

Deciding for the world?

How the Tobacco Products Directive could make or break the Illicit Trade Protocol

Francis Thompson
Executive Director
FCA

27 June 2017

No conflicts of interest

I do not now receive, and have never received, any funds or other consideration from any commercial entities with an interest in the outcome of EU or FCTC discussions about illicit trade in tobacco products.

Remember where we started (1)

SENT BY:IMPERIAL TOBACCO LTD : 5-13-93 : 10:14 : SECRETARIAL- 44 71 222 7979:# 2

Agenda item 11 (iii)

IMPERIAL TOBACCO LTD. CANADA
 TOBACCO STRATEGY GROUP - MAY 19/93
 AGENDA ITEM: 11 iii

SUMMARY OF COMPETITIVE ENVIRONMENT

network. Due to the federal government's unwillingness to lower tobacco taxes as a means to discourage smuggling, IITL products, in February of 1993, were made available for full distribution.

After evidence emerges that cigarette smuggling into Canada in 1991-94 was controlled by tobacco companies, Canadian government sues tobacco companies in US courts, November 1999

[Eventual guilty pleas in Canadian courts: 2008 and 2010.]

Remember where we started (2)

The World's Best Cross-Border Investigative Team

ICIJ THE INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS

HOME LATEST PROJECTS JOURNALISTS RESOURCES ABOUT ICIJ PEARL AWARDS LEAK TO US DONATE SEARCH

FOLLOW US:

[Home](#) > [Projects](#) > [Big Tobacco Smuggling](#) > [Philip Morris accused of smuggling, money-laundering conspiracy in racketeering lawsuit](#)

BIG TOBACCO SMUGGLING

Philip Morris accused of smuggling, money-laundering conspiracy in racketeering lawsuit

Like 2 Tweet

By [Maud Beelman](#) | May 23, 2000, 2:45 pm

Philip Morris, the world's largest tobacco multinational, has engaged in smuggling and drug-money laundering for years in a scheme to avoid taxes and boost sales of its cigarettes, according to allegations in a new racketeering lawsuit filed in U.S. federal court.

The civil lawsuit - filed by a majority of Colombia's governors - claims that Philip Morris Companies, Inc., and its subsidiaries, including Philip Morris International, Inc., defrauded the Colombian states out of billions of dollars in lost tax revenue over a 10-year period.

ABOUT THIS PROJECT

During 2000 and 2001, a team of reporters from the International Consortium of Investigative Journalists broke a series of

Colombian departments sue Philip Morris in US courts for cigarette smuggling system used to repatriate drug profits, May 2000

Remember where we started (3)

```

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-----X
:
THE EUROPEAN COMMUNITY,
acting on its own behalf and
on behalf of the Member States
it has power to represent,
:
Plaintiff,
:
- against -
:
RJR NABISCO, INC.,
R.J. REYNOLDS TOBACCO COMPANY,
R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.,
NABISCO GROUP HOLDINGS CORP.,
RJR NABISCO HOLDINGS CORP.,
R.J. REYNOLDS TOBACCO HOLDINGS, INC.,
JAPAN TOBACCO, INC., individually and as
successor to R.J. Reynolds Tobacco
International, Inc.
and its affiliated entities,
:
PHILIP MORRIS INTERNATIONAL INC.,
PHILIP MORRIS COMPANIES, INC.,
PHILIP MORRIS INCORPORATED, d/b/a
PHILIP MORRIS U.S.A.,
PHILIP MORRIS PRODUCTS, INC., and
PHILIP MORRIS DUTY FREE, INC.
:
Defendants.
:
-----X

Plaintiff, THE EUROPEAN COMMUNITY, acting on its own

```

EU and Member States sue two tobacco companies in US courts, alleging involvement in smuggling, November 2000

[Led to EU-PMI agreement, 2004, amongst others]

The FCTC Illicit Trade Protocol

The trigger for negotiating the Protocol (starting in 2008) was a global pattern of bad behaviour by the tobacco industry:

- To drive down tobacco taxes (Canada, 1994) or prevent increases;
- To penetrate closed markets (e.g. Vietnam);
- To gain market share from competitors.

The EU was the leading Party in negotiations (in terms of financing, but also in terms of content).

But the industry did not stay still

The tobacco industry strategy, since its near-death experience in the late 1990s/early 2000s:

- Present the controls it was forced to accept (because of EU, Canadian etc. Investigations) as examples of co-operation and good will.
- Focus enforcement officials attention on the issues of counterfeit and competition from small players (“cheap whites”) etc.
- Offer its own counterfeit-control systems as a complete solution to illicit trade.

Codentify: tobacco industry self-policing

Central to the tobacco industry strategy is the promotion of their *Codentify* system:

- Developed by Philip Morris, later shared with other multinationals, then transferred to a purportedly independent company.
- Changing target, but is essentially an alphanumeric code printed on packs and other packaging at time of manufacture.
- Codes include encrypted information on production, projected sales.

Codentify: good for manufacturers, not for governments

The Codentify system presents the huge advantage (for manufacturers) of keeping governments out of cigarette factories and establishing the industry as leading “partner” in fight against illicit trade.

But not obvious how to prevent *cloning* of codes (e.g. running a “ghost” shift replicating a day’s worth of codes, selling in some other market).

At least as described publicly to date, system provides no way to figure out which code is “genuine”, even if duplicates are discovered.

Codentify is not consistent with ITP

- Article 8 of ITP requires identification markings on all cigarette packaging that is:
 1. Unique
 2. Secure
 3. Non-removable.
- For “secure” and “unique” to have meaning, they must be secure against those with the strongest incentive to cheat by copying codes: manufacturers themselves.

Codentify is not consistent with ITP (2)

The ITP contains express prohibitions on delegating obligations to manufacturers and working closely with them:

- National systems must be “controlled by the Party” (Art. 8.2);
- “Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry” (Art. 8.12);
- Governments shall “interact with the tobacco industry and those representing the interest of the tobacco industry only to the extent strictly necessary in the implementation of this Article” (Art. 8.14);

Not so in the EU directive...

- EU directive Art. 15.7: Manufacturers provide the equipment to record transactions.
- EU directive Art. 15.8: Manufacturers and importers sign contracts to store all the data from transactions.

Contrast with systems in other jurisdictions, where governments contract with third parties to install stamping machines in cigarette factories, provide readers and maintain databases.

A threat to the Protocol...

Tobacco companies will misrepresent the EU system internationally:

- This already occurred with the EU-PMI agreement of 2004. It was the closely negotiated, out-of-court settlement of a serious legal case, but the industry presented it as an example for other countries of “voluntary” (and mostly non-binding) agreements as a solution to cigarette smuggling.
- The industry will selectively quote from the directive to claim Codentify has been accepted by the EU.

...a threat to EU credibility

Perception is key. If the EU is perceived as having agreed to an industry-driven tracking-and-tracing system, it will find it hard to keep the trust of governments that rely on an independent system.

In ITP implementation negotiations, the EU will be attacked for violating a basic principle of the ITP (and of the FCTC).

So what can be done?

If the Directive itself can't be adjusted:

1. Ensure that the standards for the “secure feature” and the “unique identifier” are linked. That is, that cloning or altering a unique code is as difficult as producing and passing a fake bank note.
2. Get a third-party review of any vulnerabilities to manipulation of the system by manufacturers.
3. Discuss the practicalities of information-sharing and confidentiality with other regions well ahead of the first ITP Meeting of the Parties.