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Debate

Tobacco: a product like any other?

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Abstract: Legislation in most countries regulates trade in poisons and highly addictive products, such as narcotics. The statements that (1) tobacco harms health and (2) causes addiction are established as facts in international and national law. Yet in Russia, and in many other countries, there is a contradiction between the open sale of this addictive poison and basic laws, such as those on product safety. Provisions in both the Russian constitution and the criminal code can be interpreted as making the sale of tobacco illegal, setting out severe penalties for those involved. Yet, remarkably, tobacco is treated quite differently from other products. In this paper, we describe the experience so far in seeking to enforce this legislation in Russia. Attempts to persuade the police to enforce the legislation have been unsuccessful, although they accept that there is a *prima facie* case for action but, in private, express fear of taking it. The case for action is currently being argued before the Russian Supreme Court but this could take many years to reach a conclusion. In the mean time, new legislation on the regulation of tobacco production has been passed by the State Duma, with the support of the tobacco industry, which implicitly assumes that tobacco is a lawful product, thereby creating legal confusion. We argue that the only way to redress this situation is to recognize that tobacco production and sales must be regulated in the same way as any other harmful and addictive substance.

Introduction

The WHO has estimated that tobacco caused 5.4 million deaths in 2004 and 100 million deaths over the course of the 20th century (World Health Organization, 2008) and it is likely to kill as many as a billion people in the 21st century. The scale of this problem has led many governments to agree the

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Framework Convention on Tobacco Control (FCTC), which commits them to take measures that will redress this situation. The FCTC is a major advance on what existed previously but it remains less than ideal as the original proposals were diluted, in part as a consequence of tobacco industry influence on national delegations (personal communication with members of Russian delegation to FCTC negotiations; Anon, 2003).

Notwithstanding its weaknesses, the FCTC does have considerable value, in particular by setting norms. However, in this paper, we argue that tobacco control advocates should also pay attention to existing provisions in domestic law, in particular those that seek to protect consumers from harm, recognizing tobacco's quite unique property of being a substance that kills large numbers of people when used as intended. Unfortunately, as we will show, the tobacco industry is also focusing attention on such laws, seeking to circumvent them, a situation demanding vigilance. We then describe the activities of the Russian anti-tobacco coalition 'ATACA' in seeking to use this legislation as well as the challenges in doing so. Finally, we conclude with a radical proposal to overcome the ability of the tobacco industry to circumvent almost every other obstacle placed in its way.

Russian legislation on consumer protection

Article 7 of the Russian law on consumer protection guarantees the right to safety of goods and services. It stipulates that '*the consumer has a right that the product if used accordingly would be safe for life, health, environment and property*'. The article also sets out a comprehensive set of procedures for removing from the market any products failing to meet these requirements and designating the governmental agencies responsible for prosecuting producers or distributors of unsafe goods. No exceptions are envisaged as the law derives from the fundamental rights to health, safety and private property in the Russian Constitution (Constitution of Russian Federation, 12 of December 1993).

This legislation works; in late 2009, the Russian Agency for Illegal Drugs Control outlawed smoking mixtures containing various plants (e.g. Spice, Sence and Smoke) openly available in many European countries by including them on a list of narcotics and addictive substances (McLachlan, 2009). Unlike tobacco, whose harmful effects are now exceptionally well documented, there was little evidence that these products were actually harmful (as they had not been subject to much testing). The tobacco industry and its supporters, mindful that this could be seen as a precedent, argued that while these products could be banned because they had so few users, the legislation could not apply to tobacco because it is so widely used. However, this concept has no basis whatsoever in law.

There are many other examples of the legislation being used. Thus, where unsafe goods or services are knowingly sold, Article 238 of the Criminal Code of Russia stipulates a penalty of up to 2 years imprisonment and prosecutions are

not uncommon. Typically, they involve the sale of counterfeit toys or food products beyond their expiry data, even though the health risks may be slight.

In assessing the case for using this legislation against tobacco, it is necessary to recall that the observations that tobacco kills those who use it and is an addictive substance has been established as fact, in the FCTC and in Russian domestic law, and has been conceded by the industry in their agreement to print warnings on their packs. Consequently, it is not necessary to prove these statements before a Russian court.

There are two obvious conclusions. The first, and most obvious, is that tobacco products are already illegal under Russian law. Furthermore, there is an effective legal procedure to remove them from the market, backed up by criminal sanctions against those involved in tobacco production, sales and even transportation.

The second is more complicated. The Russian Civil Code provides that any transactions between two parties are only enforceable where they are based on autonomy of decision-making on both sides. Yet, as tobacco use leads to addiction (US Surgeon General, 1988) addicted smokers are not acting on the basis of free will when they decide whether to or not to purchase a tobacco product. Indeed, there is extensive evidence from many countries that a large proportion of current smokers actually want to quit and are prepared to spend money on, for example, nicotine replacement therapy or more dubious measures such as hypnosis or acupuncture to help them (Sieminska *et al.*, 2008; Scollo and Winstanley, 2008; Ferguson *et al.*, 2009). In such circumstances, as is the case with narcotics, Russian law contains provisions for regulation of supply, whereby those distributing the product must be licensed.

How has the tobacco industry responded?

We believe that the tobacco industry in Russia has long been aware of the potential to use domestic legislation to curb its activities, especially given evidence of considerable public concern that insufficient action is being taken to control tobacco use (Danishevski *et al.*, 2008). As a consequence, the industry has worked assiduously to promote the passage of a ‘technical regulation on tobacco goods’, which would establish explicitly that tobacco could be sold legally. The draft text was written and presented to the Russian State Duma (parliament) by tobacco industry employees, after Russia had ratified the FCTC but in clear contradiction to the Convention’s Article 5.3, which states ‘in setting and implementing their public health policies with respect to tobacco control, parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law’. Many parliamentarians and senior members of the government supported this law and the industry has considerable influence in parliament. For example, the owner of the only major domestic tobacco manufacturer in Russia (Donskoy Tobacco) is a

Member of Parliament and co-authors all tobacco control laws (Саввиди, 2010).

The passage of the regulation took place even though it contradicts the National Framework Law on Technical Regulation, which states that any technical regulation of production should guarantee safety to consumers (State Duma of the Russian Federation, 2002). The effect of this regulation was not only to create confusion about the legal status of tobacco, with consumer protection legislation capable of being interpreted to show it was illegal while technical regulations set out provisions for its production, but also to transfer liability for any future legal action to seek redress for its health effects onto the government, which has approved its means of production.

The industry took advantage of the passage of the regulation to address another issue causing them concern. The regulation required disclosure of nicotine, tar and carbon monoxide concentrations but in a way that allowed the industry to describe some cigarettes as 'safer', and so sell them at a higher price. Filters, which are promoted by the regulation, play the same role. This provision has been used to defeat litigation by consumer protection organizations demanding publication of a full list of hazardous substances, as would be required under consumer protection legislation for any other product.

This account exemplifies the ways in which the industry has been able to circumvent tobacco control measures, something well recognized by industry analysts and illustrated by rises in share prices after the introduction of such measures. In part, this is because the industry has been able to align its interests with those of governments. Taxation of tobacco is attractive to governments because it can both reduce consumption and increase revenues (Jha *et al.*, 2006). However, if tax levels (which typically include not only excise duties but also value added and other taxes) were raised to the level that would reduce smoking to very low levels, then those revenues would dry up. Of course, given the time lag between collecting revenue and paying the health and social costs of smoking, governments typically ignore the latter.

Typically, as with the Russian technical regulation, the industry seeks to shape laws in ways that minimize their impact. Thus, it has conceded the need to place warnings on packs as a way of avoiding more restrictive measures, but has consistently sought ways of minimizing their impact, by use of small or illegible writing, and has fought hard against the use of pictorial pack warnings. It is helped by its ability to exploit the concept of corporate social responsibility, for example, by mounting campaigns aimed at youth that, while purporting to reduce smoking initiation, actually increase it by use of carefully crafted messages that smoking is an adult activity. Its enormous resources even enable it to overcome advertising bans by use of product placements (especially in films), brand stretching (attaching names of tobacco products to other legally advertised merchandise such as fashion goods; Assunta and Chapman, 2004), and use of images that, while not bearing the name of a particular brand are readily

associated with it (such as the red and white pattern signifying Marlboro; LeGresley *et al.*, 2006).

This ability to shape legislation can also be seen in the Russian law on limitation of tobacco smoking, a measure promoted by physicians but modified by industry lobbyists. The law is toothless and therefore ineffective, but it creates an illusion of regulation, making implementation of more effective measures impossible. Furthermore, and of importance in a highly decentralized country like Russia, it sets the ‘ceiling’ rather than the ‘floor’, so limiting the power of regional and municipal authorities to go further.

How has the tobacco control community responded?

ATACA is a coalition of non-governmental organizations active in tobacco control in Russia. Having determined that there was a case in law that stores selling cigarettes were breaching the criminal code by selling cigarettes (or unsafe products), nine of these stores in five Russian regions were reported to the police. The police did not take any action against the stores but also made no attempt to argue that the sales were legal. Where written responses were provided, if they offered any justification for inaction it was because the cigarettes had certificates of authenticity provided by a variety of governmental and non-governmental bodies, the latter often funded by the tobacco industry. These simply confirmed that the cigarettes were genuine. More recently, the police have referred to the aforementioned technical regulation for the production of tobacco. However, in private discussions, police officers admit that the argument is sound from a legal standpoint but they are simply frightened to take it forward (Danishevskiy and Saverskiy, 2009).

At present, ATACA is arguing before the Russian supreme court that the government acted unconstitutionally and inconsistently in passing the law on technical regulation of tobacco products as it contradicts the constitutional right to health and is inconsistent with a number of existing framework laws. Given the situation in the Russian court system, this could be a very long process. Crucially, although the case has been in progress for more than a year, the industry has not yet contested the substantive argument. Furthermore, as the case moves slowly through the courts, it is attracting debate about what a growing number of people see as a clear legal inconsistency.

Next steps

We believe that the case for declaring unregulated sales of tobacco products illegal under Russian law is compelling but also that the situation in other countries may be similar. Current Russian legislation on tobacco consumption has been at best largely ineffective and, at worst, of benefit to the industry, while current levels of taxation in effect make the government a stakeholder in the

industry. The logical conclusion is that tobacco production and sales should be outlawed. Yet 40 million people in Russia are already addicted to nicotine, making prohibition a long and complex process. It should not, however, prevent the government and tobacco control activists from planning long-term measures to phase out tobacco.

We argue that the logical next step (beyond strengthening existing policies on, for example, pack warnings and smoke free public places, in line with international best practice) would be to limit sales to those who are already addicted, with regulation of both users and sellers, as is the case with narcotics and substitution therapy in many countries. This should be part of a strategy for the gradual but complete ban of tobacco sales over several decades. Those unable to quit would be given a license to obtain nicotine for personal use only, drawing on the experience of drug substitution programs operating in many countries (Gowing *et al.*, 2008). The distribution of nicotine containing products by other than licensed users should be punishable in the same way as dealing in illegal drugs. However, it is essential to clarify that this proposal does not seek to make smoking illegal. There is no reason to do so if the smoker is only harming him or her self (recognizing the harm done by expectant mothers to the foetus). The focus of our attention is those involved in production, sales and marketing of tobacco.

The approach does not necessarily require that all countries agree to it. People who continue to be addicted will have legal sources of nicotine. The opportunities for the industry to market its products will be limited, even as it scales up its exploitation of media that cross borders, especially on the internet (Freeman and Chapman, 2009). There will be a growth in smuggling, given the industry's ongoing complicity in this activity, so severe punishment for illegal sales and smuggling of tobacco products will be required.

A counterargument is that there will always be people who smoke illegally manufactured and imported tobacco. However, it is not clear why this is considered a problem. It has happened with narcotics: people still use them but the scale of the consequences is much smaller than if heroin was marketed legally, with all the resources at the disposal of a global industry.

Conclusion

Tobacco is often regarded as 'a product like any other' (Gilmore *et al.*, 2009). Yet there is an arguable case that sales of tobacco should be criminalized, at least in Russia, on the basis of existing laws. Although the level of corruption in Russia is very high, we believe that other countries where smoking is less prevalent and which are more transparent, with greater respect for the law, could introduce these measures more quickly. We recognize that many will find our proposals extreme and unworkable. However, in response we would ask why it is that tobacco, among the many poisonous substances in this world, has a uniquely privileged place? Other harmful substances also have benefits; asbestos

has saved many lives from fire and narcotics are an invaluable means of pain relief. Yet both are subject to stringent regulations on their use. How can it be that tobacco is still treated differently?

This may be an idea whose time has come; the American Cancer Society and some patients' organizations have asserted the right to health in relation to tobacco. Religious authorities in the Israeli town of Efrat have stated that tobacco contradicts the fundamental principles of Judaism and removed it from the shops in the town (Wagner, 2010). The authorities in New Zealand have begun to discuss a progressive elimination of cigarette sales by 2020 (Laugesen *et al.*, 2010), a measure that has attracted considerable public support (Thomson *et al.*, 2010). In England, where serious discussion of the prospect of a complete ban has yet to begin, one survey has already found support among 44% of the public, including a one third of current smokers (Shahab and West, 2010). If nothing else, we hope that this paper will stimulate debate about what, in our view, is a clearly anomalous situation that has been accepted without question by too many people for too long.

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