

Crime proofing the policy options for the revision of the Tobacco Products Directive

Proofing the policy options under consideration for the revision of EU Directive 2001/37/EC against the risks of unintended criminal opportunities

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TRANSCRIME

CRIME PROOFING THE POLICY OPTIONS FOR THE REVISION
OF THE TOBACCO PRODUCTS DIRECTIVE

Proofing the policy options under consideration for the revision of EU Directive 2001/37/EC
against the risks of unintended criminal opportunities

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Executive Summary

This report presents the results of the project entitled *Crime Proofing the Policy Options for the Revision of the Tobacco Products Directive 2001/37/EC*, carried out by Transcrime.¹ This project originated from the Round Table on Proofing EU Regulation against the Illicit Trade in Tobacco Products hosted by Transcrime and Università Cattolica del Sacro Cuore (Milan, Italy) on 5 May 2011.

Crime proofing of legislation (CPL) is a scientific approach developed by Transcrime in 2006. The core idea is that legislation or draft legislation may have criminogenic effects.

Since the evidence shows that the EU tobacco market is extremely vulnerable to the illicit trade in tobacco products (hereinafter ITTP), **the study analysed the possible impact of the proposed policy options for the revision of the EU Tobacco Products Directive (hereinafter TPD) on the ITTP.** Indeed, the ITTP may jeopardize tobacco control policies, increase smoking prevalence by supplying cheap products, and cause significantly higher damage to human health given the reduced controls on and quality standards of illicit products. Finally, the ITTP decreases government revenues and affects the licit tobacco market, damaging the economy.

The Directorate General for Health and Consumer Protection (DG SANCO) of the European Commission is currently considering **revision of the TPD**. It launched an Impact Assessment (IA) in March 2010 which is still on-going. Thereafter, DG SANCO

commissioned a study from Rand Europe to support the Impact Assessment process. Rand published the study in September 2010. It provided detailed description of the policy options envisaged by clustering the elements provided by DG SANCO into five possible policy options.²

The present report analyses all the proposed policy options for the revision of the TPD. The study sought to assess whether the measures proposed may create unintended crime opportunities. ***The study was not concerned with assessment of the impact of tobacco control policies on health, government revenues and smoking behaviour. Without doubt, smoking is dangerous and must be regulated. The aim of the study was to contribute to the debate on the EU tobacco policies, the purpose being to prevent or minimize opportunities for the ITTP resulting from new EU measures.***

The methodology of the CPL consists of three steps of analysis. It has been applied to the possible policy options for the revision of the TPD with the following results.

Step 1 Initial Screening (IA). This activity scans the policy options for the revision of the TPD provided by the Rand study in order to establish whether they fall within the seven risk indicators provided. When the act matches one of these risk indicators, the

¹ As a concerned stakeholder in the fight against the illicit trade in tobacco products, Philip Morris International (PMI) welcomed the initiative of Transcrime to conduct research on this important and relevant area. PMI agreed to contribute financially to the research. However, Transcrime retained full control and stands guarantor for the independence of the research and its results.

² Each policy option may comprise one or more main action(s). The policy options developed by Rand Europe were:

Option 1: No change.

Option 2: No binding measures.

Option 3: Minimum revision of the directive, bringing it into line with scientific and international developments.

Option 4: Revision of the directive, bringing it into line with scientific and international developments and strengthening the protection of vulnerable groups.

Option 5: Revision of the directive with the objective of strengthening product regulation and full implementation of the polluter pays principle.

analysis moves to the second step; otherwise, the assessment is over.

As a result of the Initial Screening, policy option 3 (minimum revision of the directive, bringing it into line with scientific and international developments), policy option 4 (revision of the directive, bringing it into line with scientific and international developments and strengthening the protection of vulnerable groups), and policy option 5 (revision of the directive in order to strengthen product regulation and full implementation of the polluter pays principle) fell within the risk indicators 1) fee or obligations, 4) tax or costs, and 5) availability restrictions, and were therefore recommended for the second step of the CPL.

Step 2 The Preliminary Crime Risk Assessment (PCRA). This is a descriptive activity whose purpose is to identify and describe which crime risks can be envisaged (if any) and for which types of crime. If the acts are rated as medium/high crime risks, the analysis moves to the next phase. Otherwise, the assessment stops.

The PCRA on the policy options highlighted that the tobacco market is extremely vulnerable to crime, and in particular to the different types of the ITTP. The PCRA of the envisaged policy options, and the related main actions, reached the following conclusions:

- **There is no reliable information with which to assess the impact of the introduction of maximum limits on ingredients.** The crime risks may vary from marginal to extremely significant, depending on the extent and type of the limitations imposed. No ECRA is presently possible.
- **There is a high risk that generic packaging may favour the increased counterfeiting of tobacco products.**
- **There is a medium risk that the implementation of the “polluter pays” principle may cause the ITTP to grow as a consequence of significant increases in the prices of tobacco products.**
- **There is high risk that banning the display of products at points of sale may**

increase the ITTP because of difficulties in identifying legitimate products and retailers.

For these reasons, the above measures were recommended for the third step of the CPL.

Step 3 The Extended Crime Risk Assessment (ECRA). This is an analytical activity which describes the impact of the options/actions on the levels of ITTP, and namely on crime, actors, victims and costs. The ECRA on the main actions at risk under the policy options envisaged was limited by the scarcity of data on the ITTP and of previous studies focusing on the impact of the policies envisaged on the ITTP. Notwithstanding these limitations, the ECRA highlighted that:

- **Generic packaging is likely to impact on consumers’ capacity to distinguish legitimate products from counterfeit ones.** In particular, the measures envisaged do not adequately address the risks associated with a possible increase in counterfeiting.
- **The implementation of “polluter pays” actions may generate a high risk of increased ITTP.** Similar measures have never previously been introduced, and the estimated impact in terms of increased retail prices suggests that a significant share of the reductions in smoking prevalence may actually be the result of a shift to the illicit market.
- **The ban on displaying products at points of sale raises the risk of increased ITTP (particularly, the sale of illicit products by authorized retailers and sale by unauthorized retailers).** The risks will be higher if no specific measure is adopted to allow clear identification of legitimate retailers, and in those countries currently allowing the sale of tobacco products in bars, cafés, convenience stores, and clubs.

In **conclusion**, the study highlighted that the EU tobacco market is extremely vulnerable to the ITTP. Nevertheless, available information on the currently on-going impact assessment for the revision of the TPD indicates that DG SANCO paid almost no attention to the impacts on the ITTP.

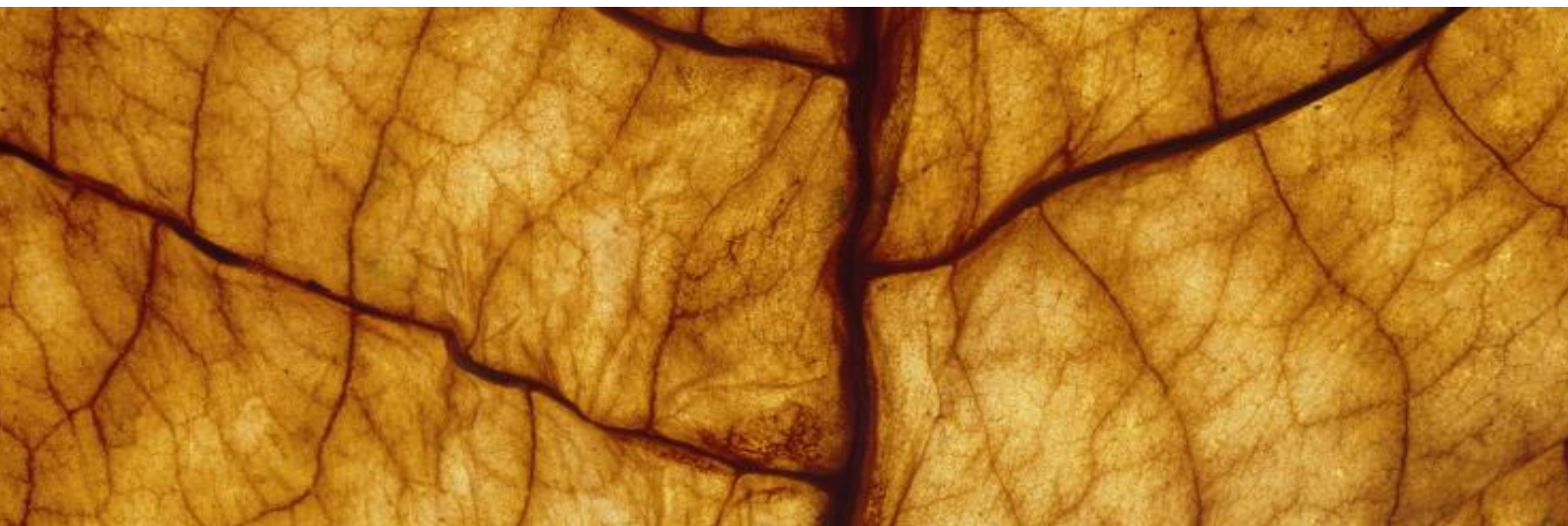
As a result of the crime proofing exercise conducted by this study, some of the envisaged policy options proved to have significant risks of creating unintended opportunities for the ITTP. In particular, the implementation of generic packaging appeared likely to increase the counterfeiting of tobacco products. Also, adoption of the “polluter pays” principle, imposing the health costs of smoking on tobacco manufacturers, may bring unprecedented changes in the market. Furthermore, the estimated increases in final retail prices may

significantly increase the demand for cheap and illicit tobacco products.

Finally, the display ban may increase the risk of ITTP if no appropriate measure enables consumers to identify legitimate retailers clearly and unequivocally. This confirms that the lack of attention paid by the European Commission to the risks of increased ITTP may have serious consequences.

Given the difficulties associated with the policing of tobacco markets though traditional crime control strategies, innovative preventive strategies should be developed by applying approaches such as situational crime prevention or problem-oriented policing. Furthermore, the European regulation should be thoroughly proofed against the risk of creating opportunities for criminals.

1. Introduction



This document concerns the **crime proofing of the policy options under consideration for the revision of the Directive 2001/37/EC** of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (hereinafter TPD).³

This Directive is part of the EU tobacco regulation, and the European Commission is currently considering its revision.⁴ The main

objective of this study is to evaluate the risks of crime opportunities being

³ *OJ L 194*, 18.7.2001, p. 26–35. A consolidated version of the TPD is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001L0037:20090807:EN:PDF>.

⁴ The European Union has addressed the tobacco market and products in several binding and non-binding legal acts:

- Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, *OJ L 194*, 18.7.2001, p. 26–35.
- Council Recommendation 2003/54/EC on the Prevention of Smoking and on Initiatives to improve Tobacco Control, *OJ L 022*, 25.01.2003 p. 31–34.

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- 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 (Tobacco Advertising Directive), *OJ L 152*, 20.6.2003, p. 16–20.
 - Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries, *OJ L 346*, 29.12.2007, p. 6–12.
 - Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, *OJ L 9*, 14.01.2009, p.12–30
 - Council Recommendation 2009/C 296/02 on Smoke-free Environments, *OJ C 296*, 5.12.2009, p. 4–14.
 - Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), *OJ L 95*, 15.4.2010, p. 1–24.
 - Directive 2011/64/EU of the Council of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco, *OJ L 176*, 5.7.2011, p.24–36.

unintentionally created by the policy options envisaged by the Commission to reform the TPD.

The present analysis is not concerned with the impact of the above-mentioned policy options on other, however important, fields (e.g. health, government revenues). Without doubt, tobacco consumption is a danger for human health, and the tobacco market should be regulated by governments. Several studies have argued that intensely regulated markets may be targets for illicit and criminal activities (Savona 2006a; Savona 2006b; Savona, Calderoni, et al. 2006; Savona, Maggioni, et al. 2006; Morgan and Clarke 2006; Albrecht and Kilchling 2002). The tobacco market has seen an impressive increase in its regulation, driven by growing concerns about the health and social consequences of tobacco consumption.

The present study explores the relation between the proposed revisions of the EU TPD and the illicit trade in tobacco products (hereinafter ITTP) in order to support the effective and efficient regulation of the tobacco market. Indeed, the ITTP may jeopardize tobacco control policies, for example by supplying cigarettes to minors or other protected groups, increasing smoking prevalence through the supply of cheap products, and causing significantly greater damage to human health given the reduced controls on and quality standards of illicit products.

As a concerned stakeholder in the fight against the illicit trade in tobacco products, Philip Morris International (PMI) welcomed the initiative of Transcrime to conduct research on this important and relevant area. PMI agreed to contribute financially to the research. However, Transcrime retained full control and stands guarantor for the independence of the research and its results.

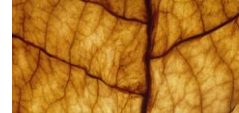
1.1. The Illicit Trade in Tobacco Products



As regards the tobacco market, the risk of crime opportunities being unintentionally created by the TPD is strictly connected to the Illicit Trade in Tobacco Products. There are numerous definitions of ITTP. While there is no common definition at the EU level, the WHO Framework Convention on Tobacco Control (FCTC) provides a widely accepted legal definition. Article 1 of the FCTC, defines

the illicit trade as “any practice, or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase including any practice or conduct intended to facilitate such activity”.

Although, the FCTC provides a first broad definition, in practice the ITTP includes a



number of illicit activities (von Lampe 2006; Framework Convention Alliance 2007; Antonopoulos 2008a; Antonopoulos 2008b; Winstanley 2008; Allen 2011; von Lampe 2011). In particular, the most frequent activities included in the ITTP are:

- **Smuggling:** the unlawful movement or transportation (including the online sale) of tobacco products (genuine or counterfeit) from one tax jurisdiction to another without the payment of applicable taxes or in breach of laws prohibiting their import or export (Joossens and Raw 1998). At the lowest level, smuggling is undertaken when an individual imports cigarettes in excess of national legal allowances for personal use. At the highest level, smuggling is the large-scale diversion of tobacco products to the illicit market which may arise between the production and retail phases. Another term often used in the literature to indicate smuggled tobacco products is 'contraband'.
- **Counterfeiting:** illegal manufacturing in which a product bears or imitates a trademark without the owner's consent. Illegally manufactured products can be sold in the source country or smuggled into another country. Excise tax is rarely, if ever, paid on counterfeit products.
- **Cheap Whites, or Illicit Whites:** this is a more recent type of ITTP where cigarettes are produced legally in one country but normally intended for smuggling into

countries where there is no prior legal market for them. Taxes in production countries are normally paid, while they are avoided/evaded in destination countries.

- **Unbranded tobacco:** manufactured, semi-manufactured and even loose leaves of tobacco carrying neither labelling nor health warnings. It may be sold by weight and consumed in roll-your-own cigarettes or in empty cigarettes tubes ("chop-chop" in some countries) or sold in the form of loose cigarettes in large plastic bags ("baggies").
- **Bootlegging:** legally buying tobacco in a low-tax country and illegally reselling it in a high-tax country. This crime concerns individuals or small groups who smuggle smaller quantities of cigarettes, taking advantage of tax differentials, with the aim of earning extra income. Bootlegging often takes place through the border crossings of the European Union.
- **Illegal manufacturing:** cigarettes manufactured for consumption which are not declared to the tax authorities. These cigarettes are sold without tax and may be manufactured in approved factories or illegal covert operations.

Within a country, there may also be leakages from legitimate tax exempt areas (e.g. duty free, free trade zones) into the tax paid market.

1.2. The Research Agenda on the Illicit Trade in Tobacco Products



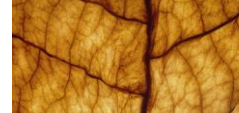
On 5 May 2011, Università Cattolica del Sacro Cuore (Milan, Italy) hosted the Round Table on Proofing EU Regulation against the Illicit Trade in Tobacco Products.⁵ The Round Table (hereinafter RT) had four objectives: 1) provide an overview of existing tobacco regulation around the world and discuss empirical evidence on these policies, 2) discuss the crime implications of existing and future European regulation, 3) identify possible solutions at multiple levels and 4) develop a research agenda to improve knowledge on the ITTP.

Participants in the RT were researchers and policymakers invited to discuss the possible criminogenic effects of tobacco regulation and the application of the crime proofing of legislation to the EU tobacco regulation (see 1.3 below).

Following the Round Table, participants agreed on a Research Agenda on the ITTP composed of six topics (Transcrime 2011b):

1. The **differential perception of the ITTP** frequently creates conflicting approaches and responses to the problem of the ITTP. Studies should analyse how different stakeholders perceive the ITTP and particularly its seriousness, its extent, its implications and possible solutions.
2. The Extended Crime Risk Assessment on the specific provisions identified in the Preliminary Crime Risk Assessment of the **European Tobacco Regulation in force** and discussed during the RT (Transcrime 2011a). The aim should be to analyse in-depth the unintended crime risks created by the provisions selected.
3. Better analysis of the market for tobacco products, considering that **the tobacco market has a dual nature**, i.e. it consists of a legitimate and an illegitimate part. Studies should focus on the relationship between the licit and illicit markets for tobacco products. This includes analysis of how demand for and supply of both types of products are affected by their price, quality and availability.

⁵ Further information and documents on the Round Table are available on Transcrime's website, at <http://www.transcrime.unitn.it/tc/517.php>.



4. The **crime proofing ex ante of the proposed review of the Tobacco Product Directive**, which may include a number of new policy measures which could impact on the ITTP (e.g. plain packaging, display ban, ingredients regulation, vending machine ban). The aim should be to assess the possible crime risks unintentionally created by proposed legislation and suggest solutions to minimize those risks.
5. A study (including, but not limited to, the crime proofing of legislation) on the WHO Framework Convention on Tobacco Control and on the **Draft Protocol to eliminate illicit trade in tobacco products**. The aim should be to assess the level of implementation and effectiveness of the measures in force and to assess the possible impact of the proposed Protocol.
6. Studies should analyse **how the licit and illicit markets vary across countries and regions**, with the focus on the cultural, social and economic factors which affect the structure of the tobacco market (in its dual, licit and illicit, nature).

In particular, topic number 4 of the Research Agenda focused on the revision of the EU TPD (see below, 1.3). The participants acknowledged that the policy options envisaged by the European Commission might have significant impacts upon the ITTP at European level. In particular, it was noted that, of the 256 pages of the study produced for the Commission by RAND Europe to support the impact assessment process, only 2 pages dealt with the ITTP (Tiessen et al. 2011). This was in line with previous studies on EU policy-making processes. Indeed, as confirmed by previous research conducted by Transcrime (Savona et al. 2006c, Savona et al. 2006c), European policymakers frequently do not consider the crime risk implications when drafting new legislation (Transcrime 2011b).

For the above reasons, the participants in the RT agreed that a crime proofing of the proposed policy options for the revision of the TPD would be an important contribution towards a smarter, better-quality and more efficient European regulation of the tobacco market.

1.3. The Tobacco Products Directive 2001/37/EU and Its Proposed Revision



The **TPD was adopted on 5 June 2001 and entered into force on 18 of July 2001.**⁶ The aim of this measure was to approximate the laws, regulations and administrative provisions of the Member States concerning the maximum tar, nicotine and carbon monoxide yields of cigarettes and the warnings regarding health and other information to appear on unit packets of tobacco products, together with certain measures concerning the ingredients and the descriptions of tobacco products. The legal bases of the TPD were Article 95 of the Treaty establishing the European Community (TEC), relating to achievement of the internal market and the protection of public health

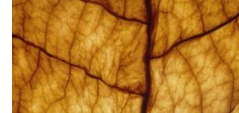
and Article 133 TEC, which deals with common commercial policy.

In the following years, the Commission published two **evaluation reports** in 2005 and 2007 providing an assessment of application of the Directive (European Commission 2005; European Commission 2007b). The reports were based on the information provided by Member States and took account of recent developments and new scientific knowledge, incorporating the views of the stakeholders concerned with tobacco control. The Commission reports acknowledged the positive effects of the EU regulation of the tobacco market and also highlighted the emerging issues to be considered in light of new scientific and technical knowledge (European Commission 2007b).

At the beginning of 2007 the Commission published the **Green Paper Towards a Europe free from tobacco smoke, policy options at EU level** (European Commission 2007a). The Green Paper focused on the promotion of smoke free environments in the EU. It also opened a public consultation on EU tobacco control policies.

In October 2007, the **European Parliament approved a resolution on the Commission**

⁶ The TPD was adopted following the European Commission's proposal (European Commission 1999b) to recast Directive 89/622/EEC (Council Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, Official Journal L 158, 11/06/1992 P. 30-33), Directive 90/239/EEC (Council Directive 90/239/EEC of 17 May 1990 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes, Official Journal L 137, 30.5.1990, p. 36-37) and Directive 92/41/EEC (Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622/EEC, Official Journal L 158, 11.6.1992, p. 30) with the purpose of clarifying and harmonising their contents



Green Paper (European Parliament 2007). The Parliament welcomed initiatives for a responsible European policy to protect citizens from harmful tobacco smoke. In particular, it asked the Commission to present a proposal of revision of the TPD, if possible by 2008, focusing on a number of issues, including:

- Display bans of tobacco products in retail outlets;
- Measures to prevent minors under 18 to access tobacco products (e.g. internet sales ban, vending machines control, bans on smoking in the presence of minors, antismoking campaigns);
- Stronger controls against tobacco smuggling.

The Directorate General for Health and Consumer Protection (**DG SANCO**) of the European Commission launched an **Impact Assessment (IA) on the possible revision of the TPD in March 2010** (DG SANCO 2010a).⁷ The IA is a process aimed at preparing evidence for political decision-making on the advantages and disadvantages of possible policy options, taking account of the economic, social and health impacts of these options. In September 2010, DG SANCO issued a second version of the roadmap, postponing the final deadline for the Commission's proposal to the first quarter of 2012 (DG SANCO 2010b). The impact assessment process is currently on-going and the Commission is expected to release the final IA in the next few months.

In the Roadmap, DG SANCO identifies the **main problems** in the policy area.⁸ Further,

⁷ For more detailed information on the Impact Assessment process, see the dedicated webpage (European Commission 2011a).

⁸ These are (DG SANCO 2010b, 5):

- The labelling rules are still different among Member States, in particular with respect to the use of picture warnings (internal market concern)
- The existing reporting system for the tobacco ingredients is complex for industry and makes it difficult for competent authorities to analyse the data in the absence of harmonised formats (internal market concern)
- Member States have introduced different positive and/or negative lists of ingredients (internal market concern)

it sets the **main policy objectives** for maintaining the good functioning of the internal market and decreasing tobacco-related diseases and deaths.⁹

To achieve the above objectives, DG SANCO envisaged the following **elements for policy options** (DG SANCO 2010b, 3–4):

1. Adjusting the scope of the directive by including further tobacco products and paraphernalia.
2. Changing the labelling requirements for producers.
3. Introducing reporting and registration requirements and market control fees.
4. Defining the ingredients of tobacco products.
5. Revising the sales arrangements for tobacco products.
6. Allowing for adaptations of a technical nature.

DG SANCO commissioned a **study from Rand Europe** to support the IA process. Rand Europe released the study in September 2010, providing a detailed

-
- Consumers are not sufficiently informed about the harmful effects of tobacco products (internal market and health concerns)
 - Information on tar, nicotine and CO on cigarette packages is misleading for consumers (internal market and health concerns)
 - Products bought on the Internet often do not bear health warnings in the language of the country of destination and are available for under-aged consumers (internal market and health concerns)
 - The directive does not cover new nicotine and tobacco products: electronic cigarettes, nicotine drinks, tobacco chewing gum and toothpaste, which are heavily marketed (internal market and health concerns).

⁹ Specific objective of the process are (DG SANCO 2010b, 2):

1. Harmonise the presentation of warning labels and improve consumer information, especially to vulnerable groups.
2. Improve mechanisms for reporting and analysing tobacco products.
3. Harmonise the regulation regarding the presence of harmful, addictive and attractive substances in tobacco products.
4. Regulate market access to tobacco products.
5. Enable speedy adaptation to technical and scientific progress.

analysis of the different policy options and actions envisaged by the Commission from an economic, social and environmental perspective (Tiessen et al. 2011). In particular, the Rand study provided more detailed description of the policy options envisaged, clustering the elements envisaged by DG SANCO into **five possible policy options** (Tiessen et al. 2011, xxii):

Option 1: No change.

Option 2: No binding measures.

Option 3: Minimum revision of the directive, bringing it into line with scientific and international developments.

Option 4: Revision of the directive, bringing it into line with scientific and international developments and strengthening the protection of vulnerable groups.

Option 5: Revision of the directive with the objective of strengthening product regulation and full implementation of the polluter pays principle.

The study discussed in detail the economic, social and environmental impact of the envisaged policy options (see Table 1 for details of the policy options envisaged and main actions). It refrained from identifying the preferred policy option.

Subsequently, **DG SANCO opened a public consultation** from 24 September 2010 to 17 December 2010. The consultation covered six areas: 1) Scope of the Directive, 2) Smokeless tobacco products, 3) Consumer information, 4) Reporting and registration of ingredients, 5) Regulation of ingredients and 6) Access to tobacco products. It asked questions about the changing market of tobacco and nicotine products in order to evidence the need to implement reforms based on an evolving market. Respondents were asked if they agreed with the problem definition, and were then offered two options for policy change: status quo or extension of the scope of the current TPD. Citizens, businesses, non-governmental organizations and national authorities were invited to the consultation (DG SANCO 2011a).

Participation in the consultation was unexpectedly large.¹⁰ More than 85000 contributions were submitted to the DG SANCO, making it the largest public consultation in the EU. DG SANCO analysed the comments and issued a report on the results in July 2011 (DG SANCO 2011b).

The results of the public consultation and additional studies commissioned by DG SANCO should inform the **forthcoming final impact assessment**. Once the final impact assessment has been issued, the Commission will decide whether to table a proposal for the revision of the TPD. Significantly, this proposal would be the first step in the EU legislative procedure involving also the European Parliament and the Council. Experience shows that the Commission's proposals are frequently amended during the legislative process, and this may significantly change the content of the final text. This procedure is likely to take several months and the eventual agreement on a revision of the TPD should take place in 2014 (Smoke Free Partnership 2011).

Surprisingly, the current impact assessment process has paid very limited attention to the issue of the ITTP, notwithstanding evidence suggesting that the illicit market covers a remarkable share of the European market (see below 3.1). In particular, only two of the 256 pages of the Rand study deal with the ITTP. As confirmed by previous studies conducted by Transcrime (Savona et al. 2006c, Savona et al. 2006c), European policy-makers frequently do not consider the crime risk implications when drafting new legislation. The case of the revision of the Tobacco Product Directive seems to confirm this negligence, notwithstanding the long-substantiated record of illicit behaviours in the tobacco market (Transcrime 2011b).

¹⁰ As admitted by DG SANCO "no previous public consultation launched by the European Commission had ever registered such significant participation" (DG SANCO 2011b, 5). However, it should be noted that such success was the "result [...] of several citizen mobilisation campaigns that took place in some Member States. One such campaign was organised by a group representing over 75% of Italian Tobacconists. This action was followed by submissions of personal signatures by over 30 000 Tobacconists across Italy" (DG SANCO 2011b, 6). Indeed, nearly 2/3 of the submissions came from Italy (36%) and Poland (28%) (DG SANCO 2011b, 8).

Table 1. Policy options and areas of tobacco products regulation.

Areas of tobacco products regulation					
Policy Options	Scope of the TPD	Labelling Requirements	Registration & Mkt Control Fees	Ingredients	Sales Arrangements
1: No Change from status quo			No change		
2: Non-binding measures					
3: Minimum revision of the TPD bringing it into line with scientific and international developments	1 - Extend the TPD to include non-regulated nicotine products, non-tob./non-nicotine smoking products, paraphernalia and tob. leaf	1 - make pictorial warnings mandatory 2 - update and enlarge warnings to 50% of both sides of the pack and place them towards the top of the pack 3 - replace TNCO quantitative labelling with qualitative information on contest and emissions and quit-lines	1 - make reporting formats for product ingredients compulsory 2 - introduce fixed yearly registration fees in order to finance ingredients work; only registered products may be marketed 3 - introduce fines for industries in case of non-delivery of ingredients data	1 - ban cancerogenic additives 2 - introduce an additional measurement method for TNCO and set maximum limits accordingly 3 - introduce maximum limits for other yields and ingredients	1 - introduce minimum packed size 2 - harmonize legal buying age to 18 in order to prevent sales to minors 3 - make vending machines inaccessible to minors 4 - ban promotion at retail outlets
4: Revision of the TPD bringing it into line with scientific and international developments and strengthening the protection of vulnerable groups	Option 3 elements	Option 3 elements plus: 4 - further increase the size of warnings to 75% of both sides of the pack 5 - introduce generic packaging	Option 3 elements plus: 4 - introduce market control fees proportionat to the number of outlets iat which the product is sold	Option 3 elements plus: 4 - continuously decrease the maximum limits for TNCO and other yields and ingredients, 5 - refine the definition of ingredients to include tob. leaf	Option 3 elements plus: 5 - ban vending machines 6 - ban cross-border internet sales including the free distribution of product samples 7 - restrict the display of products at retail outlets
5: Revision of the TPD with the objective of strengthening product regulation and full implementation of the polluter pays principle	Option 4 elements	Option 4 elements plus: 6 - further increase the size of the warnings on the back of the pack to 100% 7 - introduce inserts with supplementary information	Option 4 elements plus: 6 - include the health costs of smoking in the calculation of the fees 7 - internalise the external health costs of smoking by requiring full liability and payment of the health costs of smoking by the tob. industry to national health systems	Option 4 elements plus: 6 - set up a European Community laboratory to evaluate tob. and smoking products	Option 4 elements plus: 8 - introduce a standard pack size 9 - ban the display of products at point of sale

1.4. Crime Proofing of Legislation



The **crime proofing of legislation** (hereinafter CPL) is a scientific approach with which to assess and neutralize the opportunities for crime inadvertently created by regulation.

In particular CPL can assess legislation in force (*crime proofing ex post*) or legislative proposals or policy options, also including the “no change” option (*crime proofing ex ante*).

From a theoretical point of view, crime proofing is related to the situational crime prevention approach aimed at reducing opportunities for crime produced by vulnerabilities in legislation.

The CPL has four **aims**:

1. Identify unintended criminal implications or consequences;
2. Determine whether there is a crime risk, and if so, of what crime and of what magnitude;
3. Analyse pros and cons in terms of crime arising from each policy option;
4. If policymakers are involved in the crime proofing exercise, suggest solutions likely to reduce the risk (either by reducing opportunities for crime or by introducing security measures that may mitigate the risk) (Savona, Maggioni, et al. 2006). If policymakers are not involved, the CPL may propose recommendations for management of the risks.

The CPL consists of two elements: the *Crime Risk Assessment* (analysis and identification of possible crime risks due to legislation) and the *Crime Risk Management* (implementation of

solutions to prevent, reduce or remove the crime risks due to legislation). *This document only focuses on the Crime Risk Assessment, since the Crime Risk Management should be conducted in close cooperation with the policymakers charged of the regulation of the selected market.*

The **Crime Risk Assessment** consists of three steps: the Initial Screening, the Preliminary Crime Risk Assessment (hereinafter PCRA) and the Extended Crime Risk Assessment (hereinafter ECRA).

The first step, the **Initial Screening**, is a rapid selection (based on a checklist of 7 risk indicators) of potentially risky legislation requiring further assessment (see below section 2).¹¹

The **PCRA** is the second step of the CPL and has the objective of identifying the crime risks unintentionally created by the regulation, and assessing whether more detailed analysis is needed (thus requiring an ECRA). According to CPL methodology, a first part of the assessment focuses on the vulnerability of the market (see below section 3.1) and a second part on the possible risks arising from specific options or actions (see below section 3.2).

The third and final step (**ECRA**) provides an analytical assessment based on a set of indicators. The indicators assess the likely impact of the possible policy options on the crimes, the perpetrators, the victims and the social costs (Savona, Maggioni, et al. 2006, 28).

¹¹ For further details on the Initial Screening see Savona (2006a, 10).

2. Initial Screening



2.1. Introduction

The Initial Screening (IS) is the first step in the Crime Risk Assessment (CRA) process. Its aim is to select proposals which should undergo a CRA process. It is applied to the policy options for the revision of the TPD developed in the Roadmap by DG SANCO and in the study by Rand Europe (DG SANCO 2010b; Tiessen et al. 2011).

The IS is performed by checking whether an envisaged policy option implies measures generally associated with regulation at risk. Seven types of regulation at risk have been developed by the Jill Dando Institute and Transcrime as general categories of regulation which are likely to produce

opportunities for crime.¹² If any policy option does not fall within at least one type, the CRA process will end and no further activity will be required on that option. Contrarily, if one or more policy options correspond to at least one type, these options will pass to the Preliminary Crime Risk Assessment (PCRA).

In the IS, the policy options and main actions are assessed against seven crime risk indicators corresponding to the seven types of legislation/regulation which normally carry the risk of unintended crime consequences. These indicators are:

¹² See in this regard Jill Dando Institute of Crime Science, *Government Regulations and their Unintended Consequences for Crime: a project to Develop Risk Indicators*. Final Report to the EU Crime Proofing Steering Group. September 2003, UCL.



1) Fee or obligation:

legislation that introduces product disposal regulations or any other new or more burdensome fee or obligation

2) Concession:

legislation that introduces a concession on a tax or a concession on any other fee or obligation

3) Grant, subsidy or compensation scheme:

legislation that introduces or modifies a grant, subsidy, or compensation scheme or any other scheme that provides a benefit

4) Tax or cost: legislation that introduces or increases the tax on legal goods or in any other way increases the costs of legal goods

5) Availability restriction:

legislation that prohibits or restricts a demanded product or service or in any other way decreases the availability of demanded goods or services

6) Law enforcement:

legislation that introduces, modifies or removes a law enforcement capacity, increases or decreases funding for enforcement activity or in any other way impacts on the intensity of law enforcement activity

7) Regulatory power:

legislation that provides officials with regulatory power.

2.2. Screening of the Envisaged Policy Options



Policy **options 1 and 2** do not provide for any amendment of the TPD. In particular, option 1 is the “no change” scenario, while option 2 implies the adoption of non-binding measures. Both policy options may have similar impacts on the creation of unintended crime opportunities for the ITTP, i.e. the current impact of the EU regulation on crime would remain unchanged. For this reason, they do not fall within any of the risk indicators of the IS and no further assessments should be carried out on them. However, this does not mean that these

options are the most desirable regulatory approaches as far as the impacts on the ITTP are concerned. As already mentioned, the EU market of tobacco products shows a significant and possibly growing importance of the ITTP. The scenarios envisaged by these options are not likely to affect this trend and may therefore result in the maintenance of the current regulatory framework which may have indirectly favoured the growth and flourishing of the ITTP.



Option 3 envisages minimum amendments to the TPD in order to bring it into line with current knowledge on tobacco control and with international instruments. The option includes a number of main actions relating to all the different areas of tobacco products regulation. In regard to the possible impact of these main actions on the ITTP:

- The introduction of fixed yearly registration fees in order to finance ingredients work falls within risk indicator **1) (fee or obligation)**, and may entail consequences also for the price of tobacco products, falling within **risk indicator 4) (tax or cost)**.
- The introduction of fines for industry in the case of non-delivery of ingredients data falls within risk indicator **1) (fee or obligation)**, and may entail consequences also for the price of tobacco products, falling within **risk indicator 4) (tax or cost)**.
- The introduction of maximum limits for other yields and ingredients (non carcinogenic, mutagenic or toxic for reproduction) falls within risk indicator **5) (availability restrictions)** since it may result in alteration of the taste of tobacco products.

Option 4 aims at updating the TPD as for Option 3 and also provides increased protection for vulnerable groups, such as adolescents. It includes all the main actions of Option 3 (yearly registration fees, fines for non-delivery of ingredients data and maximum limits for other yields and ingredients) with some additional main actions. As for the risk indicators of the IS,

- The introduction of a generic packaging falls within indicator **5) (availability restriction)** since it would restrict the sale of a product by reducing its recognition by consumers.
- The introduction of market control fees proportionate to the number of outlets at which the product is sold falls within risk indicator **1) (fee or obligation)**. It is also likely to increase the tax on tobacco products and therefore falls within risk indicator **4) (tax or cost)**.
- The ban on vending machines falls within risk indicator **5) (availability restriction)** by restricting the availability of tobacco products.

- The ban on cross-border internet sales falls within risk indicator **5) (availability restriction)** by restricting the availability of tobacco products.
- The restriction on the display of products at retail outlets falls within risk indicator **5) (availability restriction)** by restricting the availability of tobacco products.

Option 5 aims at further strengthening the EU regulation of the tobacco market by implementing the “polluter pays” principle. It includes all the main actions of policy options 3 and 4 (yearly registration fees, fines for non-delivery of ingredients data and maximum limits for other yields and ingredients, generic packaging, market control fees, ban on vending machines, ban on cross-border internet sales, restriction on the display of products at points of sale), with some additional main actions. Concerning the IS,

- The inclusion of the health costs of smoking in the calculation of the fees falls within risk indicator **1) (fee or obligation)** and **4) (tax or cost)** by increasing the price of tobacco products.
- The obligation upon the tobacco industries to pay the health costs of smoking falls within risk indicator **1) (fee or obligation)** and **4) (tax or cost)** by increasing the price of tobacco products.
- Banning the display of products at points of sale falls within indicator **5) (availability restrictions)**, in practice by restricting the availability of tobacco products.

Overall, the IS highlighted that most main actions fall within the risk indicators concerning registration & market control fees (see Table 2). Indeed, these actions may induce evasion, avoidance or minimisation of the imposed fees, which may also include bribery of officials. Remarkably, the ITTP mainly revolves around the evasion of taxation on tobacco products (von Lampe 2011). Also main actions on sales arrangements frequently fall within the risk indicators. Sales arrangements, by restricting the availability of legal tobacco products, may stimulate the illicit market. Indeed, the dual nature of the tobacco market implies that consumers may switch to the illicit market whenever access to legitimate products is restrained or prohibited.



2.3. Results of the Initial Screening



Results of the IS

Several policy options fall within the risk indicators (in particular indicator **1) fee or obligations, 4) tax or costs** and **5) availability restrictions**). This implies that a **Preliminary Crime Risk Assessment (PCRA) is needed**. The PCRA will focus on the following policy options (see Table 2):

- Option 3, with a focus on registration and market control fees and sales arrangements
- Option 4, with a focus on registration and market control fees, ingredients and sales arrangements
- Option 5, with a focus on registration and market control fees and sales arrangements



Table 2. Policy options and main actions falling within the 7 risk indicators of the Initial Screening

Policy Options	Areas of Tobacco Products Regulation	Main Actions	1 Fee Obligation	2 Concession	3 Grant, Subsidy or Compensati on Scheme	4 Tax or Cost	5 Availability Restriction	6 Law Enforcement	7 Regulatory Power
Option 3	Registration & mkt control fees	introduce fixed yearly registration fees in order to finance ingredients work	X			X			
		introduce finest for industries in case of non-delivery of ingredients data	X			X			
	Ingredients	introduce maximum limits for other yields and ingredients					X		
Option 4	Labelling requirements	introduce generic packaging					X		
	Registration & mkt control fees	introduce market control fees proportionate to the number of outlets at which the product is sold	X			X			
	Sales arrangements	ban vending machines					X		
		ban cross-border internet sales including the free distribution of samples					X		
Option 5	Registration & mkt control fees	restrict the display of products at retail outlets					X		
		include the health costs of smoking in the calculation of the fees	X			X			
		internalise the external health costs of smoking by requiring full liability and payment of the health costs of smoking by the tob. industry to national health systems	X			X			
	Sales arrangements	ban the display of products at points of sale					X		

3. Preliminary Crime Risk Assessment



As argued above, only policy options 3, 4 and 5 fall within the risk indicators of the IS (Table 2). The PCRA analyses the vulnerability of the tobacco market to crime (section 3.1) and discusses possible crime risks arising from specific policy options/main actions (section 3.2).

3.1. Vulnerability of the European Tobacco Market



The analysis of the vulnerability of the European tobacco market is based on two dimensions. The first is how the tobacco market is *attractive* to crime. The second relates to the *accessibility* of the tobacco market to criminals.

3.1.1. Attractiveness of the Tobacco Market to Crime

The attractiveness of the tobacco market to crime is related to the levels of crime within the market, to the profits that can be achieved with the ITTP, and to the risk of detection associated with it.

Levels of Crime

Several studies have attempted to estimate the ITTP based on different methods. The world share of the ITTP on total tobacco consumption was reported to be 6% in 1993, 8.5% in 1995, 10.7% in 2006, 11.7% in 2007 (Mackay and Eriksen 2009, 55; Merriman, Yurekli, and Chaloupka 2000, 374; Shafey et al. 2009, 54; Joossens et al. 2009, 17). Given the difficulties of estimating illicit and undercover activities, further assessments are

certainly required, and data and methods still need significant improvements. However, the above results exhibit a fair level of consistency which reinforces the reliability of the results. They demonstrate that **the ITTP is a large component of the EU tobacco market and that its magnitude is increasing.**

Interestingly, some elements suggest that **the worldwide retail value of the ITTP may be comparable in size to the cocaine market.** Estimates by a recent UN report on the cocaine market highlight that the global retail value of consumed cocaine was 85 billion US\$ in 2009 (UNODC 2011, 60). A recent study has estimated that the worldwide government revenue losses from the ITTP amounted to 40.5 billion US\$ in 2007 (Joossens et al. 2009). Considering that the mean of taxes in percentage of retail price is approximately 50%, the global retail value of the ITTP was 81 billion US\$ for the same year.¹³

¹³ The figure is probably underestimated, since the revenue loss calculated by Joossens et al. already took account of "the impact of the fall in consumption on tax



These results demonstrate that **the tobacco market should be considered a dual market with a licit and an illicit part** (Reidy and Walsh 2011, 24). When regulating the tobacco market, consideration should be made of the interaction between the licit and the illicit markets, and particularly of shifts from one to the other (Transcrime 2011b).

In particular, recent studies have estimated the EU ITTP at approximately 8.5% of total consumption in 2007 (Joossens et al. 2009, 10) and 9.9% in 2010 (KPMG 2011, 39). Therefore, also **in the European Union, the ITTP is an important factor which should be taken into account in regulating the tobacco market.**

Existing studies show that the ITTP involves a wide **variety of actors**, including some legitimate manufacturers in the tobacco industry, organized or terrorist groups, and other criminals.

First, the tobacco industry has been repeatedly cited as indirectly contributing to the smuggling of tobacco products. In many countries, governments have taken legal action on the fiscal losses caused by the industry's exploitation of transit trade resulting in significant smuggling of tobacco products (Joossens and Raw 1998; Beelman et al. 2000; Beelman et al. 2001; Beare 2003; von Lampe 2006). For years, the industry's argument was that it could not control the product after its sale (Hornsby and Hobbs 2007, 565).

Since 2004, the four major tobacco companies (Philip Morris International, Japan Tobacco International, British American Tobacco and Imperial Tobacco) have signed agreements with the European Commission and the EU MSs to cooperate on anti-contraband and anti-

counterfeit initiatives.¹⁴ By signing these agreements, the industry has committed itself to supporting prevention of the ITTP. Moreover, a comprehensive system for exchanging information on seizures of counterfeit and genuine cigarettes has been established. The European agreements represent an extremely interesting development in the field of the ITTP in the EU. An analysis of the interaction between EU regulation in general and such agreements may highlight critical issues and potential synergies for improved market regulation.

Since the most recent agreements were signed in 2010, it is too soon to state whether they will be able to prevent any form of ITTP. Significantly, a recently released investigative report alleges the involvement of a tobacco manufacturer in repeated smuggling activities (OCCRP 2011b). The company has denied any involvement and claimed that the allegations are false, although it has provided no evidence in support of this claim (OCCRP 2011a). If finally confirmed by official investigations, these allegations may show that the agreements have not completely stopped any illicit practice. In addition, other tobacco manufacturers are not bound by the agreements and may persist in previous practices which directly or indirectly favoured the ITTP. Overall, the involvement of some manufacturers in the ITTP remains a significant factor that requires constant attention and further research.

Second, there are frequent reports of the involvement of organized crime and terrorist groups in the ITTP (OLAF). These groups may be attracted by opportunities to make significant profits with lower risks compared with other criminal traffics (e.g. drug trafficking). They may be able to organise large smuggling operations and the manufacture of counterfeit cigarettes. Indeed, extremely well-organized groups, such as the Italian mafias or other Eastern European or Asian criminal organizations, have participated in the past and participate today in the ITTP (Griffiths 2004; OLAF). In particular, many sources report that, since

revenues before estimating the resulting increase in revenue as a result of eliminating smuggling" (2009, 15). The mean tax proportion of final retail price was calculated on data from the Tobacco Atlas 2009 (Shafey et al. 2009). The mean share is not weighted for the population, but the mean tax share for the first five countries in the world by population (China, India, USA, Indonesia and Brazil) is 49,75%, suggesting that the weighted mean share should not vary significantly.

¹⁴ The texts of the agreements and other useful information are available on the OLAF website: http://ec.europa.eu/anti_fraud/budget/index_en.html.



World War II, the ITTP has been a crucial activity for the Neapolitan Camorra and the Sicilian Mafia, and that cigarette smuggling was crucial also for the development of the so-called 'fourth mafia' (the Apulian *Sacra Corona Unita*) (Arlacchi 1994; Arlacchi 1992; Paoli 2007; Massari 1998). Other studies have shown the presence of large networks of Vietnamese nationals in Berlin's illicit tobacco market (von Lampe 2002). Yet others have argued that, in some cases, terrorist groups and networks may be involved in the ITTP (Shelley and Melzer 2008; Shelley and Picarelli 2002; Allen 2011, 15; Coker 2003). However, there is a need for further empirical studies on the actual level of involvement of organised criminals and/or terrorists in the ITTP. At present, it seems that their participation is more exceptional than routine, particularly on considering the overall size of the ITTP (von Lampe 2011, 152).

Third, the bulk of the criminological literature has argued that most ITTP is perpetrated by small groups and/or independent criminal entrepreneurs (von Lampe 2006; Antonopoulos 2007; van Duyne 2003). These studies, conducted particularly at the retail level in the Netherlands, Germany, Greece and the UK, suggest that large and stable groups/networks are rarer. When they are present, as in the case of large networks mainly composed of Vietnamese nationals, there is little or no evidence of the creation of cartels or violent mafia-type groups (von Lampe 2002, 150).

Overall, the levels of crime in the tobacco market are high. The most recent estimates maintain that, in the EU, the ITTP accounted for approximately 64 billion cigarettes or 9.9% of total consumption in 2010 (KPMG 2011). This figure clearly shows that the market is extremely vulnerable to crime and suggests that it should be more closely regulated.

Profitability

The ITTP is in general extremely profitable. Tobacco products are heavily taxed worldwide, and EU MSs generally apply higher excise and taxation policies. As a result, the difference between retail price and production costs is very high and accounts for the major share of the retail price

(Joossens 1998, 149; Levinson 2011, 21). In particular, cigarettes are the commodity with the highest fiscal value per weight (Joossens 1998, 149–150). In the EU, the mean tax share of the final retail prices hovers at around 80% (DG TAXUD 2011, 6).

This means that the ITTP is likely to yield high profits. According to experts, cigarette counterfeiting may yield a return on investment amounting to more than forty times the invested capital (van Heuckelom 2010) and over (Gutauskas 2011, 72). Although heavy taxation on tobacco products is intended to reduce and compensate for the societal costs caused by tobacco consumption, the price difference makes all forms of ITTP extremely profitable (van Duyne 2003; von Lampe 2005a; von Lampe 2005b; Reidy and Walsh 2011). While accounting for the importance of price differentials, some studies argue that these are not the main elements impacting on the levels of ITTP in a country (Joossens and Raw 1998; Joossens et al. 2009).¹⁵ In fact, the expected profits are counterbalanced by other factors, such as smoking prevalence and smoking habits, supply/availability of illicit products, penalties and sanctions against the ITTP, and the levels of law enforcement. Whilst the focus on factors other than price is crucial, analyses of the role of price differentials do not seem to consider the prices of tobacco products in relation to the average income in different countries.

In general, the mechanisms producing profits for the ITTP may be a combination of (Levinson 2011, 22; von Lampe 2011; Joossens et al. 2009, 2–6):

- Tobacco tax/excise evasion (smuggling and counterfeiting)
- VAT evasion (smuggling and counterfeiting)
- Lower production/purchase cost (counterfeiting)
- Misuse of registered brands and trademarks allowing higher prices (counterfeiting).

¹⁵ Specifically, "a high tax margin can provide the initial incentive to smuggle; however the data show that it is not the most important factor" (Joossens et al. 2009, 9).



- Access to market segments/niches prohibited or restricted for legitimate products, such as minors, flavoured tobacco products, smokeless tobacco products (all types of ITTP).

Risk of Detection

The risk of detection in the commission of the ITTP is very low owing to a number of factors.

First, the sheer **size of the illicit market** represents a daunting task for most law enforcement agencies. Policing large large markets is extremely complicated, and the results are uncertain (as decades of strict anti-drug policies demonstrate). As already stated, the ITTP is comparable in size to the cocaine market. Strict policing of the ITTP would require resources that not all EU MSs can afford.

Second, **detection of the ITTP is difficult** because of the small size and variety of tobacco products. Small-scale smuggling or bootlegging or “ants contraband” regularly occur across several EU borders, and it is extremely difficult to detect these activities, given that tobacco products are transported in small loads, often in private vehicles. An example evidences these difficulties. The European Commission estimated EU-wide seizures in 2009 at 4.7 billion cigarettes (European Commission 2011b, 5). The most updated and detailed studies estimate the total ITTP volume for the same year at 61 billion cigarettes (KPMG 2011, 38). Consequently, the most recently available figures show that the current EU seizures account for only 7.7% of the EU illegal market.

Third, **international cooperation against the ITTP** is still in its development phase. Worldwide, cooperation on the enforcement of tobacco regulations has not been one of the main priorities in the last decades. Only recently have international efforts focused on the development of a Protocol to Eliminate Illicit Trade in Tobacco Products to the WHO Framework Convention on Tobacco Control. At present, the protocol is still under negotiation and its actual impact in strengthening international cooperation against the ITTP remains unknown.

Nor is the ITTP a priority in the context of closer EU cooperation in criminal matters. The ITTP remains largely neglected in the Treaties, and EU measures regulating the tobacco market do not contain any provision on the ITTP. No legal instrument has been introduced in the specific field of the fight against the ITTP. Most notably, there is no mention of the ITTP in the mutual recognition measures (e.g. European Arrest Warrant, European Evidence Warrant) and in the decisions regulating OLAF, Europol and Eurojust (European Commission 1999; European Union 2009; European Union 2002). EU competence is derived from provisions relating to the frauds against the EU budget or frauds and counterfeiting of goods in general. As further evidence, the ITTP has a minor role in the 2010 reports by Europol and Olaf (Europol 2011; Olaf 2011), while it is not mentioned at all in the Eurojust 2010 report (Eurojust 2011). Only recently has the Commission drafted an action plan to fight the smuggling of cigarettes and alcohol along the EU’s Eastern border (European Commission 2011b). The future evolution of this proposal remains to be verified.

Fourth, the **policing of the ITTP seems rarely to be a priority for national law enforcement agencies**. Criminal legislation frequently considers tobacco-related crimes to be minor offences (Allen 2011, 21). Furthermore, notwithstanding the importance of ITTP, law enforcement priorities frequently focus on other complex crimes (drugs, human trafficking, terrorism) (Beare 2003, 185 and footnote 4). For example, whilst cigarette seizures in the EU amounted in 2009 to 7.7% of the total amount of illicit cigarettes consumed, recent estimates for the cocaine market record 35 tons seized compared with 123 tons consumed in West and Central Europe in the same year, meaning that seizures account for 28.5% of final consumed cocaine (UNODC 2011, 64). Serious efforts to improve the policing of the ITTP resulted in successful reductions of the share of the illicit market (Joossens and Raw 2008; HMRC and UKBA 2008).

Lastly, the **stigma normally associated with much criminal activity does not always apply to the ITTP**. This is because the population frequently does not have



full knowledge of the seriousness and consequences of the ITTP, and also because tobacco products, contrary to e.g. illicit drugs and firearms, are still considered everyday commodities easily accessible to most adult citizens (Allen 2011, 21).

3.1.2. Accessibility of the Tobacco Market to Criminals

The accessibility of the tobacco market to crime relates to the levels of violence and/or corruption in the market (*modus operandi*) and to the exploitability of the market for criminal purposes.

Violence and/or Corruption (*modus operandi*)

In general, in demand-driven illicit markets violence is relatively limited or lower than supposed by the mainstream media. This is because violence is bad for business since it deters customers from buying illicit goods and services and attracts the attention of law enforcement agencies (Pearson and Hobbs 2001, 41–42; Reuter and Haaga 1989, 26). Since the ITTP is also competing with the legal market for tobacco products, the levels of violence should be particularly low, or otherwise customers would move rapidly to the legal sector.

The ITTP is frequently related to bribery and corruption. The European Commission states that “corruption of border police and customs remains a prevalent problem at the Eastern border” (European Commission 2011b, 8). Other studies have highlighted that corruption is a factor which fosters the ITTP, possibly more than price levels (Joossens et al. 2009, 17). Significantly, a study has found that experts’ estimates on the ITTP are positively and significantly associated with the perception of corruption as measured by the Transparency International Corruption Perceptions Index (Merriman, Yurekli, and Chaloupka 2000).

Exploitability of Factors, Products or Structures of the Tobacco Market for Crime

Given the extent of the illicit market and the significant demand for illicit tobacco products, the factors, products and structures of the tobacco market are exploitable for criminal purposes. This may happen in a number of different ways. For example, the international and local distribution channels may participate in the ITTP so as to increase profits and market shares (OCCRP 2011b). Licensed producers may also be involved in the production of counterfeits tobacco products. The tobacco manufacturing machines discarded by legitimate manufacturers may be used by criminals to set up illegal cigarette plants. As mentioned above, some legitimate manufacturers have been reported to exploit the transit trade system (which suspends taxation until the final destination) in order to increase smuggling.

Similarly, also free trade zones (FTZ) may be exploited for illicit purposes (Allen 2011, 19). FTZ have been created to attract new business and encourage foreign investments. For this reason, they enjoy special regimes relating, for example, to taxation and custom procedures, including tax exemption and reduced controls. These features make FTZ attractive not only for legal businesses but also for illegal actors. Indeed, recent reports have stressed the risk that FTZ may be exploited by organized crime groups and counterfeiters to launder proceeds of crime or to move counterfeit goods (including cigarettes) around the world (Allen 2011; FATF 2010). Due to relaxed controls and streamlined administrative procedures characterizing FTZ, criminals may smuggle tobacco products or deal in counterfeit goods, disguising their origin or changing their final destination. They can also complete the production of unfinished goods within the zone – including the use of false trademarks or the repackaging of products – and subsequently re-export the so-counterfeited goods (David Cooper 2010).



3.2. Crime Risks Arising from Specific Main Actions



3.2.1. Option 3

Option 3 envisages minimum amendments to the TPD so as to bring it into line with current knowledge on tobacco control and with international instruments. The IS selected the following main actions as falling within the risk indicators:

- Introduce fixed yearly registration fees in order to finance ingredients work
- Introduce fines for industries in the case of non-delivery of ingredients data
- Introduce maximum limits for other (non carcinogenic, mutagenic or toxic for reproduction) yields and ingredients.

Envisaged Crime Risks

The crime risks associated with the main actions envisaged for registration and market control (**introduction of registration fees and fines for the non-reporting of ingredients**) relate to the fee avoidance/evasion or transfer of increased costs to final consumers which may increase the ITTP in some Member States. However,

the probability of these behaviours occurring appears limited. The enforcement of registration fees should be relatively straightforward and with limited room for evasion/avoidance. Also, the costs of registration are not likely to represent an excessively high cost for the manufacturers, and therefore should not reflect significantly on prices. Similarly, the delivery of ingredients data is already required in some Member States, and the industry should be able to comply easily with the requirement. Therefore, fines can be expected to be low with no transfer effect on retail prices. *The risks of increased ITTP are low.*

As concerns the **introduction of maximum limits for ingredients** (other than tar, nicotine and carbon monoxide), the risk is that legitimate tobacco products may become less palatable than illicit products for consumers. In general, legitimate products have higher quality and taste. The limitation on ingredients not clearly carcinogenic, mutagenic or toxic for reproduction may make these products less appealing to the public and induce consumers to purchase



illegal products. The Rand study acknowledged that no such measure has ever been implemented in any country (Tiessen et al. 2011, 177). Furthermore, at the moment the limited evidence as to consumers' tastes and preference between legal and illegal tobacco products suggests that, although price is a significant driver, other factors are important as well, including personal preferences (Pellegrini, Fry, and Aitken 2011). Neither DG SANCO nor the Rand study provide any information about the type and extent of the limitations envisaged. This lack of information prevents more detailed analysis of the main action envisaged.

However, it seems appropriate to highlight that, *depending on the extent and types of the limitations on specific ingredients, the main action envisaged may have crime risk implications varying from marginal to extremely significant.* For example, studies have frequently reported that a ban on, or strict limitation of, menthol cigarettes may

considerably increase the illicit trade in countries where these products are popular and a relatively large demand already exists (e.g. United States or Finland) (United States Trade Representative 2010). A sudden limitation on the availability of menthol cigarettes might unintentionally create opportunities for the ITTP. Contrarily, the limitation/ban on ingredients such as candy and fruity flavours may have a marginal impact on the ITTP since the market share of such products is negligible. These examples show that further information is required before detailed assessment can be made of the crime risk implications of limitations imposed on the ingredients of tobacco products.

Overall, the assessment of the crime risks possibly created by ingredients limitations would require more information than is currently available on the types and extent of the envisaged limitations. *The risk of increased ITTP is currently impossible to determine.*

For the above reasons, the crime risks associated with policy option 3 are low in relation to the introduction of registration fees and fines for non-reporting; for the limitation on ingredients crime risks may vary from marginal to extremely significant, depending on the extent and type of the limitations. In the absence of such information, the actual level of risk is impossible to determine. **No ECRA is presently possible.**

3.2.2. Option 4

Option 4 consists in updating the TPD and also providing increased protection of vulnerable groups, such as adolescents. In addition to the main actions provided in option 3, the IS selected the following main actions as falling within the risk indicators:

- Introduce generic packaging.
- Introduce market control fees proportionate to the number of outlets at which the product is sold.
- Ban vending machines.
- Ban cross-border internet sales including the free distribution of samples.
- Restrict the display of products at retail outlets.

Envisaged Crime Risks

The crime risks associated with the **introduction of generic packaging** relate to the increased counterfeiting of tobacco products, which has significantly increased in

recent years, also as a reaction to the reduced supply of smuggled tobacco products (Shafey et al. 2009, 54). The imposition of standardized/generic packaging may make it difficult for consumers to distinguish legitimate products from illegitimate ones. As frequently argued, recent technologies enable the industry and the law enforcement agencies to maintain tight controls over market distribution through the tracking and tracing of tobacco products. However, these technologies are not yet mandatory for all manufacturers and distributors. In any case, such technologies significantly increase control and detection of illicit products by manufacturers and public authorities, but they do not assist the general public in distinguishing between genuine products and counterfeits. The capacity of consumers to distinguish legitimate from counterfeit generic packs and tobacco products may diminish according to how the measure is implemented. Furthermore, consumers may



gradually lose perception of the difference between a licit and an illicit tobacco product if brands and trademarks are removed. *The risk of an increase in the counterfeiting of tobacco products associated with the introduction of generic packaging main action is high.*

The **introduction of market control fees proportionate to the number of outlets at which the product is sold** relates to fee avoidance/evasion or transfer of increased costs to final consumers, which may increase the ITTP in some Member States. As acknowledged by the Rand study, the implementation of this measure encounters difficulties in measuring the number of outlets (Tiessen et al. 2011, 161). Assuming that this problem can be solved through improved data collection, the implementation of this measure may be reasonably easy, and fees avoidance/evasion should be reduced. As to the transfer of costs to the final consumer, much will depend on the rates of the fees. Unfortunately, the Rand study provides no estimates on this point. If the overall amount of the fees remains as envisaged for the registration fees provided in policy option 3, the unintended crime risks should be limited. Overall, *the risk of general increase in the ITTP associated with this main action is low.*

The crime risks associated with the **ban of vending machines** relate to increased demand for illicit products. In fact, many EU Member States have already banned vending machines, and others have restricted their use in order to prevent purchases by minors. Only two Member States (Denmark and Malta) have not imposed restrictions on these devices (Tiessen et al. 2011, 188–189). In some instances, vending machines may be the only means of access to tobacco products at night and during holidays. If other retailers or points of sale are generally available during these periods, consumers may be pushed towards the illicit market. Illicit retailers or street vendors may increase in number, providing illicit tobacco products

especially in the proximity of bars, restaurants, clubs and other night-life establishments. However, no study has provided empirical evidence on the relation between a ban on vending machines and the ITTP. Since the prohibition is in place in most EU Member States, further research would be possible. At present, however, *the risk of significant growth of the ITTP in relation to a ban on vending machines appears low.*

With regard to the **ban on cross-border internet sales, including the free distribution of samples**, the crime risks relate to the restriction on the availability of tobacco products. Internet sales are often prohibited or restricted in EU Member States (Tiessen et al. 2011, 188). Furthermore, internet sales are frequently connected with the ITTP. Their ban is therefore likely to reduce the levels of ITTP. *There is no risk of increased ITTP associated with the ban on cross-border internet sales.*

Finally, a **restriction on the display of products at retail outlets** may reduce the availability of legitimate products and prevent consumers from identifying legitimate retailers. The main action envisaged is a middle solution between the simple ban on advertising and the stronger ban on the display of products at retail outlets (Tiessen et al. 2011, 195). The Rand study does not provide much detail on the operational implementation of the restriction, but rather associates the mere display of tobacco products with advertising and promotion at points of sale. This approach appears questionable and further analysis should have been conducted. Notwithstanding the lack of information, it seems reasonable to conclude that display restriction would still allow consumers to identify and locate legitimate tobacco products and retailers. Consequently, *the risk of increased ITTP connected with the restriction of the display of products at points of sale is low.*

Therefore For the above reasons, the crime risks associated with policy option 4 are generally low, with the important exception of the introduction of generic packaging, which may have a high risk of increased counterfeiting of tobacco products and availability of unbranded “chop-chop” tobacco.

Therefore **an ECRA of the main action on generic packaging is required in relation to the risk of increased counterfeiting of tobacco products.**



3.2.3. Option 5

Option 5 is a further strengthening of the EU regulation of the tobacco market by implementing the “polluter pays” principle. In addition to the main actions provided in options 3 and 4, the IS selected the following main actions as falling within the risk indicators:

- Include the health costs of smoking in the calculation of the fees.
- Internalise the external health costs of smoking by requiring full liability and payment of the health costs of smoking by the tobacco industry to national health services.
- Ban the display of products at points of sale.

Envisaged Crime Risks

The crime risks associated with the main actions relating to the **implementation of the “polluter pays” principle** (namely the inclusion of the health costs of smoking in the calculation of registration fees and the internalisation of the external health costs of smoking by requiring full liability and payment of the health costs of smoking by the tobacco industry) are connected with behaviours aimed at cost avoidance/evasion or transfer of increased costs to final consumers with higher prices which may generate unexpected increases in the ITTP in some Member States. As with cost avoidance/evasion, the dramatic changes that the implementation of the above-mentioned actions would entail are likely to require a very strong system for the imposition of the costs on the industry. The current available data on market shares and final consumption are likely to provide sufficient information for the implementation of the cost-transfer system. *The risks of tax evasion/avoidance are low.*

As regards the transfer of costs to final consumers, this is likely to result in a significant increase in retail prices. As already discussed, the ITTP is mainly driven by the price differential between legal and illegal tobacco

products. According to the Rand study for DG SANCO, implementation of the “polluter pays” principle is likely to have a significant impact on the tobacco industry and on smoking prevalence (Tiessen et al. 2011, 163 ff.). The analysis, however, does not consider that a significant number of smokers may simply shift to the illicit market. A recent study has argued that the price of cigarettes in one EU Member State has already reached the point where further increases are likely significantly to stimulate the consumption of untaxed (mostly illicit) cigarettes, so that the total government revenue may decrease (Reidy and Walsh 2011). A critical review of this study has acknowledged that “further tax increases would lead to reductions in tax revenues as consumption of taxed cigarettes would fall sharply with much of the drop resulting from some smokers switching to untaxed cigarettes” (Chaloupka and Tauras 2011, 19). *The risk of a general increase in the ITTP as a result of the higher prices induced by the “polluter pays” principle of tobacco products is therefore high.*

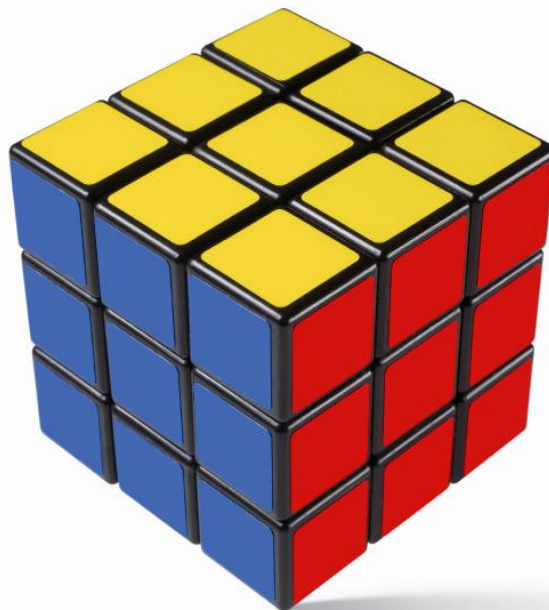
The crime risks associated with **the ban on the display of products at points of sale** relate to the reduction of the availability, recognisability and identification of legitimate tobacco products compared with illegitimate ones. In particular, the main action may make it difficult for consumers to distinguish between legitimate retailers and illegitimate ones unless specific signs or other devices are allowed in order to distinguish legitimate points of sale. Furthermore, the difficulty of identifying and locating legal retailers may induce consumers to buy tobacco products on the illegal market, whether from street vendors or other alternatives. Currently, the only EU Member State banning the display of tobacco products is Ireland. There is no study assessing the impact of such measures on the levels of ITTP, while there is a strong debate on the effectiveness of such measures in reducing smoking prevalence (Tiessen et al. 2011, 192–195). Overall, *the risk of a general increase in the ITTP is medium.*

For the above reasons, the crime risks associated with policy option 5 suggest that **an ECRA is required** of the following main actions:

- **Actions associated with the implementation of the “polluter pays” principle, in relation to the increase of the ITTP consequent upon significant increases in the prices of tobacco products.**
- **The ban on the display of products at points of sale, in relation to a general increase of the ITTP consequent upon increased difficulties in identifying legitimate products and retailers.**



3.3. Results of the Preliminary Crime Risk Assessment



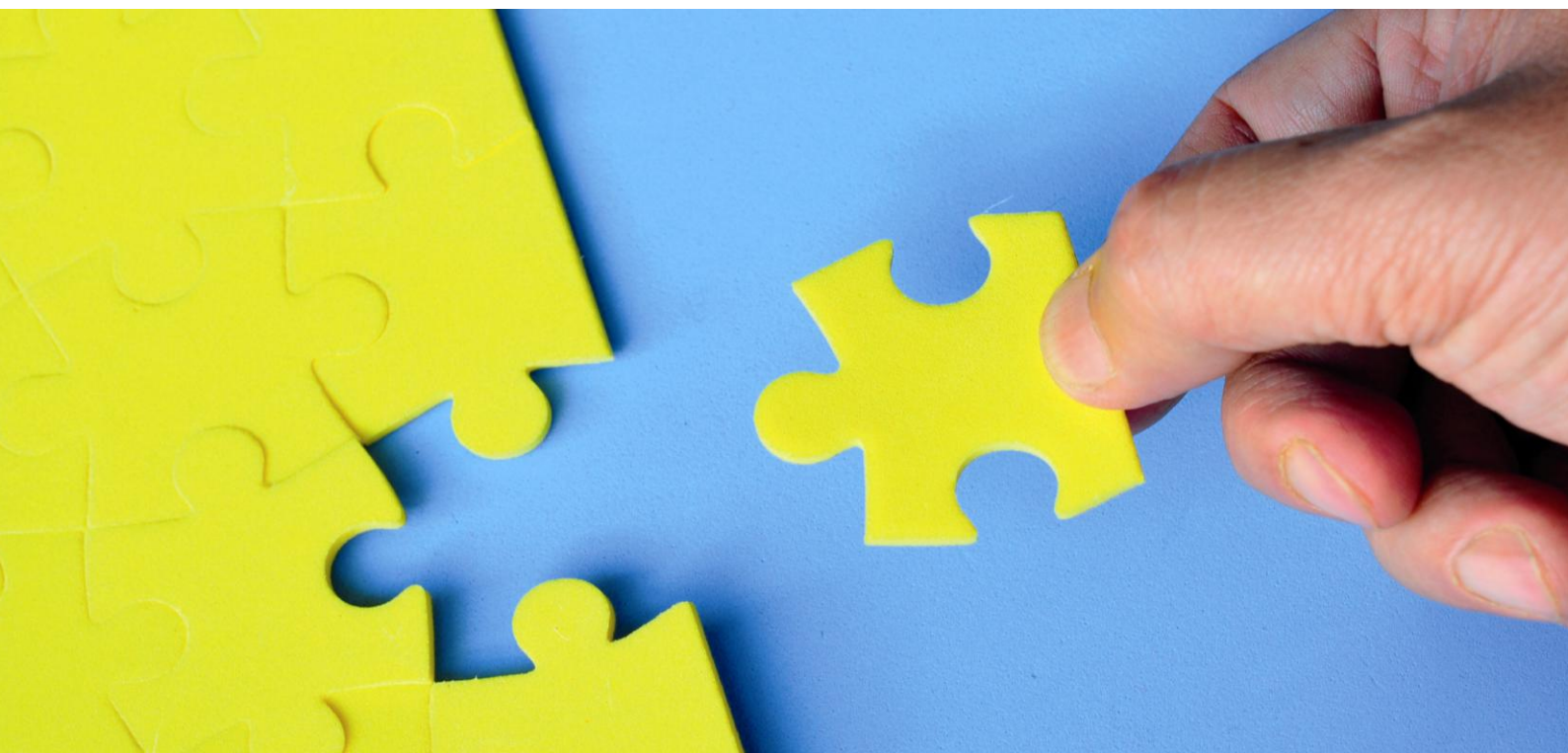
Results of the PCRA

The PCRA highlighted that the tobacco market is extremely vulnerable to crime and in particular to the different types of the ITTP.

The analysis of the policy options envisaged, and the related main actions, highlighted:

- **A high risk that generic packaging may increase the counterfeiting of tobacco products**
- **A high risk that implementation of the “polluter pays” principle may cause the ITTP to grow as a consequence of significant increases in the prices of tobacco products**
- **A medium risk that the ban on the display of products at points of sale may result in increased ITTP due to difficulties in identifying legitimate products and retailers**

4. Extended Crime Risk Assessment



The PCRA selected the main actions with a medium or high risk of creating unintended crime opportunities in the tobacco market. For each main action at risk, the following subsections analyse – on the basis of available information and data – the likely impact on crime, perpetrators, victims and costs.

4.1. Generic Packaging



Globally, only Australia will introduce the generic packaging of tobacco products (ABC News 2011). The new legislation will take effect from December 2012 (Roxon 2011). Consequently, there is no available information and data about the actual impact of generic packaging on the ITTP. The assessment is therefore based on general criminological assumptions about the likely evolution of crime, perpetrators, victims and costs.

In any case, the lack of any study on generic packaging and the ITTP suggests that any policy considering its introduction should carefully ponder the possible risks of creating crime opportunities.

4.1.1. Crime

Will the amount of risk vary?

The risk of the counterfeiting of tobacco products is likely to increase unless specific measures are introduced to prevent it. Significantly, the Australian Bill does not contain any provision concerning prevention of the counterfeiting of plain packaging (Australian Government 2011). Although frequently cited in media debates on the introduction of plain packaging, counterfeiting does not seem to have received much attention from legislators. Some sources report that the Australian Government may consider introducing

tracking and tracing technologies and other solutions to prevent counterfeiting into future regulations (Thomas 2011). However, even if these solutions were adopted, they would improve prevention and detection by the industry, distributors, retailers and the law enforcement agencies, but they would have very limited impact on the capacity of consumers to identify legitimate products. The ability to spot illicit products (and thereby avoid the increased health damage caused by counterfeit tobaccos) may be reduced by implementation of this main action.

Moreover, it cannot be ruled out that consumers will be more attracted by illicit tobacco products still featuring branded packaging (either counterfeited, smuggled, or 'illicit whites'). Furthermore, there may be the risk that if consumers are confronted with generic, unbranded products, they may gradually lose perception of the illegality of illicit alternatives (both branded, such as smuggled tobacco, or 'illicit whites' and unbranded counterfeits).

How will the risk of being detected while counterfeiting vary?

Generic packaging is likely to reduce the risk of being detected while counterfeiting tobacco products. Indeed, most of the techniques adopted to distinguish the packaging of genuine tobacco products may



be prohibited. As already mentioned, even if new tracking and tracing technologies were introduced, they would not improve the ability of consumers to detect counterfeited products.

How will the expected profits for counterfeiters vary?

Different hypotheses on the market impact of plain packaging have been advanced. Most analysts suggest that tobacco products may become commoditized, and that prices are likely to decrease with the risk of increased consumption, which should be tackled with increased taxation (Thomas 2011; Tiessen et al. 2011, 152; Deloitte 2011). Another study argues that, after an initial decline in prices, plain packaging may ultimately result in lower levels of innovation and market dynamism. This would strengthen existing market positions, ultimately leading to quasi-monopolistic competition which may result in higher prices and decreased consumption (Europe Economics 2008, 27–29). The above hypotheses may have similar impacts on the profits from counterfeiting tobacco products. Indeed, profits per counterfeited pack are likely to remain stable, or more probably increase, depending on the price dynamics on the legitimate market. Furthermore, the quantity of counterfeited products is likely to increase, given the probably higher opportunities and the reduced risk of detection by consumers.

4.1.2. Perpetrators

Will the number of authors vary?

Given the increased risk of counterfeiting connected with the introduction of plain packaging, it is possible that the number of counterfeiters will increase.

How will the complexity of the organizational structure of counterfeiting vary?

If generic packaging is introduced, the phases of the crime commission process relating to the imitation of trademarks, brands and other features will likely become superfluous or less complex.

How will the individual skills/knowledge required to commit counterfeiting vary?

As argued above, the counterfeiting of generic packaging is likely to require less skills and experience than the current counterfeiting of branded packs.

4.1.3. Victims

Will the number of victims vary?

Given the expected increase in the risk of product counterfeiting and the possible reduction in consumers' perceptions of the difference between legitimate and illicit products, it is likely that the number of victims will increase.

How will the socio-demographic characteristics of victims vary?

At present, the ITTP frequently targets groups with fewer socio-economic resources (WHO 2008, 7–9). This pattern is not likely to change with the introduction of generic packaging.

Will the amount of victims/legal persons vary?

Currently, the main legitimate manufacturers of tobacco products suffer from counterfeiting. This normally targets premium brands and products, which are normally marketed at higher prices. The introduction of generic packaging is likely to leave this pattern unchanged.

4.1.4. Costs/Harms

Will the total cost of the crime vary?

The proponents of generic packaging argue that it will reduce smoking and therefore the societal costs associated with it. These benefits may be countered by the increased consumption of illicit cigarettes, which may decrease the expected contraction in smoking prevalence and also increase the health risks for smokers. In particular, several sources report that counterfeit cigarettes are more dangerous than legitimate products (Levinson 2011; The Center for Regulatory Effectiveness). For example, the most recent report of the Italian National Antimafia Direction states that the European Antifraud Office (Olaf) has

established that counterfeit cigarettes contain more tar (+160%), nicotine (+80%), carbon dioxide (+133%) and lead (+600%) (Direzione Nazionale Antimafia 2010, 382).

In addition to health costs, counterfeiting is likely to impact upon the legitimate tobacco markets, including the manufacturing, distribution and retail segments. Illegal products may reduce revenues, profits, employment and ultimately impact upon tax revenues.

How will private costs for victims vary?

On accessing cheaper tobacco products, consumers of counterfeited cigarettes are likely to incur higher health dangers and risks from the illicit products.

How will social costs vary?

The actual impact on social costs of generic packaging will depend on the actual increase in cigarette counterfeiting as a result of increased opportunities, reduced risk of detection, and market dynamics. Current data do not allow for more specific forecasts.

4.2. “Polluter Pays” Principle



Implementation of the polluter pays principle entails the inclusion of health costs in the yearly registration fees imposed on tobacco products and the internalisation of the external health costs of smoking by requiring full liability and payment of the health costs of smoking by the tobacco industry. The Rand study analysed the possible impact of these options and estimated that they would increase the retail prices of tobacco products by more than 90% (Tiessen et al. 2011, 168). This estimate is made in order to reduce smoking prevalence by 25% and significantly impact on the tobacco market, from cultivation to manufacturing and distribution, including the overall tax revenue.

The implementation of the polluter pays principle is likely to cause an unprecedented change in the tobacco market. The estimated impact on the market structure and on retail prices will generate a scenario where the risks of increased ITTP may be extremely high. Considering that the policy would apply exclusively within the EU and that illicit trades already account for a significant share of tobacco consumption in the Union, it is surprising that the possible impacts of these policies on the ITTP have not been assessed at all.



4.2.1. Crime

Will the amount of risk vary?

The literature recurrently points out that the ITTP is driven by profit and that price differentials are among the main drivers of the ITTP (for further details see above subsection 3.1.1., Profitability). The main actions envisaged are likely to transfer most of the health costs of smoking to final consumers. The retail price increases estimated by Rand Europe are very likely to make illicit products more appealing to a large share of consumers.

How will the risk of being detected while engaged in the ITTP vary?

The probable increase in the levels of ITTP as a reaction to the large tax hikes implied in the main actions are likely to impact on the risk of detection. As already pointed out, EU seizures of tobacco products currently amount to approximately 7% of the estimated illicit market (see above 3.1.1, Risk of detection). Consequently, law enforcement resources and capacities appear to be limited, since the main operational priorities are other criminal markets. In an overall context of budgetary constraints, it is difficult to envisage an increase in law enforcement resources to prevent and police the ITTP. EU MS will be unable to tackle the increased risks of a general growth of the ITTP with comparable increases in law enforcement reaction.

As a result, the risk of detection for criminals will decline.

How will the expected profits for the perpetrators of the ITTP vary?

Considering the dual nature of the tobacco market, the profits for illicit traders will probably increase as a result of increased retail prices of legitimate products. In fact, the ITTP essentially revolves around the evasion of tax and excise (von Lampe 2011). The expected profits for the perpetrators can be assumed to be positively correlated with the tax share on the final retail price. Consequently, the envisaged hikes are likely to significantly increase the expected profits of the ITTP, both as a result of higher returns per cigarette and of increased amounts of illicit products.

4.2.2. Perpetrators

Will the number of perpetrators involved in the ITTP vary?

The risk of increased levels of ITTP is likely to create new opportunities for involvement in the ITTP. The overall number of people actively involved in the trade will probably increase.

How will the complexity of the organizational structure of the ITTP vary?

The main actions envisaged do not appear likely to have a significant impact on the complexity of the organizational structure required to engage in the ITTP.

How will the individual skills/knowledge required for the ITTP vary?

The main actions envisaged do not appear likely to have a significant impact on the individual skills required to engage in the ITTP.

4.2.3. Victims

Will the number of victims vary?

The risk of increased levels of ITTP implies that the number of victims and/or consumers of illicit tobacco products may increase. In addition, legitimate market operators, especially the retail sector, are likely to be damaged by the increased availability of illicit products.

How will the socio-demographic characteristics of victims vary?

No expected impact

Will the amount of victims-legal persons vary?

As already mentioned, small retailers of tobacco products such as tobacconists may be significantly affected by the increase in the ITTP, since a part of their income may be transferred to illicit suppliers.

4.2.4. Costs/Harms

Will the total cost of the crime vary?

Implementation of the polluter pays principle is likely to cause major changes in the interaction between the legal and illegal

tobacco market. Surprisingly, no study has focused on the impact that this policy may have on the illicit side of the market. Given the absence of any empirical study, it seems reasonable to assume that, at least in the short-medium term, the levels of the ITTP will significantly increase to meet the increased demand for cheap tobacco products. This will inevitably impact on the total costs of the ITTP, including direct costs (e.g. tax evasion, losses to the legal economy) and indirect costs (e.g. possible increased health costs, law enforcement of the ITTP).

How will private costs for victims vary?

As already mentioned, some illicit products, such as 'illicit whites' and counterfeits, have

been frequently reported as significantly more dangerous to smokers' health. Therefore, the financial benefits associated with lower prices on tobacco products may be outweighed by higher health costs.

In addition, the increased ITTP may significantly affect the legitimate retail sector, with the risk of lower revenues, loss of employment and fiscal revenues.

How will social costs vary?

The actual impact on social costs of the "polluter pays" principle will depend on the actual increase in the ITTP. As the mentioned actions have never been introduced in any country, it is impossible to make more detailed hypotheses about this pattern.

4.3. Ban on the Display of Products at the Point of Sale



As already mentioned, there are few instances of bans on the display of tobacco products in retail outlets (see above 3.2.2). Only Ireland has introduced this measure (in 2009). Recent studies on the relation among tobacco control policies, smoking prevalence, and impact on the illicit trade do not provide report results as to the impact of such bans on the ITTP (Reidy and Walsh 2011; Chaloupka and Tauras 2011).

4.3.1. Crime

Will the amount of risk vary?

Implementation of the display ban may increase the risk of more widespread ITTP. Indeed, consumers may have difficulties in distinguishing legal retailers from illegal ones. The main risks are associated with the sale of tobacco products by unauthorized outlets, and with the sale of illicit products by authorized outlets.



The former risk (sale of tobacco products by unauthorized outlets) will most likely depend on a) implementation measures ensuring the identification of legitimate retailers (signs, banners etc.) b) the structure of the tobacco market. In regard to the former element, legitimate retailers should be easily identifiable by consumers and identification devices should not be easily counterfeited. As for the latter element, the risk will probably be associated with the structure of distribution and retail in each country. The risk appears higher wherever the sale of tobacco products is allowed in bars, clubs, or convenience stores. Indeed, the display ban may incentivise some shops to sell illicit products. The risk may be lower in countries where tobacco products are sold only by specific retailers (such as tobacconists) or by larger outlets (e.g. supermarkets, motorway service stations, pharmacies), since these channels are easier for consumers to identify.

The second risk (sale of illicit products by authorized outlets) will likely depend on the levels of controls on the distribution and retail network in each Member State and on the presence of effective sanctions for the sale of illegal products, such as fines, temporary or permanent disqualification, and confiscation.

How will the risk of being detected while engaging in the ITTP vary?

At present, the available information on the implementation of the display ban does not allow assessment of the detection risk. However, if not associated with specifically designed preventive solutions, the risk of increased ITT may increase.

How will the expected profit for the authors of the ITTP vary?

The available information does not allow detailed analysis of this issue.

4.3.2. Perpetrators

Will the number of perpetrators involved in the ITTP vary?

As already mentioned, if not properly implemented, the policy may increase the number of illegal retailers or incentivize authorized retailers to sell illegal products.

The risk of increased numbers of authors involved in these activities is likely to be inversely correlated with the effectiveness of the measures introduced to prevent criminal exploitation of the display ban.

How will the complexity of the organizational structure of the ITTP vary?

The action envisaged does not appear to have a significant impact on the complexity of the organizational structure required to engage in the ITTP.

How will the individual skills/knowledge required for the ITTP vary?

The action envisaged does not appear to have a significant impact on individual skills required for engaging in the ITTP.

4.3.3. Victims.

Will the number of victims vary?

The number of victims is likely to vary according to the increase in the levels of the ITTP.

How will the socio-demographic characteristics of victims vary?

As a consequence of the display ban, the increased levels of ITTP may target the young population in particular. As said, there may be a risk of increased ITTP for countries which allow the sale of tobacco products in bars, cafés and clubs, since these outlets may be less easily controllable. Young people are the main customers of these places, especially at evening and at night.

Will the amount of victims/legal persons vary?

Especially in countries where tobacco products can be purchased in bars, cafes and clubs, legitimate retailers of tobacco products may be significantly affected by the increase in the ITTP. Indeed, part of their income may be transferred to illicit/unauthorized suppliers.

4.3.4. Costs/Harms

Will the total cost of the crime vary?

Given the lack of empirical studies on the impact of a display ban on the ITTP, it is difficult to make detailed assessment of the

total costs caused by the increased ITTP. Ultimately, such costs will depend on the increase in the ITTP that these measures actually generate. Data from the limited number of countries which have introduced display bans are scarce and do not allow straightforward conclusions to be drawn (Europe Economics 2008).

How will private costs for victims vary?

As already mentioned, some illicit products, such as 'illicit whites' and counterfeits, have been frequently reported to be much more dangerous to smokers' health. Therefore, the financial benefits associated with lower

prices of tobacco products may be outweighed by the higher health costs.

In addition, the increased ITTP may significantly affect the legitimate retail sector, with the risk of lower revenues, loss of employment and fiscal revenues.

How will social costs vary?

The social costs associated with the implementation of the display ban will be related to the measures adopted to prevent the exploitation of the new policy for illicit purposes. Current data do not allow more specific forecasts.

4.4. Results of the Extended Crime Risk Assessment



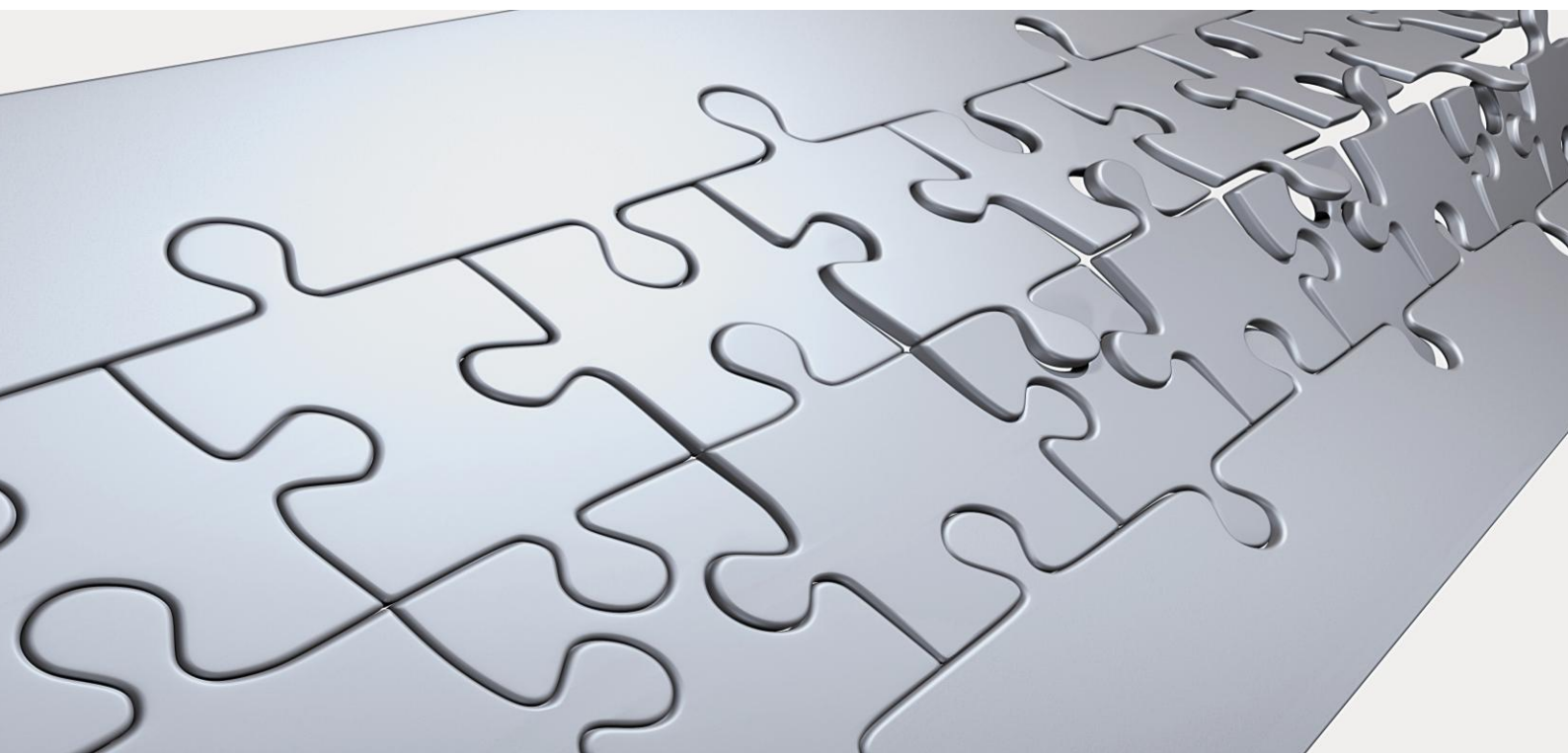
Results of the ECRA

The ECRA on the main actions at risk was limited by the scarcity of data on the ITTP and of previous studies focusing on the impact of the policies envisaged on the ITTP. Most existing studies have focused on the impacts of different pricing and taxation policies on smuggling, while "the impact on non-price smoking regulations on cigarette smuggling has not been considered in the literature" (Goel and Nelson 2008, 55).

Notwithstanding these limitations, the assessment suggested that:

- Generic packaging is likely to impact on consumers' capacity to distinguish legitimate products from counterfeit ones. In particular, the envisaged measures do not adequately address the risks associated with a possible increase in counterfeiting.
- The implementation of "polluter pays" actions may generate a high risk of increased ITTP. Similar measures have never previously been introduced, and the estimated impact in terms of increased retail prices suggests that a significant proportion of the reduction in smoking prevalence is actually the result of a shift to the illicit market.
- The ban on the display of products at points of sale raises a risk of increased ITTP (particularly the sale of illicit products by authorized retailers and sale by unauthorized retailers). The risks will be higher if no specific measure is adopted to allow clear identification of legitimate retailers and in those countries currently allowing the sale of tobacco products in bars, cafés, clubs, and convenience stores.

5. Conclusion



The crime proofing of the policy options envisaged for the revision of the TPD suggests that the impact on crime levels of some of the actions foreseen needs further and detailed analysis.

There is clear evidence that **the EU tobacco market is extremely vulnerable to the ITTP (see above, subsection 3.1)**. The European illicit market has been recently estimated as accounting for nearly 10% of total tobacco consumption. It is an exceptionally attractive market, given the high levels of illicit or irregular activities that have been reported, high profitability, and the low risks of detection and sanctions. Moreover, criminals can easily access the tobacco market given the reported frequency of illicit activities occurring at various levels of the market and

opportunities to corrupt law enforcement officials, border agencies, and regulatory officials.

Nevertheless, the available information on the policy options envisaged indicates that **DG SANCO paid almost no attention to the impacts on the ITTP**. As already mentioned, the Rand study on the ITTP commissioned by DG SANCO almost entirely overlooked the possible implications of such options for crime. This is particularly surprising, considering that the European Commission's Impact Assessment Guidelines clearly mention crime, terrorism and security among the social impacts which should be considered during an Impact Assessment. The European Union has repeatedly stressed the importance of developing "smart" or "better" regulation, and the Commission is

committed to improving the overall quality of EU law. Currently, the process of revision of the TPD seems not to comply with these aims and with the Impact Assessment Guidelines.

Overall, given the importance of the illicit trade for the tobacco industry, national governments (from both a revenue and health perspective), and the tobacco control movement, **the lack of available data and reliable studies on the ITTP is surprising.** Most of the actions considered are based on very limited evidence, and the full spectrum of their possible impacts is not taken into account because crime impacts are systematically overlooked. European policy makers and citizens should be better informed about all the possible impacts of European policies. Further research should be conducted on the relation between policy measures and their impact on the ITTP. The choice of the measures should be based on the most complete and multidisciplinary information. The present situation is far from optimal. Some of the actions envisaged (such as generic packaging or the “polluter pays” principle) have never been applied, and their implementation appears to be more a “leap of faith” than “evidence-based” policy-making. Greater caution should be exercised when considering the introduction of new policy measures in the tobacco market. In fact, the ITTP may be likely to reduce or ultimately annul the expected benefits of such measures.

The crime proofing exercise conducted above showed that some of **the policy options envisaged carry significant risks of creating unintended opportunities for the illicit trade in tobacco products.** In particular, generic packaging, which has never been applied to date (it will be

introduced in Australia only in 2012), appeared to be possibly at risk of the increased counterfeiting of tobacco products. Secondly, the integration of the “polluter pays” principle imposing the health costs of smoking on tobacco manufacturers may bring unprecedented changes in the market. The estimated increases in the final retail prices may significantly boost the demand for cheap, illicit tobacco products. Finally, a display ban may increase the risk of ITTP if no appropriate measure enables consumers clearly and unequivocally to identify legitimate retailers and ensures that retailers only supply legitimate products.

The lack of attention paid by the European Commission to the possible risks of increased ITTP in relation to certain measures considered for the revision of the TPD may have **serious consequences.** An increase in the ITTP will inevitably *jeopardize* tobacco control strategies, increase health damage to European citizens, and reduce tax revenues for governments. Finally, policing of increased ITTP will also result in increased social costs, which will be paid by society as a whole. As discussed above, there are reasons to believe that the ITTP is not a top priority for law enforcement agencies or for citizens in their demands for security and crime control.

Given the difficulties associated with the policing of the tobacco markets by means of traditional crime control strategies, **innovative preventive strategies should be developed by applying approaches such as situational crime prevention or problem-oriented policing.** All the more so, **the European regulation should be thoroughly proofed against the risk of creating opportunities for criminals.**

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