**NATIONAL PROSECUTING AUTHORITY**

**PRESENTATION TO THE**

**STANDING COMMITTEE ON FINANCE**

**2 MAY 2018**

**THE ILLICIT TOBACCO TRADE INDUSTRY**

**ADV M GOVENDER**

Greetings to Chair and Committee Members

With me are:

Adv Knorx Molelle, the Head of Operations in the Asset Forfeiture Unit,

Adv Anthony Mosing, who is the National Co-ordinator for Organized Crime Prosecutions and Adv Johan van Heerden, representing the Specialist Tax Components within the NPA.

The NPA welcomes the opportunity to contribute to the discussions. The impact of the illicit economy of which the illicit tobacco industry is but one facet, is accepted as a huge concern to our fiscus, as well as its contribution to the overall crime picture in our country, the region and globally.

**MAGNITUDE/SCALE OF THE TRADE IN ILLICIT TOBACCO**

1. An article published in the "Rapport" newspaper on 6 July 2014 claimed that the amount of taxes the fiscus receives from tobacco products amounts to R11 billion a year. The trade in illicit cigarettes thus results a loss of revenue that would otherwise be lawfully due in taxes, specifically both customs and excise tax involving either mis or non-declarations.
2. The biggest drive behind the smuggling of cigarettes is financial gain. The profit margin is very high. An internet search last year showed that a packet of Columbia, Peterman Blue, SP Gold and Caspian could be obtained at R6-00 per packet (Internet: December 4, 2017 at 4:48 pm: I supply Columbia, Peterman Blue, SP Gold and Caspian at R55.00 per brick) with a significant amount of tax payable being at risk. The total loss can only be estimated but runs into billions of rands per year. The financial loss to the fiscus if one truck with a fully loaded 40ft container is smuggled across a border is a whopping R10m.
3. The Deputy Minister of Police, Hon. Ms. MM Sotyu (MP) at the Tobacco Institute of Southern Africa (TISA) Annual Anti-Illicit Trade Conference stated that:

*“South Africa currently ranks amongst the top 5 countries in the world with the highest incidence of trade in illicit cigarettes, together with Malaysia, Iraq, Brazil and Pakistan.*

*If this trend is not tackled decisively, we will continue to have the following crisis:* ***Organized Crime … Financial Impact … Health impact…****.*

*South Africa is a manufacturing hub, a point of distribution and a nexus point for smuggling into and from our neighbouring countries.*

1. The health risk that illicit tabacco products hold for the persons that use the same is accepted as a further factor which requires attention.

**NPA’S ROLE:**

1. The NPA involved in the prosecuting of illicit cigarette offenders since its inception. The oldest case was investigated in 2000 and the prosecution instituted in 2003. The charges *inter alia* relates to racketeering, “ghost” exports, false claiming of VAT and other customs and Excise offences and an amount of R280m is involved. The case is still being litigated upon in court with the property of the accused and the companies involved are under restraint of a High Court order applied for by AFU.
2. The NPA had as early as 2003 established four Specialized Tax Units (STU’s) in conjunction with SARS based in the major centers of Pretoria (Gauteng North), Johannesburg (Gauteng South), KZN and the Western Cape.
3. These units comprised of dedicated prosecutors whose sole task was to deal with criminal matters affecting the revenue of the country. The units from the four divisions serviced the other provinces that did not have their own STU.
4. The illicit tobacco trade matters were predominantly dealt with by the Component within the NPA using the following pieces of legislation:

**a) Customs and Excise Act**

 Section 78 Minor Offences

 Section 80 Serious Offences

 Section 84 Statutory Fraud

**b) Tobacco Products Control Act**

 Section 7 related to the sale and advertising of tobacco products in certain respects and to what is to be reflected on packages; and for matters connected therewith

**c) The Counterfeit Goods Act**

Section 2 of the Act prohibits the manufacture, distribution or dealing in counterfeit goods.

**d) Prevention of Organised Crime Act**

 Section 2 (Racketeering)

 Section 4, 5 and 6 (Money Laundering)

 Chapters 5 and 6 are used to freeze and recovery the proceeds of unlawful activity & the instrumentality of offences.

1. The cases relating to illicit cigarettes reported to the NPA increased significantly during 2007. These cases were reported countrywide. The most cases were however reported at the border areas. By way of example, an analysis of our cases in the 2011 year for the NGD regions STU showed:

**Province Mpumalanga (Mozambique/Swaziland)**

335 Cases prosecuted in Court

178 convicted and sentenced (53%)

55 warrants for arrest issued (16%)

34 cases withdrawn (10%)

**Province Limpopo (Mozambique/Botswana/Zimbabwe)**

220 Cases prosecuted in Court

194 convicted and sentenced (88%)

14 warrants for arrest issued (6%)

7 cases withdrawn (3%)

1. In the year 2017, 124 cases were referred to the NPA of which 43 cases have finalized with a guilty outcome. Most cases are being litigated upon. My colleagues Advv van Heerden and Mosing can speak in greater detail on some of the types of cases we have processed.
2. Some of the challenges that have become evident through the cases are the following:

 a. Complexity of organized structures

 b. Cross Border involvement

 c. Foreign persons involved.

 d. Cost of analysis

 e. Legal representation and defences

 f. Abscondment of accused persons & the legal process of extradition

1. The Asset Forfeiture Unit has also played a significant role to address the proceeds or instrumentality of the offence by inter alia having obtained a restraint/s to the value of R70 million, Preservation orders of property to the value of R5 105 570.00 and forfeitures to the value of R602 410.00. My colleague will provide more detail on the cases dealt with by the AFU should this be required.
2. The role of organized crime in the area of the illicit trade is one which the NPA has also dealt with, with our most significant case emanating from the Western Cape in the ***State versus De Vries and others*** where the accused were successfully charged with racketeering and money laundering in relation to the hijacking of consignments of cigarettes and smuggling thereof.
3. The NPA sits at the centre of the criminal justice system being responsible for guiding investigations especially complex matters and the presentation of matters before courts. As such, we have observed best practices but are also able to deal with challenges that impact on our collective ability to effectively deal with illicit trade.

**ASPECTS FOR ENGAGEMENT**

1. **Transnational nature**
2. Information made available indicates that the illicit tobacco trade is a transnational problem with our country being considered a manufacturer, a market and a transit destination impacting not just on us but also our neighbouring countries.
3. The porous nature of our borders and element of corruption to allow consignments to pass are factors which act as enablers requiring us to not only partner effectively domestically but also with our counterparts in our neighbouring countries.
4. Efforts are underway through ESAAMLG to determine the scale of the problem through a typology study specifically focusing on the illicit tobacco trade and money laundering to better understand the regional challenge and look at best practices in addressing the same. South Africa’s efforts are led by FIC and the DPCI in this regard.
5. It however requires us to collaborate more effectively with our counterparts in the region to address border management to prevent consignments crossing our borders and or sharing of information allowing us to intercept consignments.
6. **Organized Activity**
7. The complexity of the structures to produce and move product as well as disguise the proceeds require that the organized crime element be more effectively addressed.
8. This requires prioritization of the crime and collaboration within the CJS to address.
9. The DPCI is ideally placed to deal with such and the Operations Committee as contemplated in section 17J of the SAPS Act of 1996 is the structure within which the approach to illicit trade should be dealt with. The NDPP on 1 September 2017, wrote to the Head of the DPCI requesting that the structure be constituted in order to address specific types of crime typologies impacting not just on the security of the our state but also the economy.
10. **Interdepartmental Collaboration**
11. The role of the DPCI as being central to addressing the organized crime element has been stated.
12. Inter departmental cooperation is essential to be in a position to formulate an effective strategy and addressing illicit trade involving:

 i. SAPS DPCI

 ii. SAPS CI

 iii. SAPS Border Policing

 iv. SARS Customs

 v. SARS Canine unit

 vi. SANDF

 vii. NPA STU and AFU

 viii. DoHA

1. Together with the various stakeholders a tiered approach will have to be adopted based on best practices observed. Some of these are:
	* 1. Use of civil penalties involving smaller consignments and where foreigners are involved. Collaboration with DoHA to effectively deal with the foreigners thereafter will be necessary.
		2. Establishment of a joint operational committee on the illicit trade in tobacco products as was in Limpopo
		3. Komatipoort Tabacco Enforcement Group and the Ermelo Tabacco Enforcement Group created to improve multi-disciplinary cooperation servicing the Mpumulanga border posts.
		4. Identification of organized crime and/or corrupt officials for purposes of prioritization of investigations and prosecutions
		5. Identification of the modus operandi and addressing with specific joint operations
		6. Better sharing of information and joint target setting.
2. The NPA provides a dedicated capacity to the DPCI and SARS in tax, organized crime and commercial crime which traverses the areas of illicit trade.
3. The NPA is also in the process of finalizing a memorandum of understanding with SARS which will endeavour to improve collaboration, joint target setting and operations in joint priority focus areas.
4. **Private Sector Engagement**
5. There currently are various bodies representing the private sector. The State does not have body which is responsible for regulating the industry and performing the overarching role of co-ordination with the private sector. An example of such a body is the Liquor Board under the DTI. Such a body is necessary, not to address the fiscal but also the health and other aspects.
6. The benefit of structured engagement with the role players within the CJS will enhance the following:
	* 1. Traceability of origin of goods
		2. The calculation of risk relating to the Rate of Duty (free on board value)
		3. Market analysis on illicit trends
		4. Expert evidence in counterfeit cases
		5. Training and Capacitating of officials to recognise illicit products

**CONCLUDING REMARKS**

1. A broader engagement led by Government on the nature, extent and impact of illicit trade is required.
2. Structured engagements with the private sector in a co-ordinated manner in order to ensure that there is effective regulation and collaboration is required. It is suggested that a regulatory body created by the State, similar to the Liquor Board, lead this process to deal with cross cutting issues.
3. The best practices of joint collaboration within the criminal justice sector to address high level financial crime through the dedication of resources, joint target setting and joint operations be used as the method to effectively address the areas of organized crime, corruption and subversion of the customs system to address the focus areas in the illicit trade market.