

EXPLANATORY MEMORANDUM TO
THE TOBACCO PRODUCTS AND HERBAL PRODUCTS FOR SMOKING (FEES)
REGULATIONS 2017

2017 No. 409

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument introduces new fees, payable by industry to cover the cost of work in relation to certain obligations under the Tobacco Products Directive 2014 (Directive 2014/40/EU). The obligations concern the verification of tar, nicotine and carbon monoxide emissions from cigarettes, and reporting requirements in relation to tobacco products and herbal products for smoking.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.
- 4.2 The Tobacco and Related Products Regulations 2016 (“TRPR”) implement the majority of the Tobacco Products Directive 2014 (“TPD”).
- 4.3 In so far as relevant, the TRPR:
- set maximum tar, nicotine and carbon monoxide emission levels for cigarettes, and require the Secretary of State to approve and monitor laboratories, and to arrange for an approved laboratory to verify emission measurements. See regulations 13 and 14 of the TRPR, which transpose Articles 3 and 4 of the TPD;
 - require producers of tobacco products to submit certain information relating to the product, including ingredients and emissions information, and to notify novel tobacco products. The Secretary of State must ensure that the submitted

information is made publicly available. See Part 4 of the TRPR, which transposes Articles 5 and 19 of the TPD;

- require producers of herbal products for smoking to submit ingredients information relating to the product. Again, the Secretary of State must ensure that the information is made publicly available. See regulation 29 of the TRPR, which transposes Article 22 of the TPD.

- 4.4 In the United Kingdom, the national competent authority and Member State functions in relation to the emissions testing, and reporting of tobacco products and herbal products for smoking, are conferred on the Secretary of State for Health. In practice Public Health England (“PHE”) will carry out the functions on behalf of the Secretary of State.
- 4.5 The fees introduced by this instrument relate to the work carried out by PHE on behalf of the Secretary of State for Health under the TRPR.
- 4.6 The Electronic Cigarettes etc. (Fees) Regulations 2016 (S.I. 20016/521) have already introduced fees to cover the costs of work in relation to obligations relating to electronic cigarettes under the TPD, which include notification of the products. These came into force at the same time as the TRPR.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 On 29 April 2014, the European Commission published the TPD, which enhanced and updated harmonised controls on the composition, labelling and presentation of tobacco and related products. The TPD requires Member States to perform a number of duties, including the operation of a notification system to receive, store, handle, analyse and publish information submitted by producers of tobacco products and herbal products for smoking, and to verify the levels of tar, nicotine and carbon monoxide (TNCO) in the emissions of cigarettes, via an approved laboratory. The TRPR transpose most of the TPD into domestic law and set out these duties.

The Department of Health currently funds these statutory duties. Fees are proposed to recover these costs from businesses.

Notification of tobacco and herbal products for smoking

- 7.2 Public Health England (PHE) has been designated the competent authority to receive notification of tobacco and herbal products intended to be placed on the UK market. Notification data must be submitted by businesses via an EU online Portal and updated (a modification) as appropriate. Information concerning novel tobacco products must be submitted in the same way. Both the information that is identical to that submitted by all tobacco products and that which is additional in relation to the

novel tobacco product are submitted at the same time and in the same submission. PHE will need to make adequate checks of all notifications.

- 7.3 In addition to the initial notification ongoing work will be required of PHE. This will include receipt and checking of annual sales and marketing reports relating to products for the UK market at the end of the year and responding to enquiries from producers, Member States, the European Commission and consumers about the data. PHE will also be responsible for collating and publishing data for all products notified as being placed on the UK market, taking into account the need to protect commercially sensitive and personal data submitted as part of the notification. These data will be freely available, including to industry, consumers, enforcement officers and academics.

Total costs to PHE, inclusive of fixed cost overheads, are estimated to be approximately £130,000 per year.

Verification of cigarette emissions

- 7.4 The TPD requires Member States to verify cigarettes for tar, nicotine and carbon monoxide emissions. This is a continuation of previous legislative requirements, the cost of which is currently met by the tax payer. Fees are set to recover costs associated with performing this duty and the cost of tendering and managing a contract with an independent laboratory to undertake the testing and liaising with the tobacco industry.
- 7.5 Total costs to PHE, inclusive of fixed cost overheads, are estimated to be approximately £219,000 per year.

Non-payment of fees

- 7.6 In relation to the consequences of non-payment of fees, the instrument provides that any unpaid fees are recoverable as debts due to the Crown (see regulation 7). It also amends the TRPR to provide for additional consequences for non-payment of fees relating to the submission of information concerning tobacco products and herbal products for smoking (see regulation 8). These amendments are intended to be consistent with the position under the TRPR in relation to a producer of electronic cigarettes who fails to submit a notification, or to pay a connected fee.
- 7.7 Under the TRPR, where a producer of tobacco product or herbal products for smoking fails to submit the relevant information, he must not supply the product until the information has been submitted. This instrument extends this provision so that the relevant fee must also be paid before supply can commence/continue. Under the TRPR it will be a criminal offence to supply products before complying with these requirements.
- 7.8 Further, this instrument amends the TRPR to provide that information is regarded as not having been submitted in accordance with certain provisions on deadlines if any connected fees have not been paid. Under the TRPR, it is a criminal offence for a person to fail to submit information in accordance with the reporting provisions.

8. Consultation outcome

- 8.1 The Department issued a nine week consultation from 2 July to 3 September 2015, concerning the Government approach to transposition of the TPD. As a result of that consultation the Government decided to adopt proportionate fees to recover, from businesses, Government costs in complying with the requirements of the Directive,

including for the notification of tobacco products and herbal products for smoking and the verification of tar, nicotine and carbon monoxide emissions from cigarettes.

- 8.2 On 25 October 2016, the Department issued a further 4-week consultation on proposed fees for these services. The consultation concluded on 22 November 2016. The Department received 47 responses, the majority (98%) from businesses involved in the production and supply of tobacco products and users of tobacco products. One response was received from a public health charity.
- 8.3 The majority of responses (87%) opposed the level of fees proposed at consultation, with particular concerns raised on the impact to small businesses of charging fees for products other than cigarettes and roll-your-own tobacco. Respondents suggested that niche tobacco products, such as snuff (a form of nasal tobacco) and pipe tobacco primarily consist of large product ranges manufactured in low volumes, therefore fees would disproportionately affect this sector. Respondents also raised uncertainty as to the number of products that will be notified and how the market will adjust to the recent changes in tobacco law, including the TRPR, Standardised Packaging of Tobacco and legislation banning the display of tobacco products.
- 8.4 The fee structure is set to ensure that relevant businesses are charged for the services that they use and that there is no cross subsidy from one sector to another or from those businesses not subject to tobacco duty to those that are not.
- 8.5 As a result of the information received at consultation the proposed fee levels were lowered and set as follows:

Notification of tobacco and herbal products for smoking:

		Service		
		Notification	Modification	Annual Periodic
Product type (grouped)	Cigarette, Roll Your Own (RYO), Novel Tobacco Products	£200	£100	£100
	Other Tobacco Products (OTP)	£100	£50	£50
	Herbal	£60	£30	£30

Verification of TNCO emissions in cigarettes

To recover the cost of verification of TNCO emissions in cigarettes, the fee is set at £1000 per product line (down from £1200 estimated at consultation stage).

- 8.6 The proposed fees for tobacco products compare favourably with that charged by other Member States for the provision of similar services. These are set at the minimal level to ensure full cost recover, without resulting in a surplus or deficit.

9. Guidance

- 9.1 The Department have already issued guidance on the Tobacco and Related Products Regulations 2016 on www.gov.uk. Public Health England plan further guidance on the notification elements and administration of the fees for business.

10. Impact

- 10.1 The impact on business is around £356,000 per year (of which around £88,000 on UK-based activity). Over the standard 10 year appraisal period this results in an Equivalent Annual Net Direct Costs to Business of £0.1 million.
- 10.2 The impact on the public sector is estimated to be an annual saving of around £349,000 (the small difference in savings and cost to business due to rounding of fees to the nearest £5) in terms of full recovery of costs of Public Health England in providing the specified services.
- 10.3 A Validation Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The Department is committed to review the policy of charging within 5 years alongside the Tobacco and Related Products Regulations 2016. The level of fees will be reviewed annually to ensure that only costs incurred are recovered, without accruing a surplus or deficit.

13. Contact

- 13.1 Alette Addison at the Department of Health email: alette.addison@dh.gsi.gov.uk can answer any queries regarding the instrument.