

Executive Summary

This report analyses the Draft Protocol to Eliminate Illicit Trade in Tobacco Products (ITTP) (hereinafter Draft Protocol), currently under negotiation by an Intergovernmental Negotiating Body established by the Conference of the Parties to the World Health Organisation's Framework Convention on Tobacco Control (WHO FCTC).

The aim of the study was to **assess the impact of the Draft Protocol on the ITTP, identifying strong and weak points and possible improvements.**

The Draft Protocol contains a variety of measures, including ones for **a) the prevention of the ITTP and b) the improvement of law enforcement and international cooperation.** The introduction of preventive measures along with provisions on improved law enforcement and international cooperation is one of the most interesting aspects of the Draft Protocol. Indeed, this approach is **exceptional for an international instrument** mainly dealing with crime/illicit activities and should be welcomed as a positive development. If effectively implemented, the envisaged innovations will increase the transparency of the tobacco markets, allow identification of illicit activities, and reduce the opportunities for the ITTP.

The analysis conducted for this study highlighted that the initiative for a Draft Protocol is to be welcomed. Notwithstanding these important premises, **the current version of the text appears to require significant improvements in various respects.**

First, the **scope of the Draft Protocol may be too narrow.** At present, it is not clear whether its most innovative provisions will also apply to key inputs. This would allow better control over the production of tobacco products, enabling prevention of the ITTP from the production stage onwards. The current text of the Draft Protocol does not seem to include key inputs. If this does not change in the final negotiations, an important opportunity to prevent the ITTP may be missed.

Secondly, **the Draft Protocol is hybrid in nature:** on the one hand, it is strictly connected to the FCTC, which mainly deals with health issues; on the other, it draws most of its provisions on international cooperation from the UN Convention on Transnational Organized Crime (UNCTOC). This may duplicate existing measures and ultimately jeopardize international efforts.

Third, **the WHO does not have established experience in the field of international cooperation on criminal matters.** This has already impacted on the negotiations, causing difficulties in identifying a core list of crimes and in coordinating the Draft Protocol with the UNCTOC. Furthermore, it may entail substantial costs for supporting State Parties in the implementation of the Protocol.

Fourth, **the Draft Protocol fails to identify a set of core conducts that all State Parties should criminalize.** This limitation is one of the most serious problems of the Draft Protocol. There is the risk that State Parties may adopt very different solutions as to the criminalization of the ITTP. Given that both Parts IV and V of the Draft Protocol will mostly apply only to criminal offences, there is the risk that the Draft Protocol may prompt *à la carte* law enforcement and international cooperation, with very limited harmonisation among countries.

Fifth, **the actual implementation of the Protocol relates to the ability of governments to invest** in capacity building (both for regulatory and law enforcement agencies), technological equipment and international cooperation. This will probably depend on the availability of adequate financial resources. Developing countries may have difficulties in finding these resources or they may be faced with a trade-off between the fight against the ITTP and other important investments.

Furthermore, given that some states are directly involved in the manufacturing of tobacco products, and given that governments earn important revenues from taxes, different state interests (government revenues from tobacco taxation, citizens' health and public healthcare costs, profits of state-participated tobacco manufacturers) may complicate effective policies against the ITTP.

This report surveys the **existing measures falling within the scope of the Draft Protocol in four countries in different continents, the socio-economic background, and tobacco markets (Canada, Italy, Singapore and South Africa)**. The survey highlights that effective and successful practices have been introduced in several jurisdictions. Notwithstanding the introduction of effective legislation and the improvement of law enforcement measures, the ITTP remains, suggesting that traditional approaches, based on criminal law and law-enforcement, may not be able to solve the problem.

The survey points out that there are still important differences and incoherence among the countries surveyed in regard to nearly all the policy areas examined. The mentioned differences may have affected the negotiations on the Draft Protocol, inducing the removal of the most constraining measures in favour of a more flexible, but less effective, text.

All these issues suggest that the next session of the INB will be of crucial importance. In view of the last session of negotiations, it is important to raise the issue of the actual effectiveness and feasibility of the current version of the Draft Protocol. In particular, given the lack of agreement on a minimum core of ITTP crimes, the entire international cooperation framework may be negatively affected. **Unless radical innovations are made to the current text, there is the risk that the Draft Protocol will contain loopholes and be difficult to implement.**