

EXPLANATORY MEMORANDUM TO
THE TOBACCO PRODUCTS (TRACEABILITY AND SECURITY FEATURES)
(AMENDMENT) REGULATIONS 2023

2023 No. 606

1. Introduction

- 1.1 This explanatory memorandum has been prepared by His Majesty's Revenue and Customs (HMRC) and is laid before the House of Commons by Command of His Majesty.
- 1.2 This memorandum contains information for the Select Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to amend the Tobacco Products (Traceability and Security Features) Regulations 2019 to provide for stronger sanctions for contravening the requirements specified in those regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments.

- 3.1 In order for Trading Standards to be able to exercise their investigative functions under these regulations fully, it is intended that an amendment will be made to add the Tobacco Products (Traceability and Security Features) Regulations 2019 to the list of enforcer's legislation set out in paragraph 11 of Schedule 5 to the Consumer Rights Act 2015. A draft of that instrument, the Consumer Rights Act (Amendment) Order 2023, which is subject to the affirmative resolution procedure, was laid before Parliament on the same day as this instrument.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The Tobacco Products Directive 2014 and its implementing legislation, Commission Implementing Regulation 2018/574 and the Tobacco Products (Traceability and Security Features) Regulations 2019, introduced track and trace, and security features for cigarettes and hand-rolling tobacco from 20 May 2019.
- 6.2 Section 93 of the Finance Act 2022 introduced provisions into the Tobacco Products Duty Act 1979, giving powers to make regulations setting out new sanctions linked to

Tobacco Track & Trace (TT&T). The provisions provide powers to make secondary legislation which allows the issue of financial penalties, seizure of certain tobacco products found at non-compliant premises and the exclusion of retailers from the TT&T registration system. This instrument is an exercise of those powers.

- 6.3 These regulations amend the Tobacco Products (Traceability and Security Features) Regulations 2019, to provide for stronger sanctions for breaches of those regulations.
- 6.4 The regulations also give Trading Standards a discretionary function to investigate compliance with the Tobacco Products (Traceability and Security Features) Regulations 2019 and to share information with HMRC where breaches are uncovered.

7. Policy background

What is being done and why?

- 7.1 Although large criminal gangs coordinate the supply of illicit tobacco, most illicit sales are made by small scale operators, usually retail outlets and individuals. This makes the scale of illicit distribution difficult to contain.
- 7.2 High duty rates reduce the affordability of tobacco products and so support the government's public health objective to reduce smoking prevalence. Illicit sales damage legitimate business, undermine public health and facilitate the supply of tobacco to young people.
- 7.3 At Budget 2020, the government announced a package of measures for stronger, more visible street level enforcement. The announcement included a grant of c.£1 million to support Trading Standards' anti-illicit tobacco projects. The announcement also revealed plans to consult on new sanctions linked to the TT&T system.
- 7.4 The consultation proposed the sanctions be used in collaboration with Trading Standards to enhance enforcement activity. Respondents supported both the introduction of stronger penalties and extension to Trading Standards.
- 7.5 TT&T was introduced in 2019 and gives HMRC the ability to monitor the manufacture and supply of legitimate tobacco products. This helps identify where genuine product is diverted towards the illicit market and prevents illicit products infiltrating legitimate supply chains.
- 7.6 In line with the government's manifesto commitment, primary legislation setting out powers for the new sanctions was introduced in Finance Act 2022.
- 7.7 The provisions in Finance Act 2022 introduced powers into the Tobacco Products Duty Act 1979 to make regulations to issue penalties of up to £10,000; to seize product involved in a contravention of applicable law; to exclude retailers from TT&T, therefore restricting their ability to buy duty paid tobacco for retail purposes; and to make future administrative amendments to the TT&T regulations.
- 7.8 The Tobacco Products (Traceability and Security Features) (Amendment) Regulations 2023 will implement the new sanctions and confer investigation functions on Trading Standards.
- 7.9 The sanctions will be imposed and administered by HMRC based on referrals by Trading Standards. Trading Standards will carry out investigations and will be able to refer evidence of contraventions to HMRC for action.

- 7.10 This approach will support more visible, street-level enforcement through targeting small-scale offenders, who play a key role in the distribution of illicit tobacco.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union because the regulations amend the Tobacco Products (Traceability and Security Features) Regulations 2019, which were originally made under section 2(2) of the European Communities Act.

- 8.2 The Commissioners for HMRC, have made the following statement regarding regulations made under the European Communities Act 1972:

“In our opinion there are good reasons for The Tobacco Products (Traceability and Security Features) (Amendment) Regulations 2023 to amend the Tobacco Products (Traceability and Security Features) Regulations 2019. This is because while the current regulations contain some enforcement features, these are not considered to be strong enough, so the amending regulations are introducing new sanctions for failure to comply.”

9. Consolidation

- 9.1 This instrument is not being consolidated.

10. Consultation outcome

- 10.1 Following announcement at Spring Budget 2020, an eight-week consultation was launched on 1 December 2020. The consultation proposed new sanctions to be used by HMRC and, innovatively, Trading Standards, including a penalty of up to £10,000 to tackle tobacco duty evasion. There were 37 responses from public health bodies or anti-smoking groups, local government (including Trading Standards), tobacco manufacturers, the retail sector and private individuals. All respondents supported the proposals which included extending powers to Trading Standards.
- 10.2 The consultation outcome is published at:-
<https://www.gov.uk/government/consultations/sanctions-to-tackle-tobacco-duty-evasion/outcome/sanctions-to-tackle-tobacco-duty-evasion-summary-of-responses>
- 10.3 These regulations were also published for technical consultation from 11 April to 23 May 2023. Responses to the consultation did not result in any changes of substance to the regulations.

11. Guidance

- 11.1 HMRC is preparing guidance on the implementation of these measures for businesses which will be published on gov.uk in advance of the implementation of the sanctions.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A Tax Information Impact Note is submitted with this memorandum and published alongside the Explanatory Memorandum on the website at
<https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins>.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to provide clear and consistent guidance outlining how businesses will be compliant or non-compliant with the regulations.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that businesses selling compliant products will not need to do anything. This measure is aimed at those who sell non-compliant products.

14. Monitoring & review

- 14.1 The measure will be kept under review through ongoing stakeholder engagement and with Trading Standards.
- 14.2 As this instrument is not made by a Minister of the Crown, no review clause is required.

15. Contact

- 15.1 Khaleel Abdul-Razak at HMRC can be contacted with any queries regarding the instrument (Telephone: 03000 516782 or email: khaleel.abdul-razak@hmrc.gov.uk).
- 15.2 Nisadha Bandara, Deputy Director for Excise and Environmental Taxes at HMRC, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Gareth Davies MP, Exchequer Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.