



4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173

Fax +44 (0)20 7329 2190

DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

HMRC,
Indirect Tax Tobacco Strategy and Policy team,
3W Ralli Quays,
Salford,
M60 9LA.

By e-mail: tobacco.policy@hmrc.gsi.gov.uk

Dear Sir/Madam

Re: Consultation - Sanctions to tackle tobacco duty evasion and other excise duty evasion

This submission is made on behalf of the City of London Law Society Land Law Committee. The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

A full list of the CLLS corporate members may be found on the CLLS website at <http://www.citysolicitors.org.uk/attachments/category/81/Corporate%20Membership%202017%202.pdf>

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

The members of the Land Law Committee have had the advantage of reviewing the submission of the UK Real Estate practice group within Eversheds Sutherland in response to HM Revenue & Customs' consultation on "Sanctions to tackle tobacco duty evasion and other excise duty evasion". The Committee agrees that this submission addresses the issues on this consultation relevant to their practice and to their clients.

The Committee therefore wishes to respond to the consultation by endorsing the views expressed in the response of the UK Real Estate practice group within Eversheds Sutherland to this consultation.

This is a part response to the HMRC consultation document “Sanctions to tackle tobacco duty evasion and other excise duty evasion”. The UK Real Estate practice group within Eversheds Sutherland manages many hundreds of lettings of commercial properties each year, acting for both landlords and tenants. We have responded to only the questions set out in part 6 of the consultation document as being the area within our expertise.

Question 20: Would you be in favour of this approach?

Response

No – for the following reasons:

- An additional clause is unnecessary as commercial leases already contain a tenant’s covenant not to use the premises for any illegal use.
- In addition commercial leases already contain a tenant’s covenant to comply with all statutes in relation to the use and occupation of the premises.
- An additional unnecessary clause adds to the length and complexity of documents whereas it is preferable for all for leases to be clear and concise
- Given that commercial lease agreements have always prohibited illegality at the premises and required a tenant to comply with all laws, it is unlikely that adding an extra clause regarding one specific crime will make a difference to the attitude of those who seek to evade tobacco duty.
- It is inappropriate to pick out one statutory duty for special mention. No doubt those who campaign against modern slavery or alcohol abuse could make out similar cases for special mentions in lease documentation. The existing generic drafting covers all unlawful activity at the premises.
- Any additional wording would not give the landlord any further control over the premises. Commercial lease agreements already give the landlord grounds to forfeit the lease for breach of tenant’s covenants, which would include the obligation not to use the premises for any illegal use or to the obligation to comply with all statute.

Question 21: Do you think the examples above are on the right lines to ensure that the duty of care is reasonable and proportionate?

Response

No – as we disagree with the proposal to impose a duty of care on landlords and landowners in this way in the first place. What is proposed is not a “duty of care” but a legal obligation. The reasons we disagree with the proposals are the following:

- The policing of the payment of excise duties is a role for the state, not private companies or individuals.

- No reputable landlord would condone tobacco duty evasion by anyone anywhere, but the appropriate parties against whom to take action are those who break the law by trading in illicit tobacco, not their law abiding landlords.
- If, as the consultation suggests, some landlords are complicit in tenants breaking the law in this way, then the appropriate enforcement action would be against those few criminal landlords and their tenants for breaking the existing law against duty evasion.
- The number of commercial premises from which illicit tobacco is being sold at any one time must be an extremely small percentage of all commercial lettings. To impose a new duty of care on all landlords in respect of all lettings would result in significant increase in the administrative burden of all landlords, disproportionate to the problem it is trying to address.

Notwithstanding our disagreement with the proposal to impose a duty of care on landlords we would make the following comments on the proposals as to the extent of that duty of care.

We note that it would be intended that any such duty of care would only arise when the landlord has been “notified that the tenant has evaded tobacco duty (or other excise duty)”. The justification given in the foreword to the consultation document centres on smoking and tobacco but it seems that the proposed duty of care would extend beyond just illicit tobacco into all other goods that attract excise duty – with no justification given for the imposition of that wider duty.

In respect of the proposals to notify a landlord we have the following observations:

- Who is the landlord who is to be notified? One retail tenant could have several landlords e.g. several individuals who own the one property, all of whom would have to act in concert to take action against the tenant. If one joint landlord didn't take the steps that any duty of care required then the second joint landlord would be limited in the actions they could take and yet be exposed to action for the breach of the proposed duty of care.
- One property could have several associated landlords and landowners e.g. a freeholder, a long leaseholder, a previous occupational tenant who has then sublet to the present tenant. Is it intended that duty of care would affect all of them and even those who are several interests remote from the management of the property? Not all landlords will be able to take enforcement action against a tenant in any case (that right being exercisable only by the tenant's immediate landlord in practice).
- Will the notification give rise to the landlord's duty of care in respect only of the particular premises occupied by the tenant who has evaded tobacco duty? If the tenant occupies other premises also will the duty extend to all such premises? How long would that duty of care last – until the end of the lease in place at the time? Or until the tenant is no longer the tenant in situations where it assigns the lease? Or until the tenant is no longer in occupation of the property in cases where it goes on to sublet the premises? Or until the particular landlord who received the notification is no longer the landlord of that particular property?

As to the proposals to require a landlord to have in all new leases provisions making it clear that any illicit tobacco trading *or any other illicit excise activity* [emphasis added] will terminate an existing lease we would note the following:

- Leases do not just “terminate” if a tenant breaches a term of the lease agreement. There is long established and comprehensive statutory and case law dealing with a landlord’s right to forfeit a lease for breach of a tenant’s covenant.
- If illegal trading has taken place the landlord will not be the person who holds the evidence that this has occurred. Landlords might be left in the impossible situation of having a legal obligation to terminate a lease without the necessary evidence to do so. If in fact a tenant had been prosecuted and found guilty of duty evasion, any landlord could already use that as evidence in forfeiture proceedings based on the tenant’s breach of the covenant to comply with statute.
- A landlord cannot simply end a lease in such circumstances – it must first serve notice under section 146 Law of Property Act 1925 and allow the tenant the opportunity to remedy the breach. Only then might a landlord take steps to forfeit a lease and even if it does so a tenant has a right to apply to court for relief against forfeiture. The whole procedure is long and costly, cumbersome and uncertain for a landlord. And if a court were to grant a tenant relief against forfeiture and reinstate the lease what steps would a landlord be expected to take then? How would such competing obligations be resolved?
- The forfeiture of a lease would have significant and expensive adverse consequences for a landlord. He loses the income stream of the rent, becomes responsible for all insurance and service costs and for business rates. If the law was to require landlords to take such steps then there would be significant costs and losses for a landlord, incurred through no fault of the landlord but due to the illegal behaviour of a third party.
- The forfeiture of a lease would have significant and expensive adverse consequences for any sub-tenant of part of the premises. The forfeiture of the lease would simultaneously and automatically end the sublease and the only remedy available to the law-abiding sub-tenant would be an expensive and lengthy court application for relief against forfeiture.

The consultation paper suggests that a landlord should undertake periodic checks on premises and request information relating to the tenant’s business as a way of taking “reasonable steps to prevent future wrongdoings in or on their property”. We have the following comments:

- Any commercial lease agreement will contain a landlord’s covenant to give “quiet enjoyment” of the premises to the tenant. Once a property is let to a tenant the tenant has control and possession of the property and the landlord may only enter with the consent of the tenant or in accordance with the limited entry rights that it is possible to reserve in the lease agreement itself. A landlord’s right to enter the property during the term of the lease will typically be subject to a landlord’s obligation only to enter for particular purposes and only to enter upon giving prior written notice to the tenant. The landlord will not have the right (save perhaps for a right to be used in the case of emergencies) to enter the premises at any time. No doubt any tenant conducting any illegal activity at a property will ensure that any evidence of this is well gone before a landlord carries out its inspection.
- Even when a landlord can access premises, how is the landlord to determine that the excise duty on the tobacco on site (and presumably other goods that carry excise duty) has been paid?

- As to the suggestion that a landlord should request information relating to the tenant's business in order to determine whether excise duty is being evaded, we can see no purpose to this. No tenant is likely to volunteer the fact that is evading excise duty or breaking the terms of its lease. If there is the suspicion or evidence that excise duty is being evaded then presumably Customs & Excise could make investigations and request such information.
- We note the suggestion that a landlord should be obliged to take steps to ensure that it is aware of illicit activity – what further steps could be taken other than inspecting the property in the limited circumstances that a landlord may be able to do so?
- As to the suggestion that landlords should provide HMRC with a copy of the tenancy agreement with provisions relating to illicit tobacco or other excise products, we have set out above our reasons as to why such additional provisions are unnecessary. In any event leases granted for a term of over seven years are registerable at the Land Registry and publicly available and HMRC would be able to obtain copies of those leases that way.

Question 22: What would be a reasonable expectation of the steps landlords should take and the timescale for doing this and for taking action if there are further transgressions?

Question 23: What sanctions should HMRC apply to landlords or landowners who have not taken steps to prevent illicit tobacco or other illicit excise activity on the property or land? For example should HMRC impose a financial penalty?

We make no comment in response to these questions as we have set out reasons above for disagreeing with the imposition of such a duty of care in the first place.

Question 24: Are there any potential wider consequences of introducing a duty of care and a civil penalty that we have not identified?

The significant expensive consequences for all landlords (which will hit smaller landlords hardest) and the adverse reputational consequences for institutional landlords, arising from the illegal activity of people over whom they can exercise little control.

Yours faithfully

Jackie Newstead,
Hogan Lovells International LLP
Chair, City of London Land Law Committee

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THE CITY OF LONDON LAW SOCIETY LAND LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

J Newstead (Hogan Lovells International LLP) (Chair)

J. Barnes (Herbert Smith Freehills LLP)

N. Brent (Druces LLP)

J. Brooks (DLA Piper UK LLP)

J. Chapman (Ashurst LLP)

J. Crookes (Pinsent Masons LLP)

B. Dear (Eversheds LLP)

Ms C. DeLaney (Rosenblatt Law LLP)

Ms J. Elkins (Field Fisher LLP)

M.J.H. Elliott (Linklaters LLP)

Ms A. Hardy (Squire Sanders UK LLP)

D. Hawkins (Norton Rose Fulbright LLP)

L. Heller (Emeritus)

Ms V Hill (Freshfields Bruckhaus Deringer LLP)

N.D.E. Jones (Simmons & Simmons LLP)

A. Judge (Travers Smith LLP)

P. Karia (CMS Cameron McKenna Nabarro Olswang LLP)

D. McKimm (Allen & Overy LLP)

J.Nevin (Slaughter and May)

T. Pedder (Macfarlanes LLP)

F Pena (Clifford Chance LLP)

J.R. Pike (Reed Smith LLP)

P. Taylor (Emeritus)

Ms. S. Unadkat (Trowers & Hamlins LLP)

I. Waring (Berwin Leighton Paisner LLP)

W. Gordon (CMS Cameron McKenna Nabarro Olswang LLP) (Secretary)