrimental to the financial interests of the Union. Also, Europol may enable cooperation of law enforcement institutions from different EU Member States. In addition, the European Public Prosecutor's Office, once operational, may contribute to combatting this type of criminality.

7 Other Relevant Legal Instruments

This chapter examines the existing penal legal framework that has emerged on the international level regarding the illicit tobacco trade. However, one must not forget that the illicit trade of tobacco products is just one part of a wider criminal

²⁵See more: https://ec.europa.eu/health/tobacco/tracking_tracing_system_en.

²⁶Pursuant to Art. 83 TFU, currently these areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. However, based on developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

²⁷Regulation (Eu, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999. This Regulation is in the proceed of amendments, which are expected to be adopted in 2020.

phenomenon that is addressed by the international community a variety of ways, most notably through binding legal instruments. In this context, one must emphasise that the illicit tobacco trade (which refers to excise fraud, smuggling, illegal manufacturing and counterfeiting) is just one category of crime covered by penal conventions and EU legal acts of general character. When the illicit tobacco trade constitutes a customs violation, the behaviour may also be covered by international and EU legal instruments on administrative cooperation.

Concerning the EU penal legal framework, one should refer to all the legal instruments adopted by the EU Member States regarding police and judicial cooperation in criminal matters, dating back to the III pillar of the EU. This collection covers different and important instruments, starting from the European arrest warrant and joint investigation teams,²⁸ up to the mutual recognition of decision and the principle of mutual trust.

Concerning international penal instruments, one should mention some notable instruments adopted by the Council of Europe, starting with the 1959 European Convention on Mutual Assistance in Criminal Matters and the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

Administrative cooperation may seem less spectacular than fighting against criminal behaviours, but it is nonetheless very important. On 25 January 1988, the Council of Europe adopted the Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1 April 1995. It was amended by the Protocol to the Convention of 27 May 2010, which entered into force on 1 June 2011. According to this Convention, which binds all six states covered in this research, states must provide administrative assistance to each other in tax matters. Such assistance may involve, where appropriate, measures taken by judicial bodies. Such administrative assistance consists of the exchange of information, including simultaneous tax examinations and participation in tax examinations abroad; assistance in recovery, including measures of conservancy; and service of documents. What is important is that countries must provide administrative assistance whether the person affected is a resident or national or not. According to Art. 2.1b, the excise tax is covered by the scope of the Convention.

Administrative cooperation between EU Member States customs services is regulated by the 1998 Convention based on Article K.3 of the Treaty on European Union. This Convention fosters mutual assistance and cooperation among customs administrations.²⁹ According to Art. 1 of the Convention, Member States of the European Union provide each other with mutual assistance and cooperate through their customs administrations to prevent and detect infringements on national customs provisions and to prosecute and punish infringements of community and national customs provisions.

The Convention on the Use of Information Technology for Customs Purposes (CIS Convention) is also notable. Also, the system based on the Council Act

²⁸Council Framework Decision 2002/465/JHA on joint investigation teams.

²⁹Official Journal C 024, 23/01/1998 P. 0002 – 0022.

95/C316/02 of 26 July 1995, draws up the Convention on the use of information technology for customs purposes. A second legal basis for the system is Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States. It also promotes cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, as amended by Regulation (EC) No 766/2008 of 9 July 2008. Currently the system operates based on the latter legal act as well as on the Council Decision 2009/917/JHA of 30 November 2009, on the use of information technology for customs purposes. It calls for a central database and terminal accessible in EU Member States.

A general framework of administrative cooperation between the EU Member States regarding taxation is currently established by the Council Directive 2011/16/EU of 15 February 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. However, according to Art. 2.2 of the Directive, the Directive does not apply to value-added tax and customs duties or to excise duties covered by other Union legislation on administrative cooperation between Member States. This approach is due to the fact that these taxes are covered by specific instruments, namely the Council Regulation (EU) No 904/2010 of 7 October 2010, on administrative cooperation and combating fraud in the field of value added tax³⁰ and the Council Regulation (EU) No 389/2012 of 2 May 2012, on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004.³¹ Both instruments detail the rules on cooperation and more importantly, the exchange of information among the competent authorities of the Member States to ensure the correct application of legislation on excise duties and VAT.

8 Discussion

Even though tobacco products contain nicotine, which is addictive, and the use of tobacco constitutes a health hazard, tobacco regulation is different from regulation of other addictive substances. Like alcohol, tobacco is a legal addictive, and therefore no one is ready to criminalize the possession or use of tobacco, as has been done with some narcotics. For this reason, both states and international organizations struggle with “tobacco control” instead of tobacco prohibition.

Tobacco control has been a challenge for the international community. Its conditions are determined, on the one hand, by the interests of consumers, producers (industry)³² and public finances, and on the other, by the necessity to protect public

³⁰OJ L 268, 12.10.2010, pp. 1–18.

³¹OJ L 121, 8.5.2012, pp. 1–15.

³²Although states are bound based on Art. 5.3 WHO FCTC to protect their public health policies with respect to tobacco control ‘from commercial and other vested interests of the tobacco industry in accordance with national law’.

health. Due to the sensitive nature of the issue, international organisations have only recently decided to regulate tobacco, and still to a limited extent.

The tobacco trade relies on a complex system of processes, from manufacturing, transportation to marking and sales marketing. These processes are heavily regulated. Tobacco products are subject to multiple taxes, subject to many customs duties, and are rather pricy for the consumers. Therefore, people are willing to profit by evading taxes on tobacco products. As mentioned by this author in the introduction to this volume, fight against the illicit tobacco trade is just one aspect of a wider process of tobacco control, but an important one. The illicit tobacco trade is detrimental to states, industry and consumers for a variety of reasons: loss of public revenue, loss of private profits and threats to personal health, although consumers are the least committed to combatting the illicit trade.

The international legal framework to combat the illicit tobacco trade is comprised of one international convention (WHO FCTC) and a protocol thereto. As analysed above, the Protocol, which was specifically designed to eliminate this illicit trade, exhaustively tackles the criminal activity, and in this regard, it resembles the more traditional penal international treaties, especially transnational criminal law treaties.³³ As is usual for suppression conventions, the Protocol does not provide for direct criminalisation nor does it contain self-executive norms. However, its provisions impose legislative and practical obligations on states and therefore, require implementation through national legal systems.

As with other penal treaties, it is the level of harmonisation of national law with the conventional standard that poses a real challenge for states. The WHO FCTC has been one of the most eagerly ratified UN conventions and has numerous state signatories. The Protocol has considerably less signatories, however, most likely due to the obligation to establish a costly track and trace system. Yet, it has come into force after just a few years since adoption, although ratification itself does not guarantee compliance of the national law and practice with the convention requirements. Some authors have already expressed doubts about the practical implementation of the FCTC by national legislatures as well as the WHO's capacity to survey the states in this regard.³⁴ Similarly, the monitoring mechanisms set forth by the Convention and the Protocol, which encompass respectively the Conference of the Parties and the Meeting of the Parties, even though typical for international treaties,³⁵ seem too weak to ensure a proper implementation of both these treaties into the national law. It remains to be determined the extent to which state signatories to the Convention and the Protocol will be ready to comply with their provisions.

The situation is less controversial regarding the EU law, as the EU deals with the administrative aspects of tobacco control in a limited capacity. Also, its supranational status empowers the EU to enforce Member States' compliance with the 2014 Directive and other legal instruments. The impact of the EU legislation on

³³On the notion of transnational criminal law, see Boister (2012).

³⁴See Hoffman and Rizvi (2012), p. 727.

³⁵See Boister (2012), p. 261 ff.

administrative cooperation between the Member States is praiseworthy. Moreover, the developing institutional framework for combatting crimes that are detrimental to the EU financial interests, embodied by the newly established European Public Prosecutor's Office (expected to start its operations in the nearest future), deserve attention in future research. For one may expect that this institution, as well as already existing bodies, will contribute to the improvement of investigation and prosecution of economic crimes, including illicit trade of tobacco products.

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