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Development of a Policy Framework on Anti-Illicit Trade for the COMESA Region

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Table of Contents

List of abbreviations	4
1. Background	5
1.1. Context	5
1.2. Objectives of this study	6
1.3. Expected outcomes	6
1.4. Approach to the Study	6
2. Introduction to Illicit Trade	10
3. Regional Situational Analysis	11
3.1. Existing frameworks to counter illicit trade in COMESA member states – current legislation	11
3.2. Existing frameworks to counter illicit trade in COMESA member states – stakeholder engagement	16
4. International best practice to counter illicit trade	21
4.1. Enhancing effectiveness of sanctions	21
4.2. Improving the legal framework to combat illicit trade	22
4.3. Improving coordination	23
4.4. Eliminating the risk of illicit trade in free trade zones	23
4.5. Improving the screening of imports	23
4.6. Improving the enforcement of intellectual property rights	23
5. Existing frameworks to counter illicit trade in COMESA member states – gap analysis	24
5.1. Sanctions for illicit trade	24
5.2. Use of ancillary legislation	24
5.3. Legal framework	25
5.4. Coordination	25
5.5. Screening of imports	26
5.6. Enforcing intellectual property rights	26
6. Policy framework on Anti-Illicit Trade for COMESA	26
6.1. Aim of policy framework	26
6.2. Principles and long-term goals	27
7. Institutional arrangement to support the Anti-Illicit Trade Policy Framework	31
7.1. Assessment of institutional arrangement	31
7.2. Institutional arrangement to support implementation of Anti-Illicit Framework Policy	32
8. Implementation plan for Anti-Illicit Trade Policy Framework	33

8.1. Political support	33
8.2. Intergovernmental Committee	33
8.3. Member state taskforces	34
8.4. Addressing priorities	34
8.5. Evaluating progress	34
8.6. Monitoring effectiveness	34

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List of abbreviations

Abbreviation	Meaning
ACA	Anti-Counterfeit Agency
CBC	COMESA Business Council
COMESA	Common Market for Eastern and Southern Africa
FCTC	WHO's Protocol to Eliminate Illicit Trade in Tobacco Products
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCAC	The United Nations Convention Against Corruption
UNTOC	The United Nations Convention against Transnational Organised Crime
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1. Background

1.1. Context

The Common Market for Eastern and Southern Africa (COMESA) is the largest regional economic community in Africa. It comprises of 21 Member States, that jointly cover about two thirds of the African Continent in square kilometres, a population of approximately 583 million people, a gross domestic product of \$805 billion and an annual import and export trade of approximately \$324 billion.

COMESA is a Free Trade Area (FTA) and has ambitions to become a Customs Union, Common Market and eventually an Economic Community. In terms of the Trade and Customs programme of COMESA, the main function of the programme is to enhance cooperation in trade, customs and monetary affairs. This is required to achieve a fully integrated, internationally competitive and unified economic space. The cooperation programmes in turn aim to achieve the removal of all physical, technical, fiscal and monetary barriers to intra-regional trade.

Illicit trade is a global issue that detrimentally affects both the private and public sector globally but also in COMESA. Illicit trade causes revenue losses, unfair competition and health risks and undermines the concept of a free and open marketplace as envisaged by a Customs Union.

Although there is no official definition, illicit trade is commonly described as any practice or conduct prohibited by law which relates to production, shipment, receipt, possession, distribution, sale or purchase of products including any practice or conduct intended to facilitate such activity. Within Africa, illicit trade has long been the centre of discussions on development. This is due to the wide consensus on its negative impacts, such as the ability of governments to collect revenue that may be used to ensure the delivery of key public services to its citizenry. It is estimated that illicit trade amounts to in excess of US\$120 billion per annum within Africa. The loss in tax revenue is about US\$3.6 billion. An estimated 24 million jobs are lost, which is about 6% of overall employment in Africa. By curbing illicit activities such as these, Africa could potentially create 25 million more jobs.

In COMESA, there is prevalence of counterfeits and imports of sub-standard products; these pose high risks in losses of revenue to the local industry due to unfair competition, danger to human health and safety, loss of government revenue, stifling of creativity and innovation, and loss of trade and investment competitiveness. Networks of counterfeit trade undermine creativity, innovation and competitiveness, and hamper investment in the research and development of new products and ideas. The adverse effects on industry competitiveness often leads to company shutdowns due to the influx of cheap substandard products. The illegal competition caused by illicit trade reduces sales and employment opportunities and disincentivizes investment.

In 2015 CBC commissioned its first study on illicit trade. The COMESA Business Council (CBC) is the recognized Business Member Organization, established as a private sector institution of COMESA. It represents the interests of business sectors at a regional level. The services provided go beyond advocacy, to actively promote business participation in regional integration, investment and global trade. This is done by facilitating the growth of strong business synergies, the development of business opportunities, business alliances, legislative and strategic advocacy. Its vision is, "Building Regional, Going Global".

The first study, entitled ‘Promoting manufacturing competitiveness in COMESA: Towards the establishment of A Framework for combating Illicit Trade in COMESA’ was the first step towards the establishment on a framework on anti-illicit trade in COMESA.

1.2. Objectives of this study

Several years have passed since the original study on illicit trade. CBC required an updated and comprehensive review of the situation across COMESA. This is required to provide a baseline and determine what actions and additional measures and/or institutions will be needed in each COMESA member state. It was decided that the review shall be limited to the representative sample of member states that were analysed in the first study. The member states in the first study were Ethiopia, Kenya, Mauritius, Sudan and Zambia. Due to the current political climate in Sudan and the fact that no stakeholder consultations could be had in Sudan, Uganda replaced Sudan in this study. This study also focusses on four key sectors as per the previous study in order to determine the baseline. The sectors are:

- Food and beverages
- Seeds
- Electric and electronic goods
- Tobacco.

This baseline will then form a basis for development of an Anti-Illicit Trade policy framework for the COMESA region as well as the development of appropriate institutional arrangements to support the policy framework. In addition, an implementation plan for the policy framework must be developed.

1.3. Expected outcomes

This study undertakes a comprehensive review and analysis of the existing legislative, regulatory and policy framework in 5 of the COMESA member states. This is supplemented with stakeholder interviews in order to accurately assess the actual situation in each of the selected member states. Regard is also had to international best practice, the practical context in COMESA as well as the regional and bilateral dimensions. This should provide context to the development of a contextually appropriate policy framework on Anti-Illicit Trade, the development of appropriate institutional arrangement to support this policy as well as the development on an implementation plan for the policy framework.

1.4. Approach to the Study

1.4.1. Methodology – introduction

To conduct the study and develop the Anti-Illicit Trade framework and implementation plan, the Senior Trade Expert must conduct both a desk review as well as virtual field missions and stakeholder engagements. The aim hereof is to:

- assess the current environment and determine the requirements for establishing an effective policy framework on Anti-Illicit Trade. This will be achieved by:
 - reviewing the existing legislative, policy and regulatory frameworks in the selected COMESA Member States;

- comparing the selected COMESA Member States' frameworks against international best practices and identifying gaps;
- examining the enforcement and coordinating mechanism for illicit trade in the selected COMESA Member States and determining the gaps;
- analysing the effects of illicit trade on selected sectors, namely food and beverages, electronic and electrical goods, seeds and tobacco in the selected Member States;
- examining the regional and national dimension of illicit trade and the integration of the two dimensions;
- develop a policy framework on anti-illicit trade based on the key elements identified that will address the issues of illicit trade in the COMESA region.
- Address the institutional arrangement by:
 - assessing and determining an appropriate institutional arrangement to support the proposed policy framework on Anti-Illicit Trade for the COMESA region;
 - developing institutional arrangements to support implementation of policy framework on Anti Illicit Trade for the COMESA region;
 - describing the role of the key stakeholders in the institutional arrangement and relationships between the stakeholders.
- Develop and implementation plan to guide the implementation of the policy framework on Anti-Illicit Trade for the COMESA region.

1.4.2. Methodology – desk review

In terms of the desk review the Senior Trade Expert is firstly required to review the earlier study¹. This will allow the Senior Trade Expert to build on the earlier work conducted. The desk review will also entail an in-depth review of relevant documents, literature and reports related to illicit trade and national, regional and international levels. The Senior Trade Expert has already commenced with this research in order to provide a meaningful inception report. As examples of some of the literature that will be reviewed include the World Customs Organizations' Illicit Trade Report 2019 or academic writings on illicit trade as published in the World Customs Journal. Such literature may provide insights which may be used in developing the Anti-Illicit Trade framework and implementation plan.

Where possible, the desk review will also include a review of Anti-Illicit Trade frameworks and implementation plans that have been implemented. The Senior Trade Expert also intends to review international treaties which may be relevant or related to illicit trade.

National and regional (within COMESA) strategies and policies relevant or related to illicit trade will also be reviewed. In addition, the Senior Trade Expert will also review relevant national and regional legislation and regulation relevant or related to illicit trade. The Senior Trade Expert will also review other documents relevant to illicit trade. This could include, for example, border control management or cooperation memorandums between different governmental departments that may play a role in combatting illicit trade. In this regard, the Senior Trade Expert will be assisted by the CBC, its network and member associations as well as potentially some junior experts. Locally based individuals are often, through their experience, privy to legislation, regulation or documents which may be relevant to illicit trade which the Senior Trade Expert might not have access to in

¹ Promoting manufacturing competitiveness in COMESA – Towards the establishment of A Framework for combatting Illicit Trade in COMESA.

a remote desk review. This aspect of the desk review is crucial in conceptualising the Anti-Illicit Trade framework and accompanying implementation plan.

1.4.3. Methodology – stakeholder engagements

The aim of the virtual field missions and stakeholder engagements is to consult with stakeholders which will provide insight which may be used in the design of the Anti-Illicit Trade framework and implementation plan. As such, it was envisaged that the following stakeholders will be consulted:

- business within the identified sectors;
- manufacturer/processor associations within the identified sectors;
- customs authorities;
- revenue authorities;
- bureaus of standards;
- the African Organisation for Standardisation or ARSO (the five selected Member States are members of the ARSO)
- law enforcement organisations;
- border management authorities;
- intellectual property right enforcement authorities such as the Anti-Counterfeit Agency;
- intelligence agencies;
- judiciary or legal practitioners;
- Plant Health Authorities (Seeds);
- COMESA's Trade and Customs Division; and
- Cross Border Associations.

It is proposed that the stakeholder engagements are conducted as in-depth interviews but that the stakeholders receive possible questions ahead of the actual interviews. The questions that will be posed will depend on the stakeholder as well as the specific sector. In addition, the questions will be expanded and refined as progress is made on the desk review. The aim of the stakeholder engagements is to enable the Senior Trade Expert and the stakeholders to have a full exchange of information and views so as to:

- understand the effects of illicit trade on the selected sectors;
- examine the enforcement and coordination mechanism for illicit trade;
- exploring the regional and national dimensions of illicit trade and the integration of the two dimensions;
- understanding national and regional frameworks and any possible gaps it may have compared to international best practice.

The following serves as an indicative list of questions:

- Give an indication of the share of illicit trade in your market.
- What impact does illicit trade have on your sector?
- What types of products are trade illicitly?
- What is the origin of the illicit trade?

- Do you know how the illicit trade enters the market?
- Do you know how the authorities in the country of production allow the goods to be exported?
- Are the products capable of being uniquely identified (either at production or on sale/export)?
- How are the illicit products sold to wholesalers, distributions end-consumers?
- Is licensing a requirement to import/sell the illicit goods?
- Do you have any legislation (including treaties) in place that combats illicit trade or protects consumers?
- What capabilities do you have to detect illicit trade?
- What enforcement mechanisms exist to combat illicit trade?
- Please elaborate if authorities are empowered to conduct searches and if they may confiscate illicit trade or transportation means used in carrying out illicit trade.
- What are the sanctions/penalties if found guilty of participating illicit trade?
- Do different governmental departments collaborate to combat illicit trade?
- Is there any strategy or policy for combatting illicit trade?
- What do you believe are the main reasons why illicit trade is not stopped or minimized?
- What role does intelligence play in gathering, analyzing and disseminating of intelligence related to illicit trade?
- Do different COMESA Member States cooperate to combat illicit trade?
- Do the prosecutors and the judiciary ensure that illicit traders are taken to task?

1.4.4. Methodology – draft report

The information and insights gained during the desk review and the stakeholder engagements will be collated into a background document that will form the basis of the draft report. The draft report will contain the following output and structure:

- an assessment of the current environment and the requirements for establishing an effective policy framework on Anti-Illicit Trade;
- a policy framework on Anti-Illicit Trade for the COMESA region that will address the issues of illicit Trade in the COMESA region;
- institutional arrangement to support implementation of policy framework on Anti-Illicit Trade for COMESA region and description of the role of the key stakeholders in the institutional arrangement and relationships between these various stakeholders
- an implementation plan to guide implementation of policy framework on Anti Illicit Trade for COMESA region.

1.4.5. Methodology – presentation of draft report

The draft report will be presented to stakeholders. This presentation would include not only the assessment of the current environment and the requirements for establishing an effective policy framework, but also the proposed framework, the necessary institutional arrangement and the accompanying implementation plan.

The aim of the presentation is to validate the work of the Senior Trade Expert and to solicit any additional inputs from the stakeholders. The received inputs will be incorporated into the final report.

1.4.6. Methodology – final report

The final report will be drafted after the presentation of the draft report incorporating any inputs received. The final report will contain the same outputs and follow the same format as the draft report being:

- an assessment of the current environment and the requirements for establishing an effective policy framework on Anti-Illicit Trade;
- a policy framework on Anti-Illicit Trade for the COMESA region that will address the issues of illicit Trade in the COMESA region;
- institutional arrangement to support implementation of policy framework on Anti-Illicit Trade for COMESA region and description of the role of the key stakeholders in the institutional arrangement and relationships between these various stakeholders
- an implementation plan to guide implementation of policy framework on Anti Illicit Trade for COMESA region.

2. Introduction to Illicit Trade

Illicit trade is a global menace that seriously affects both the public and private sectors within the COMESA region and all other parts of the world. It undermines the concept of a free and open marketplace, which is fundamental to improving competitiveness, increasing investment, generating jobs and ultimately contributing to economic growth of COMESA member states.

According to the World Health Organization (WHO)², illicit trade is any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase including any practice or conduct intended to facilitate such activity. Illicit trade is categorized under the following five broad areas –

- smuggling – which refers to illegal trading of products across borders. Typically, this is done without any approval for importation/exportation, in breach of laws prohibiting importation/exportation and with no payment of applicable taxes and duties (customs or excise);
- counterfeiting – which refers to piracy and substandard goods. Piracy in turn refers to the unauthorised reproduction of goods without the authorisation of the brand owner. Substandard goods claims to adhere to a specific standard but in fact is inferior as it does not conform to the specified standard;
- transit fraud - which refers to the illegal entering of a product into a market through which the product was intended to be transiting through;
- trade in prohibited or restricted products – which refers to goods which may not be imported (prohibited) or goods which require authorisation (or adherence to some conditions) to be imported (restricted goods) which are then imported although it is either prohibited or it did not adhere to the prescribed conditions (or was unauthorised); and
- undeclared local production – which refers to the instance where a product is manufactured and sold in the same country but its production if not declared and hence excise tax is not paid. Such undeclared

² The World Trade Organization does not have a definition of illicit trade.

local production occurs either in registered and approved production facilities or in illegal covert operations.

Illicit trade has long been at the centre of discussions on development in Africa, particularly due to the wide consensus on its negative impacts. It undermines the ability of governments to collect important sources of revenue that help ensure the key public services in the health, safety and security of its citizenry. According to AfDB reports, the wider economic impact of illicit trade is estimated at US\$120 billion per annum, which is 5% of Africa's GDP. The loss in tax revenue is about US\$3.6 billion. An estimated 24 million jobs are lost, which is about 6% of overall employment in Africa. By curbing illicit activities such as these, Africa could potentially create 25 million more jobs.

In COMESA, there is prevalence of counterfeits and imports of sub-standard products; these pose high risks in losses of revenue in the local industry due to unfair competition, damage to human health and safety, loss of government revenue, stifling of creativity and innovation, and loss of trade and investment competitiveness. Networks of counterfeit trade undermine creativity, innovation and competitiveness, and hamper investment in the research and development of new products and ideas. The adverse effects on industry competitiveness often leads to company shutdowns due to the influx of cheap substandard products. The illegal competition caused by illicit trade reduces sales and employment opportunities and disincentivizes investment.

3. Regional Situational Analysis

3.1. Existing frameworks to counter illicit trade in COMESA member states – current legislation

A first port of call, and arguably the most relevant, is to assess the national legislative and regulatory frameworks within each of the chosen COMESA member states as these typically would provide not only the authority and mechanism to enforce national laws but so to any regional or international framework relevant to anti-illicit trade. In terms hereof, the following pieces of legislation and regulation are indicative of what is relevant to illicit trade.

3.1.1. Ethiopia

Ethiopia has several pieces of legislation and regulation that could assist in addressing illicit trade. Some of these include:

- Coffee Marketing and Quality Control Proclamation. This proclamation is rather interesting as Ethiopia has implemented a process where the processing and transacting in coffees is highly regulated, using inspections, licensing, certification, a transaction platform and end-receipt confirmation.
- Seed proclamation. This proclamation sets seed standard (set by the Ethiopian Standard Agency). To produce seed, producers require a certificate of competence and must establish an internal seed quality control system. Even distributors need certificates of competence. Ethiopia relies on both regional authorities and laboratories to ensure quality of seeds. Importation of seeds also require import permits, which is only given if prior verification of the seeds have been done. Importers also require a certificate of

competence. All holders of certificates of competence must keep detailed records of all seed produced, processed, distributed or imported and keep samples for testing for at least a year. Sanctions for violations range from imprisonment up to ten years or a fine of up to fifty thousand Birr.

- Trade practice and consumer protection proclamation. This proclamation established the Trade Practice and Consumers Protection Authority. In the current context it prohibits false advertising on goods in respect of the nature, components and quantity of the goods, the source, weights, volume, method of manufacturing, date of manufacturing, expiry date of the goods and how it is used, the manufacturer or the supplier of the goods and any trade marks. Enforcement is based on businesses bringing application to the Authority which then adjudicates the matter and may impose administrative (such as the discontinuance of business or the cancelling of business licence and civil sanctions (which could include the seizure and selling of the seized goods)). It may also impose very severe fines and imprisonment.
- Proclamation to establish quality and standards authority. This allows the Authority to formulate and approve Ethiopian standards including providing license to persons for a quality mark of certificate of conformity. The Authority may also close factories or business operations where products do not conform to the standards. Officers are appointed to ensure enforcement of the relevant standards. A corrupt officer who takes bribes is punishable with a fine not exceeding three times the value of the gift and with imprisonment of not less than fifteen years but no more than twenty years.
- Proclamation to provide for food, medicine and health care administration and control. This permits the setting of standard for food quality, production and importation. It also applies to tobacco products and one is required to have special permit to import, export or wholesale tobacco products. Depending on the type of violation the sanctions range from insignificant to a maximum of a fine of fifty thousand Birr and or imprisonment of not more than three years.
- Trademark registration and protection proclamation. This allows for intellectual property protection and it not only holds civil sanctions but it is possible to go be imprisoned for a minimum of five years and a maximum of ten years.
- Customs. In terms of the customs framework the aim is mostly to address certain forms of illicit trade, such as prohibited products. Customs officials have the general powers of inspecting and seizing goods the penalties for prohibited goods are not significant as you mostly face a fine of the full value of the goods or one hundred thousand Birr (whichever is the greater).

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3.1.2. Kenya

Kenya has a well-developed legislative and regulatory framework which is able to be utilised to combat illicit trade. Some of the primary pieces of legislation (with its attended regulations) are:

- Anti-counterfeit Act. It only addresses one form of illicit trade being counterfeiting. Importantly it established the Kenyan ACA. The ACA is tasked with not only combatting the trade in counterfeit products but also to enlighten consumers, devise training programmes to combat counterfeiting, coordinate with other national, regional or international organisations and it may conduct studies.

The ACA has its own inspectors who are appointed to enforce the Anti-counterfeit Act. These inspectors have wide powers to enter and inspect premises, take steps to terminate the manufacturing of counterfeit products, seize and detain counterfeit products, question and demand information from persons suspected of dealing in counterfeit products and generally have the same powers that customs officials have under the East African Community Customs Management Act.

The Anti-counterfeit Act caters for a wide array of offence related to counterfeiting. Importantly it also creates sanctions for violations of the Anti-counterfeit Act. The level of sanction differs depending on if it is a first or second and subsequent conviction. A first conviction carries either a maximum of five years imprisonment or a fine equal to not less than three times the prevailing retail price of the counterfeit products. For subsequent convictions, a perpetrator may face a maximum of fifteen years imprisonment or a fine equal to not less than five times the prevailing retail price of the counterfeit products.

- Seeds and Plant Varieties Act. This Act controls the sale and importation of seeds. It also establishes a Tribunal to hear proceedings and appeals. It also appoints officers that have the powers of inspection in order to enforce the Act. They also have wide ranging powers that allows them to seize seeds. It further creates penalties for any offences under the Act. This is however limited to twenty thousand shillings or to a maximum imprisonment of 6 months or both.
- The Standards Act. This Act allows for the standardisation in industry and commerce. It also allows for the testing of commodities to ensure compliance with any standard so set. Inspectors are also appointed who have wide ranging powers to inspect, require a person to provide information, seize and detain products suspected of not meeting the relevant standards which the eventual destruction of the goods once it has been definitely found not to have met the standard. It also creates offences for violations. For a first offence a person may be imprisoned for a maximum period of 12 months or be fined a maximum of one million shillings or both. For a second or subsequent conviction a maximum imprisonment of three years or a fine (undefined in terms of maximum) or both.
- Trademark Act and the Copyright Act. Both these Acts provide for protection of the relevant intellectual property rights as well as incorporating the TRIPS and the WIPO Copyright Treaty. Both these Acts are dependant on the intellectual property owners for enforcement which is of a civil nature.
- Narcotic drugs and psychotropic substances control Act. This Act is relevant to the extent that parallels can be drawn between these products and prohibited (illicit) products. The Act created penalties not only for trading in these products, but also for manufacturing, cultivation and possession. Given the nature of these products the penalties are severe starting at a maximum of ten years imprisonment up to twenty years for possession and a fine starting at 500 000 shillings or three times the value (whichever is highest) for trafficking and imprisonment that could be for life. Even the usage of these products carry severe sanctions. Land may also be forfeited if these products are cultivated or manufactured thereon.
- Customs and Excise Acts (including the East African Community Customs Management Act). The Acts provide for the manner in terms of which goods are cleared into Kenya as well as for how excise duties are levied. In terms of excise, unlicensed producers are guilty of an offence and the penalty is twice the amount of excise that would have been payable. The same penalty applies for goods imported that did not pay excise duty.
- Consumer Protection Act. This Act is mostly relevant to the extent that a false representation is made about a product. This could carry a potential sanction of a fine not exceeding one million shillings and/or a maximum of three years imprisonment.

3.1.3. Mauritius

- Basmati rice control of sale regulations. Akin to the Ethiopia coffee proclamation, Mauritius employs stringent control on basmati rice. It may only be imported, distributed or sold if certified in the countries of origin by specified authorities. The certificate must state the following:
 - the full name and address of the exporter;
 - the full name and address of the consignee;
 - the country and place of cultivation;
 - the FOB value in US dollars;
 - the number and date of invoice;
 - the marks and numbers, including the reference and number of batch;
 - the description of rice, including information on its variety;
 - the number and kind of packages, including the number and weight of packages; the gross weight, in kilogrammes; and

- the net weight, in kilogrammes;
 - In addition, every importer or distributor must keep a record of every purchase, sale or delivery of basmati rice for a period of one year from the transaction and at the request of an authorised officer, produce the certificate as well as a record which states the description and weight of the basmati rice, the full name and address of the person from whom the basmati rice is purchased or received or to whom the basmati rice is sold or delivered, the date of sale, purchase, delivery or receipt of the basmati rice and the price paid or payable in respect of the basmati rice
- Fair Trading Act. The Act prevents the misleading of a consumer. The Act makes use of authorised officers who may seize and detain goods. Contravention does not have a severe sanction as it is limited to a fine of fifty thousand rupees and a one-year imprisonment.
 - Protection against unfair practices (industrial property rights) Act. This Act defines numerous unfair practices such as misleading the public which includes misleading as to the manufacturing process, or the quality or characteristics of a product. It also carries much more severe sanctions of a fine limited to two hundred and fifty rupees and imprisonment of a maximum of five years. For owners of intellectual property rights, they may register with the Mauritius Revenue Authority. This allows the owner to apply for border protection (clearance of the goods are suspended until it is determined if it is counterfeit) but customs may also enforce protection without application. This can be done online (interface public-members) where owners and customs interact where information may be shared which facilitates the identification of counterfeit goods.
 - Customs Act. Mauritius, unlike many other COMESA member states only have a few border posts through which goods may enter. Mauritius employs strict entry requirements and will even hold an importer liable for the cost of examining a consignment. It not only employs severe sanctions for corrupt customs officials but also for any person which colludes with such a customs officer.
 - Seeds Act. Cultivation of seeds and dealing in seeds requires registration. Seed inspectors may also inspect seeds (at cultivation or dealing). The Authority also needs to certify all seeds produced in Mauritius (which certification is comprehensive). In addition, all imported seeds must, within 30 days of importation provide a sample to the Authority for testing.

3.1.4. Uganda

- Narcotics Drugs and Psychotropic Substances (Control) Act. This Act is again relevant for the parallels that may be drawn with prohibited products. As expected, the Act provides severe sanctions for possession, trafficking, cultivation and manufacture. It also includes forfeiture of land in the event that land is used for these prohibited items. Other than the sanction, this Act provides for international cooperation however this is mostly subject to a treaty or other arrangement having been entered into between Uganda and another member state.
- Trademarks Act. This Act provides protection to intellectual property owners. The remedies are civil in nature other than the potential forfeiture of illicit goods.
- Excise Duty Act. This Act provides for the levying of excise duties on excisable products. In terms of control, it is possible for a licensed premises to have an officer stationed there to ensure adherence to the Act. It is also an offence to violate the Act which carries either a fine not exceeding one million four hundred and forty thousand shillings (which is insignificant) or a minimum of three years imprisonment.
- Seeds and Plant Act. This Act deals with seed standards but also the licensing of seed merchants, dealers and seed conditioners (which clean, treat or otherwise condition seeds). The licensed seed merchants or dealers are not required to adhere to much although they cannot sell unapproved seeds. The Act also caters for seed sampling, field inspection and laboratory testing. Both locally produced and imported seeds need to undergo testing before release.

3.1.5. Zambia

- National Technical Regulation. In terms hereof, it is possible that a commodity must adhere to a specified technical regulation. When such commodities are imported, a foreign test report and certification is required. This will only be accepted if an agreement of mutual recognition has been negotiated between the regulatory agency and the conformity assessment provider in the foreign country or the regulatory agency is of the opinion that the foreign conformity assessment service provider's technical competency has been adequately demonstrated through accreditation and that the risk of accepting the test reports and certification unilaterally is acceptable.
- Food Safety Act. This creates a prohibition when labels are deceptive, selling foods that are not compliant with the relevant food standard. Imported food must also conform hereto however it is possible to import the feed and then to correct any non-conformity once imported. It carries severe penalties.
- Customs and Excise Act. This contains the usual provisions as well as severe penalties for non-compliance.
- Compulsory Standards Act. Creates and Agency which inspects goods which are subject to compulsory standards. It is not possible to provide non-conforming products, however as with locally produced goods will be given an opportunity to bring the goods into conformity with the Act. Local producers may be ordered to cease further production until conformity has achieved. Imported products must either return to its origin or confiscated, destroyed or re-worked.
- Competition and Consumer Protection. Misleading the consumer in any way is prohibited and the perpetrator may be liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units.

3.1.6. Observations on the legal framework

All of the member states had legislation in place that could be utilised to combat illicit trade. These laws were administered by various agencies. Illustratively, for purposes of this study, this included:

- Bureaus of Standards
- Intellectual Property Commissions/Institutes
- National Police Force
- Revenue Authority
- Weights and Measurement Departments
- Departments of Agriculture
- Seed (Plant Health) Inspectorate
- Department of Public Prosecutions
- Consumer Protection Commissions

In the instance of Kenya, the use of a specialist agency, the Anti-Counterfeit Authority, that cooperated with numerous stakeholders, resulted in more effective enforcement of counterfeit trade. Zambia was in the process of furthering its illicit trade task force (which also envisages private sector and government collaboration). Although these advances are welcome, there is clearly a need for a more integrated enforcement framework between not only various governmental departments but also the private sector. A further observation is that there is a desperate need for to introduce formal cooperation between COMESA member states in order to jointly address illicit trade in the region.

Despite the intention of the legislative frameworks to disincentivise illicit trade, the sanctions imposed thereby were not enough of a deterrent for illicit traders. This, coupled with corruption, a lack of political will and the fact that illicit traders could exploit the litigation process goes a long way to neutralising any theoretical sanction that may be imposed once successfully prosecuted.

The lack of COMESA wide harmonisation also served to undermine efforts to counter illicit trade. Differing excise regimes in fact created huge incentives for illicit traders. Differences in standards of numerous products created difficulty for business in complying with them as well as for relevant national authorities to monitor, inspect and enforce national standards.

The legal frameworks did not create an effective track and trace enforcement mechanism for either locally produced or imported goods. This was also true of transit trade. It appeared, that for most COMESA member states, free trade zones were regulated the same way as national border posts and therefore appeared not to introduce additional risk of illicit trade.

3.2. Existing frameworks to counter illicit trade in COMESA member states – stakeholder engagement

Over the course of multiple weeks, the Senior Trade Expert undertook numerous stakeholder engagement consultations. These consultations were held remotely and covered each of the five chosen member states as well as all of the sectors. The stakeholders ranged from governmental departments, regional organisations, business associations and the private sector. The following themes were identified.

3.2.1. Source of illicit trade

All stakeholders confirmed that illicit trade originates both from locally manufactured illicit products as well as illicit imports. A large number of stakeholders expressed the view that in many cases these were powerful organisations that operate in multiple COMESA member states. Furthermore, their operations were not curtailed to one sector but typically extended to multiple sectors many of which was a focal point for this study. Often the organisations and individuals were known (some here well-known brands owned by registered companies but due to political and economic clout as well as corruption, nothing had been done to prosecute these organisations or individuals. Such companies themselves claimed to be victims of counterfeit goods (i.e. the illicit goods do not originate from them).

Although there were instances in some sectors and in some member states where the incident of illicit trade was higher, in general it seemed to be the consensus that illicit trade represents approximately 30% of the market.

3.2.2. Standards

The COMESA member states have differing levels of standards across the multiple sectors. A number of member states require local manufacturers to register with the relevant authority. Once registered the manufacturing facility is inspected to ensure that it is able to comply to the standards relevant to its production. These registered entities are then also periodically inspected. In terms of imported products, typically an importer needs to apply for pre-approval prior to importing a consignment. Few member states require the relevant authority in the exporting nation to certify that a standard has been complied with. None of the member states employed a track and trace system for goods subject to standards. Mostly the consignments are inspected on arrival (although this cannot occur for each and every consignment). In addition, importers are able to apply for approval for a number of consignments that would arrive in a set period (for instance in the six months or year). In such instance, inspections will occur at random and as capacity allows.

COMESA member states also sometimes adopted the harmonised standards agreed adopted by the African Organisation for Standardisation. However, these harmonised standards were voluntary and not all member states adopted all of the harmonised standards. The African Organisation for Standardisation also does not have any regulatory powers and thus cannot force any member state to either adopt a standard or to ensure the adopted standard is enforced.

Little was known of either manufacturers or importers that trade in illicit goods although it was generally estimated to have approximately thirty percent of the market. It was estimated that the vast majority of the illicit trade was in fact imported by unknown parties. This generally occurred via porous borders and not through formal border posts and typically in limited (small) quantities. All stakeholders also confirmed that good entering via post or courier were not inspected. The authorities were not organised to assist with inspections in the market (other than what has been detailed herein).

Generally, no stakeholder could recall if any perpetrator had ever been prosecuted. This is not surprising seeing that most of the legislation have minimal sanctions for non-compliance. Most authorities said they still needed to work with the public prosecutors to capacitate individuals to prosecute standards violations. In addition, the framework polices the legal market and not the illegal market and in fact it is difficult to determine who actually contravened the legislation as these entities are not known or located in other nations. Additionally, if a product is found to not comply, the importer/manufacturer is given the opportunity to ensure compliance. Only if this cannot happen is the product detained and disposed of or in the case of imports, it may also be returned to the country of origin.

3.2.3. Governmental coordination

None of the member states, save for Mauritius, utilised a single window (or centralised point) whereby every relevant governmental departments would be able to view information on possible illicit trade as gained by another department. In the case of Mauritius, the single window operated on the basis that a department sharing the information had to give authorisation. Furthermore, it was not possible for the private sector to cooperate in this single window. This did lead to a less effective single window. For the other member states, at most there were some incidences of sharing for information with customs and revenue authorities. This occurred mostly where the relevant departments entered into a formal memorandum of understanding. In limited instances did the cooperation also extend to drug enforcement agencies and the police force. In only once instance, Zambia, did the cooperation also extend to anti-corruption. In only one instance, Kenya, was there a formal agency set up to deal with illicit trade albeit it only illicit trade in the form of counterfeit goods. In Zambia there has been advancement on setting up a committee on illicit trade but much still needs to be done

to formalise any authority and action plan. In Ethiopia, examples were found where one governmental department usurped another governmental departments efforts to assist in combating illicit trade as the usurper did not believe it had the authority to do so.

Most stakeholders advocated for a single window to be complimented with the implementation of a risk management approach to both inspections and prosecution. Almost all stakeholders were in favour of a formal mechanism through which COMESA member states could cooperate as none were aware of any formal cooperation mechanism currently in place. Stakeholders advocated for the ratification of international instruments, such as the Anti-counterfeit Trade Agreement or the FCTC to fast-track COMESA member state cooperation. It was considered that COMESA member states must have a harmonised approach to combatting illicit trade as any difference would present opportunities that may be exploited by illicit traders.

In most cases there was no formal cooperation between the private sector and any government department. Kenya and Uganda presented examples of formal cooperation between the private sector and the relevant revenue authority. Such cooperation extended to information sharing, assisting with seizures, jointly training officials and undertaking joint educational campaigns on the pitfalls of illicit trade. The private sector only had informal arrangements with revenue authorities. Only in Kenya was there formal cooperation between different government departments – this cooperation only extended to counterfeit trade.

Stakeholders expressed dissatisfaction that there was no formal cooperation between different COMESA member states. Cooperation only extended in so far as to facilitate trade via the one stop border posts but did not extend to addressing illicit trade.

3.2.4. Inspections

All member states stated that there was insufficient capacity to conduct inspections. This relates to both customs inspections as well as inspections in the market to ensure conformity. The lack of capacity extended to both equipment used as well as people to conduct these inspections. Within the context of standards every member state did not have enough laboratories to assist in inspections. In addition, the individuals currently involved in conducting inspections needed to be capacitated to identify instances of illicit trade. All stakeholders were of the view that customs officials were not properly capacitated to identify instances of illicit trade.

Another issue that was identified is that inspections simply do not occur in the rural areas. It was both unclear to what extent illicit trade was prevalent in these areas and to what extent products from rural areas made their way urban areas.

Only in one country, Zambia, did stakeholders report that customs maintain a list of products which are often subject to illicit trade. Due to customs' ignorance on identifying if the product is indeed illicit, customs may notify the Bureau of Standards or Sanitary or Phytosanitary officials, as the case may be, to come and assess if the product is legal or illicit. Mostly, this assessment does fall on customs officials.

In all of the COMESA member states, except for Ethiopia, stakeholders were of the opinion that free trade zones do not pose any additional risk of illicit trade as the controls are the same, if not better than at national border posts. In Ethiopia stakeholders expressed strong views that free trade zones present a significant source of illicit trade. Stakeholders claim that there was little control in place in free trade zones.

In all of the COMESA member states the highest incidence of detecting illicit trade came from the private sector. In most cases the private sector manufactures employed private entities to assist in the identification of illicit trade in their markets.

3.2.5. Prosecution

Prosecution of illicit traders has been almost non-existent save for illicit traders guilty of counterfeiting in Kenya as the Anti-Counterfeit Authority has had several prosecutions. Ethiopia did have an anti-illicit task force, but this was private sector driven and thus had limits on what can be done as governmental assistance and enforcement is required. Outside of Kenya, in most instances where prosecution was considered the matter ended with the payment of a fine at most. This was not a deterrent as the maximum legislated fines were generally insufficient to deter illicit traders. In addition, the actual fines were often much less. Stakeholders were of the view that major impediment to prosecution was that there is no political will to prosecute certain illicit traders. In addition, the views were that there was corruption at the level of the prosecutors and that the general legal system had many loopholes which illicit traders could exploit. Other than Kenya, no other member state had prosecutors who were specifically equipped to prosecute illicit trade cases. In Kenya this skill was also limited to counterfeiting and not all forms of illicit trade. A major issue in successful prosecution remained that the process was lengthy and complex and this often led to fatigue either from the prosecution or legal market.

Some member states did have counterfeit units in the police force, but this was not the norm. Few member states claimed that there was sufficient cooperation for the police force in addressing illicit trade.

Although legislation exists in some of the member states that, whilst not aimed specifically at illicit trade, may in fact be used to uncover illicit trade. Examples hereof would be legislation aimed at the prevention of organised crime, or income tax legislation allowing for lifestyle audits. No instance of reliance on these could be found from the desk review nor where any stakeholders aware of any such instance. Stakeholders ventured that such ancillary legislation was not relied on due to political interference and lack of political will.

Stakeholders expressed the view that there should be an integrated enforcement mechanism. This was due to the fact that one could not only rely on the prosecutors but needed cooperation with both the private sector and numerous government departments. Without such cooperation often prosecution would fail. Kenya also used alternative dispute resolution which often delivered favourable results and avoided some of the pitfalls associated with prosecution in the context of illicit trade. In such instances the offending goods were destroyed and conditions for the settlement were negotiated (such as for example requiring an undertaking not to import illicit goods).

Most were in favour of destroying illicit trade shortly after it is confirmed to be illicit. Prosecution should then continue. Forfeiture should not stop at the illicit goods, but should extend to any equipment or premises used on the production, warehousing and transportation of the illicit goods. It was also suggested by some that due to the fact that COMESA has such porous borders and that inspections cannot be done on most consignments and due to the fact that politically some businesses and individuals cannot be prosecuted that instead the end retailer should be punished. Such punishment shall not necessarily take the force of prosecution but those goods may be seized which may discourage such retailers from stocking such products.

3.2.6. Excise

The excise regimes of the member states differed quite substantially both in the rate of excise duty applied as well as the manner in which it was enforced. All stakeholders were of the opinion that the differences in rates and enforcement presented an incentive to engage in illicit trade. Of the two, stakeholders expressed the view that the difference in excise duty rates among COMESA member state was the biggest incentive for illicit traders. It was strongly advocated that COMESA should have a COMESA excise regime and move away from a sovereign excise regime.

The enforcement of the excise regime had major differences. Some relied on declarations of production and importation. Others used excise stamps. Of those who used excise stamps only Uganda and Kenya utilised digital excise stamps. What is more is that the paper excise stamps were easily counterfeited and the authorities could not rely on the presence of an excise stamp as definitive proof that the product was not illicit. Often, other markers were more effective in identifying if a product was illicit, such as the manufacturer details, the warning label and of course pricing. This is due to the fact that the biggest form of illicit trade in excisable products was smuggling. However, these identifiers were exclusively used by the private sector to identify illicit product and then to alert the relevant authorities. The authorities themselves were not capacitated to utilise these identifiers to identify illicit products. The net result is that the enforcement of excise duty via the usage of actual excise stamps or any track and trace method utilised mostly only served a tax administration tool for the legal market which unnecessarily added costs for the legal market and created a further incentive for illicit traders due to the price differential. Stakeholders expressed the view that without improvement in enforcement and digital excise tax stamps, the revenue authorities may forego all the measure and merely rely on declared production and auditing income. Digital excise stamps had numerous benefits such as tracking and tracing the products in real time, sharing information across the region in real time and sharing in the cost burden in implementing a regional system as oppose to a national one.

Stakeholders also relayed examples of where illicit goods were seized. In terms of the legal framework, these products should be seized and secured whilst the legal process runs its course through the courts. In practice the examples demonstrate that the products are not secured nor destroyed and often found their way back onto the market.

Stakeholders were in favour of introducing production counters which would make it impossible to produce without counting every single product produced. This data should be sent electronically to the revenue authorities on a daily basis. Stakeholders furthermore were of the view that if all businesses in the value chain from producer, distributor and wholesaler were licensed and they each must issue unique codes to whom they sell to, government would effectively be able to trace the products and know when products are illicit. Retailers should all be VAT registered and then they can report on sales of products which are subject to excise duty.

3.2.7. Corruption

Almost all stakeholders expressed the view that corruption was a major issue in combatting illicit trade. Corruption affected the effective functioning of the customs function, conformity inspections and the protection of intellectual property rights. This extended not only to the individual civil servant level, but extended much higher up in the chain of command.

3.2.8. Transit trade

All stakeholders expressed the view that illicit trade occurring via transit trade is rife. Depending on the market, the biggest source was either locally manufactured goods destined for export that remains in the manufacturing country or pure transit goods which was never destined for the transit country. None of the stakeholders, except for one stakeholder in Kenya, claimed that any member state or sector were subject to effective tracking and tracing of trucks and the cargo carried by the trucks. In Kenya electronic tracking of trucks did occur. This allowed for the monitoring of unauthorised stopping. However it did fall short of digitally sealing the cargo and ensure the cargo does reach its final destination. This combined with corruption as the customs official level create an ideal environment for illicit traders. Stakeholders were in favour of introducing sealed cargo where the cargo is sealed digitally and traced digitally. None of the legal frameworks provided for destination searches to ensure the goods have successfully transited. Kenya had supply chain legislation for excisable goods, but none of the controls had been implemented as yet.

3.2.9. Anti-illicit trade campaigns

Some of the stakeholders reported efforts, either by the private sector or specific governmental departments, of running educational campaigns to educate the customers of the pitfalls of illicit trade. None of the stakeholders were satisfied with the outcome of any such campaign. They all advocate for continued and increased efforts on this front.

4. International best practice to counter illicit trade

Numerous studies and frameworks were consulted to determine what international best practice may be in countering illicit trade. The desk review revealed that such best practices did exist, however mostly it was sector specific. As such, this information was utilised and is presented here in a general manner that is not only specific to a certain sector or product. The following best practices were identified.

4.1. Enhancing effectiveness of sanctions

Illicit traders seek out opportunities where the rewards are the highest and the risks are the lowest. As such illicit traders respond to the changes in the risk-reward structure. The risk-reward structure is typically influenced by the risk of interception, the severity of the sanctions and the extent to which the sanctions are applied. In order to effect change, it is not sufficient to only increase the sanctions that may be imposed at a national level. What is required is an integrated approach so as to ensure that the severe sanction can in fact be enforced. Of further importance is the fact that there must be international cooperation (or in this case COMESA wide cooperation) to ensure that once an illicit good has been found in a market due to its importation, that the perpetrator may be prosecuted in its home market. The success in using sanctions as a deterrent is therefore dependent on:

- the severity of the sanctions that may be available;
- the ability of any relevant authority to enforce the legislation is tasked to uphold ; and
- the capacity to investigate, prosecute and, if necessary, cooperate with foreign authorities as well as strengthening and expanding the use of existing international treaties to counter illicit trade.

4.2. Improving the legal framework to combat illicit trade

It is recommended that any improvement to the legal framework should be done both from a national and international perspective.

The approach to improving the international legal framework rests on three pillars. The first pillar is that of adopting, ratifying and implementing existing international treaties which applies to illicit trade in a specific sector (for example the FCTC for tobacco products or Article 61 of TRIPS – which provide member states with the option of imposing sanctions for counterfeit trade) as well as other international treaties which legal principles may apply to a broader range of illicit activities (such as the UNCAC or the UNTOC). In addition, COMESA member states could consider enhancing prosecution of illicit trade crimes in member states. Together these international measures could contribute to an increased effectiveness in prosecutions, raise the possible sanctions that may be encountered if engaged in illicit trade and impair funding for illicit trade

The second pillar is that of harmonising COMESA member states approaches to illicit trade. This does not only concern the enforcement of the actual legislation on illicit trade but also harmonisation of the legislation which provide for the arbitrage opportunity in illicit trade such as standards, excise duty, recognition of intellectual property rights, tracing and tracing production, distribution, destination arrival, sales, licensing, registration and export country certification.

The third pillar is that of formal coordination as set out below.

In terms of improving the national legal framework the following has been done in terms of best practice:

- sanctions for illicit trade should be increased as a deterrent to engaging in illicit trade;
- sanctions should include both civil and criminal liability;
- sanctions should not only be enforced against manufacturers and importers but should extend to distributors and retailers;
- ancillary legislation, like those aimed at corruption, tax evasion and money laundering, should be applied to illicit trade;
- consideration should be given to the seizure and forfeiture of any illicit products as well as any vessels used in transporting it, equipment used in manufacturing and land used in any part of the value chain as well as any other assets (such as the proceeds of illicit trade). This could be combined with a reverse burden of proof from the relevant authorities to the alleged illicit traders;
- regulations on free trade zones should attract investment but this should not be done at the expense of border control or any internal controls as it may relate to illicit trade;
- enforcement mechanisms should allow for multi-department and private sector collaboration;
- policies and programmes should be developed to punish and deter illicit trade. This allows for swifter action to be taken than the amendment of laws, promulgation of new laws or the negotiation and adoption of international treaties. In essence it allows for the allocation of resources towards combatting illicit trade and the alignment and cooperation of enforcement authorities to ensure effective enforcement.

4.3. Improving coordination

The strengthening of cooperation between governmental departments and the private sector leads to improved information sharing, a single platform for either the government or the private sector to pursue a complaint of illicit trade, increased identification of illicit trade and enforcement of legislation.

Improved international coordination have has many of the same benefits than coordination between national governmental departments and the private sector. In addition is assists in detecting and preventing the production of illicit goods for export, harmonising approaches to illicit trade and allowing for prosecution of exporters where an importing member state has no authority. This is even more important if ancillary legislation will be deployed for combatting illicit trade as international cooperation is often needed to follow the financial flows of illicit trade. Essential to international coordination is that member states should seek to harmonise their legal framework as set out above.

4.4. Eliminating the risk of illicit trade in free trade zones

Generally free trade zones are designed to have less legal and regulatory compliance. This then could lead to an increased risk of incidence of illicit trade. In this regard it is recommended to:

- improve the supervision within free trade zones. This can be achieved by expanding information and production requirements, imposing sanctions for violations of the free trade area, enhancing security screenings and maintaining an adequate number of officials (from several governmental departments, such as customs, standards, intellectual property, etc) to monitor adherence to relevant rules associated with illicit trade;
- enhance the formal responsibilities of zone operators. This creates an incentive to monitor and ensure compliance and could create formal liability for violations that occur in the free trade area; and
- streamlining customs procedures so as to not create unnecessary burdens but to ensure that goods rightfully enter the customs territory.

4.5. Improving the screening of imports

Improving the screening of imports is dependent on:

- developing a suitable risk-based approach to screening;
- committing sufficient resource for screening (both equipment and personnel);
- creating liability for courier and postal intermediaries for transporting known illicit trader's goods; and
- engaging e-commerce platforms and creating liability for these platforms for trading in illicit goods.

4.6. Improving the enforcement of intellectual property rights

Intellectual property rights are generally plagued by weak enforcement of laws, low risk of detection, low sanctions (mostly civil in nature). As such the risk is generally very low whilst, the reward is high as

counterfeiting is mostly very profitable. To ensure enforcement of intellectual property rights are improved, best practice includes:

- reviewing whether there is in fact adequate enforcement. Such a review would also need to consider the level of resources committed to enforcement systems as well as the tools available to both government and the intellectual property right holders in enforcing intellectual property rights. Importantly consideration should also be given to international cooperation on this front as counterfeit goods are often imported;
- reviewing the deterrents to counterfeiting. This does not only extend to the usual and potential civil liability but also to any governmental (i.e. criminal) sanctions that apply or could apply;
- reviewing the methods in terms of which the private sector as well as member of the public could cooperate in detection and reporting of counterfeit products;
- ensuring that international treaties on intellectual property rights are acceded to, ratified and effectively implemented;
- examining to what extent any public educational campaigns may raise awareness of counterfeiting, the negatives effects thereof and the encouragement to try and ensure that genuine products are bought.

5. Existing frameworks to counter illicit trade in COMESA member states – gap analysis

Having conducted a desk review and stakeholders' consultations on the current legislative framework, it is necessary to undertake a gap analysis between the current legislative framework and international best practice.

5.1. Sanctions for illicit trade

From the desk review and the stakeholder engagements the following was observed:

- generally, the sanctions imposed by the legislative framework were not severe enough and did not act as a possible deterrent to illicit trade;
- in the case of counterfeiting, in very limited instances were the sanctions of a criminal nature. Mostly it was left to the intellectual property owners to pursue civil liability;
- no formal cooperation among COMESA member states existed to assist in enforcing sanctions;
- little cooperation existed between the relevant national authorities to assist in prosecution;
- political will in prosecuting illicit trade appears to be lacking. Corruption makes this more problematic coupled with a timeous court process which may be exploited by illicit traders with deep pockets.

5.2. Use of ancillary legislation

Although ancillary legislation exists in most instances, these are not being utilised in combatting illicit trade. COMESA member states would benefit from utilising existing ancillary legislation to combat trade. It would

assist in uncovering the illicit traders. It could also assist in acting as a further deterrent in instances where the ancillary legislation allows for:

- the seizure and forfeiture of the illicit goods, equipment used in manufacturing, concealing and transporting illicit trade as well as any assets, such as proceeds from illicit trade or land on which the illicit goods are found, stored or manufactured;
- lifestyle audits, proceeds of organised crime, corruption and money laundering legislation may be used to both uncover illicit trade and prosecute illicit traders; and
- a reversal of the burden of proof from the relevant authorities to the alleged illicit traders.

5.3. Legal framework

The following gaps were identified from an international legal framework perspective:

- only a few incidences were found where existing international treaties were in fact adopted to counter illicit trade;
- no COMESA cooperation existed on combatting illicit trade;
- there was no harmonised response to combatting illicit trade;
- little harmonisation on legislation addressing illicit trade existed; and
- no cooperation existed in enforcing illicit trade legislation.

In terms of the national legal frameworks, the gaps as identified above in 5.1 should be noted as they represent gaps in the legal framework. In addition, the following gaps have been identified:

- enforcement mechanisms where authority (i.e. legislation) specific and prosecution did not collaborate with other authorities. The private sector had little involvement in enforcement other than where civil possibilities existed; and
- other than Kenya and to a limited extent, Zambia, no policy or programme existed which was aimed at combatting illicit trade.

It appeared that, at least for the member states forming part of this study, free trade zones do allow for certain investment incentives, but the goods produced or entering into free trade zones were subject to the usual customs and other controls which all locally manufactured or other imported goods had to adhere to. As such it seems not to introduce a greater incidence of illicit trade.

5.4. Coordination

There is a large gap in both national coordination as well as regional (COMESA) coordination. Little cooperation exists on a national level between different national authorities that are tasked with combatting illicit trade. There is also little to no formal coordination between the private sector and the relevant authorities. In only one instance was an authority set up to coordinate efforts against illicit trade, albeit limited to one form of illicit trade. No example of the use of a single window of information sharing could be found.

International cooperation was limited in some instances to facilitating trade. Other than that, there was no formal cooperation on a COMESA or other regional or neighbouring member state level. Little evidence of informal cooperation could be found.

5.5. Screening of imports

A number of gaps were identified in the screening of imports. Perhaps the most important one is that COMESA member states mostly have porous borders and from a reading of the customs legislation and stakeholder interviews, it appears as if a large portion of illicit trade does enter through the porous borders. It further seemed that small parcels entering via postal or courier intermediaries were largely unchecked. In a few instances imports were only screened by sample some time after importation. In these instances, it appeared easy to provide the correct sample which may not correlate with what was in fact imported. Little to no inspections were undertaken at the retail level, especially in rural areas where illicit trade seemed to be more prominent.

5.6. Enforcing intellectual property rights

The following gaps were identified in enforcing intellectual property rights:

- violations of intellectual property rights were mostly left to the private sector to pursue both from a civil perspective. Few legal frameworks provided for criminal liability (these were mostly in respect of illegally registered a trademark as opposed to counterfeiting). Criminal sanctions were typically not of a severe nature. There were few incidences of authorities pursuing criminal convictions;
- little to no international cooperation existed in enforcing intellectual property rights;
- mostly it seemed quite cumbersome for the private sector to pursue any civil remedy. Where criminal sanctions existed, it suffered from a similar cumbersome procedure;
- TRIPS seem to have been ratified and implement, where appropriate, but few chose the criminal sanctions route; and
- public educational campaigns seemed to be scattered, once-off and uncoordinated and infrequent.

6. Policy framework on Anti-Illicit Trade for COMESA

6.1. Aim of policy framework

The purpose of this policy framework is to set to provide a clear set of principles and long-term goals that will form the basis for making future legislation, rules, programmes and guidance and given overall direction to planning and development in COMESA member states efforts to combat illicit trade. This is needed as the situational analysis has shown that the current legal framework does not adequately address the rather large and growing concern of illicit trade within COMESA.

6.2. Principles and long-term goals

There are a number of principles and long-term goals that underpin the policy framework on anti-illicit trade in COMESA. These are set out below.

6.2.1. Political Support

The first principle and arguably the most important is that of political support. It is critical to obtain and maintain governmental support for this initiative. This is because member states will not only have to pursue anti-illicit trade initiatives domestically but will also have to do so at a COMESA level. Importantly this support must be maintained as initiatives to counter illicit trade will continuously have to evolve as the methods employed by illicit traders change to adapt to the initiatives employed to combat illicit trade.

The support does not only extend to adopting illicit trade initiatives, such as national legislation, international treaties, harmonising legislation and programmes to combat illicit trade. It is critical that this support extends to other efforts to which are necessary when holistically combatting illicit trade. These efforts include support for:

- prosecution of illicit traders;
- sanctioning of, with the aim of the eventual elimination of, corruption; and
- utilising ancillary legislation to both identify illicit trade, deter illicit trade and prosecute illicit trade.

6.2.2. Deterrents to illicit trade – sanctions

Sanctions may act as a deterrent to illicit trade if the assumption is true that holds that illicit traders seek out opportunities where the risks are low and the reward is high. The following are key principles in adopting an improved sanctions regime:

- the severity of the sanctions should, in itself, be a deterrent. Insignificant fines (in relation to the value or profits of the goods) and maximum imprisonment of a short duration are not seen as enough of a risk which warrants abstaining from illicit trading activities;
- relevant authorities (dependent of the nature of the illicit trade) must be empowered and capacitated to enforce the legislation it is tasked to uphold;
- prosecuting teams must have the capacity to investigate and prosecute. In this respect it care should be taken to ensure that political influence, corruption and other influences do not interfere with the prosecution process.
- national prosecution teams and relevant authorities must be able to cooperate with foreign authorities as well as strengthening and expanding the use of existing international treaties to counter illicit trade. This allows for the increased detection in illicit trade and its sources as well as enhanced prosecution success. This adds to the deterrent nature of sanctions.
- in terms of counterfeiting, national sanctions should be expanded to ensure that counterfeit traders are not only civilly liable to intellectual property right owners but that there are criminal sanctions for engaging in illicit trade.

6.2.3. Deterrents to illicit trade – use of ancillary legislation

Many member states have ancillary legislation whilst some are in the process of adopting same. For those who have not yet done so, it is recommended to commence the process as soon as possible. These pieces of legislation should be used in the fight against illicit trade. It should serve two main purposes. The first is in uncovering illicit trade and illicit traders. In this respect the ancillary legislation that caters for lifestyle audits, proceeds of crime, corruption, money laundering and the like should be effectively used to uncover illicit trade and traders. The second is that the increased reliance on the ancillary legislation would act as a further deterrent to illicit traders. The ancillary legislation should be used to seizure and forfeiture of the illicit goods, equipment used in manufacturing, concealing and transporting illicit trade as well as any assets, such as proceeds from illicit trade or land on which the illicit goods are found, stored or manufactured. Where possible, a key driver in enhancing the deterrent nature of the use of ancillary legislation would be to reverse the burden of proof from the relevant authorities to the alleged illicit traders.

6.2.4. Improving national legal frameworks

When improving the national legal frameworks, which must be done in all instances, member states must be guided by the following principles:

- the sanctions should be developed in line with the principles set out in 6.2.2 above;
- the improved sanctions should not only be enforced against manufacturers and importers but should extend to distributors and retailers;
- the use of ancillary legislation as set out in 6.2.3 above should be incorporated into national legal frameworks;
- regulations on free trade zones should attract investment but this should not be done at the expense of border control or any internal controls as it may relate to illicit trade;
- enforcement mechanisms should allow for multi-department and private sector collaboration;
- policies and programmes should be developed to punish and deter illicit trade. This allows for swifter action to be taken than the amendment of laws, promulgation of new laws or the negotiation and adoption of international treaties. In essence it allows for the allocation of resources towards combatting illicit trade and the alignment and cooperation of enforcement authorities to ensure effective enforcement.

6.2.5. Improving COMESA legal frameworks

Three principles are key to improving the international legal framework. These are:

- the use of existing international treaties. These international treaties should be adopted, ratified and implemented. These international treaties typically are either sector specific such as the FCTC for tobacco products or Article 61 of TRIPS or are of broad application which legal principles may apply to a broader range of illicit activities. Examples of the latter include the UNCAC or the UNTOC. In addition, COMESA member states could consider enhancing prosecution of illicit trade crimes in member states.

- harmonising COMESA member states approaches to illicit trade. In this regard, harmonisation should include both the enforcement of the actual legislation on illicit trade as well as harmonising of the legislation which provide for the arbitrage opportunity in illicit trade such as standards, excise duty, recognition of intellectual property rights, tracing and tracing production, distribution, destination arrival, sale and licensing.
- Enhancing coordination and cooperation as set out in 6.2.6 below.

6.2.6. Improving coordination and cooperation

A key principle of enforcement of anti-illicit trade legislation and the identification of illicit trade is increased coordination and cooperation. This increased coordination and cooperation should be developed in three areas being:

- between different national authorities (or governmental departments);
- between national authorities and the private sector; and
- between different COMESA member state authorities.

The use of a single window of information sharing should be a key principle in the design of any improved coordination and cooperation. This would allow all actors access to information in real time and allow them to further coordinate efforts as agreed. In designing such a single window, the actors should be cognisant of the need to rely on authorities tasked with enforcing the ancillary legislation as this is typically used to either identify illicit trade and traders and to effectively enforce any cross-border illicit trading activities. Such authorities should also have access to the single window and contribute to the information sharing.

It is further vitally important that, as a key principle in improving international coordination and cooperation, COMESA member states should seek to harmonise their legal framework as set out in 6.2.5 above.

6.2.7. Improving the screening of imports

COMESA member states must develop an appropriate risk-based strategy to screening of imports arriving at known border posts. Member states should also allocate sufficient resources in order to ensure that the risk-based approach can be implemented. This would require both addressing the number of inspectors, the capacity of the inspectors as well as equipment used.

In terms of capacity, inspectors should be capacitated to identify illicit trade. In this regard it is not only customs officials that are inspectors but also the inspectors of all other relevant national authorities who are tasked with enforcing legislation relevant to illicit trade. As such collaboration needs to occur if a duplication of skills and potential efforts are to be avoided. If this is not feasible, customs officials should be capacitated to identify potential issues and once identified should they should be able to call on official from the relevant national authorities to assist. A key principle in capacitating all officials would be to consult with the relevant private sector participants to gain insight into identification techniques.

It remains unlikely, if not impossible, that COMESA member states would be able to address its porous borders. It is therefore not possible to screen all imports at the porous borders. Accordingly, reliance should be had to random inspections. Such inspections should be conducted by multiple national authorities at a central point. Inspections at retail outlets is to be preferred. This is especially the case if sanctions (seizures, forfeiture, fines and imprisonment) are also imposed on retailers stocking illicit products. It also has a deterrent effect in that retailers would not want to stock illicit products if they face financial loss and criminal sanctions.

In terms of addressing small parcels arriving via postal and courier intermediaries, member states should alert these intermediaries of the sanctions that may be imposed against them coupled with random inspections at distribution centres. In the event that e-commerce sites are utilised, member state must make use of take-down notices to ensure consumers do not have access thereto. Reliance for information hereon would be through the single window.

6.2.8. Regulating free trade areas

The key principle that needs to be adhered to in designing any new free trade area, modifying any free trade area legal framework or implement any such framework is that control should remain. The free trade area may therefore be signed to attract investment and increased use of these areas. However, the same control needs to be exercised when the goods are released from this area. In this regard, the usual customs, excise, inspections, standards and other related illicit trade control should remain in place.

6.2.9. Enforcing intellectual property rights

Member states should improve their enforcement of intellectual property rights. This can be done by developing a programme that can address the following:

- developing an action plan for enforcement
- introducing further deterrents to counterfeiting by imposing criminal sanctions for counterfeiting.
- developing the methods in terms of which the private sector as well as member of the public could cooperate in detection and reporting of counterfeit products;
- ensuring that international treaties on intellectual property rights are acceded to, ratified and effectively implemented;
- examining to what extent any public educational campaigns may raise awareness of counterfeiting, the negatives effects thereof and the encouragement to try and ensure that genuine products are bought.

6.2.10. Excise

Member states must recognise the arbitrage opportunities that differing excise regimes present for illicit traders. A guiding principle is that there should be a COMESA wide excise regime which addresses both enforcement as well as the rates of excise duties. This aligns with COMESA's ultimate goal of becoming a common market and economic community.

In terms of enforcement, the following should be guiding principles:

- eliminating physical excise stamps in favour of digital excise stamps;
- ensuring that production counters at legitimate excise manufacturing facilities are implemented;
- licensing all businesses in the value chain from producer, distributor and wholesaler. This coupled with the instance that each entity in the value chain should issue unique codes to whom they sell to, would allow government to effectively trace excisable products and know when products are illicit;
- retailers should all be VAT registered and then they can report on sales of products which are subject to excise duty.

6.2.11. Transit trade

In order to combat illicit transit trade, the following principle should be adhered to:

- implementing electronic tracking of trucks which allows for the monitoring of unauthorised stops;
- digitally sealing the cargo and ensure the cargo does reach its final destination even with authorised stops; and
- ensuring inspection of cargo at point of destination.

Some of the stakeholders reported efforts, either by the private sector or specific governmental departments, of running educational campaigns to educate the customers of the pitfalls of illicit trade. None of the stakeholders were satisfied with the outcome of any such campaign. They all advocate for continued and increased efforts on this front.

6.2.12. Anti-illicit trade educational campaigns.

In an attempt to stifle demand, member states should develop educational campaigns aimed at the end consumer. These should be frequent and aimed at raising awareness across the different forms of illicit trade.

7. Institutional arrangement to support the Anti-Illicit Trade Policy Framework

7.1. Assessment of institutional arrangement

The issue of illicit trade is a cross-cutting issue which can only be addressed if numerous institutions cooperate. Although the Anti-Illicit Trade Policy Framework is aimed at COMESA, it also requires significant

actions to be taken by national authorities and different governmental departments. As such the assessment of the institutional arrangement should be split between the COMESA and member state level.

7.1.1. Assessment of COMESA institutional arrangement

As the first principle of the Anti-Illicit Trade Policy Framework is that of political support, it is of the utmost importance that Heads of State and Government of all COMESA Member States support the Anti-Illicit Trade Policy Framework. It is therefore recommended that the Authority and Heads of State and Government approve the Anti-Illicit Trade Policy Framework.

As the Anti-Illicit Trade Policy Framework sets out the principles that should be used in developing a response to combat illicit trade the Council of Ministers should also oversee the implementation thereof.

As illicit trade is such a cross-cutting issues, the most appropriate institution at the COMESA level would be the Intergovernmental Committee. The Intergovernmental Committee is responsible for the development of programmes and action plans in all sectors of co-operation. It further monitors the functioning and development of the common market and oversees the implementation of the programmes. As such, the Intergovernmental Committee would be a suitable institution to develop the action and programmes set out in the Anti-Illicit Trade Policy Framework. The CBC would be an excellent institution that could support the work as it represents the private sector that has a lot of insight into illicit trade in the market.

7.1.2. Assessment of member state institutional arrangement

In the desk review and stakeholder engagement it was discovered that there is no coordination of efforts on illicit trade. This division was further exemplified by differing authorities claiming exclusive jurisdiction on aspect of illicit trade. Best practice as well as the example presented by Kenya suggests that the best way to overcome this and to have a truly coordinated approach to any national actions would be to establish a task force dedicated to illicit trade. A task force is easier to set up and empower than that of setting up an independent authority dedicated to illicit trade. The task force would consist of each of the relevant authorities that bears a nexus to illicit trade. The task force would then be able to coordinate national efforts as well as provide inputs at the COMESA level.

7.2. Institutional arrangement to support implementation of Anti-Illicit Framework Policy

As set out above there exists a COMESA institution that would be suitable to utilise to support the implementation of the Anti-Illicit Policy Framework. In addition, on a member state level it is recommended that each member state sets up an illicit trade taskforce to coordinate national actions as well as inputs to be delivered to the Intergovernmental Committee. It is further recommended that the CBC be utilised to support the efforts at both national and COMESA level due to the insight and support its members may be able to provide to both member states as well as the Intergovernmental Committee.

As stated above the taskforce of each member state would consist of each of the authorities that are tasked with enforcing legislation related to illicit trade. These could include:

- Intellectual property
- Customs and excise
- Revenue
- Standards
- Agriculture
- Plant Health and Safety
- Police
- Public Prosecution
- Consumer Protection
- Organised Crime
- Corruption

Each of the members of the task force would contribute to the national action plans as well as providing inputs to be used at the Intergovernmental Committee. Task force representatives would have to be nominated to interact with the Intergovernmental Committee.

The Intergovernmental Committee would, in consultation with the member states and member state taskforces, formulate actions plans in terms of the Anti-Illicit Policy Framework. It will be supported in its efforts by the CBC. The CBC may, in turn rely on its membership, for enhanced inputs and cooperation in assisting the Intergovernmental Committee

8. Implementation plan for Anti-Illicit Trade Policy Framework

The following implementation plan may be used to guide the implementation of the Anti-Illicit Policy Framework.

8.1. Political support

As a first step, the Anti-Illicit Policy Framework should be adopted by the Authority and Heads of State and Government.

8.2. Intergovernmental Committee

The next step would be to brief and mobilise the Intergovernmental Committee. The Anti-Illicit Policy Framework should form part of their formal programmes and action plans. It should also provide for the formal cooperation with the member state task forces and well as the CBC.

8.3. Member state taskforces

Following the mobilisation of the Intergovernmental Committee, each member state should be allowed to set up its task force.

8.4. Addressing priorities

Once the member state taskforces have been established, the Intergovernmental Committee should call for proposals on the order of priority of issues identified in the Anti-Illicit Policy Framework to be addressed. These proposals should also indicate the timelines by which the priorities must be addressed. Proposals should be sought from the member states' taskforces as well as from the CBC. This should allow member states and the private sector to indicate which areas may be of perceived priority. The Intergovernmental Committee should, in assessing these proposals and making a decision, be led by the Report on the Development of a Policy Framework on Anti-Illicit Trade for the COMESA Region as well as the principles as outlined in the Anti-Illicit Policy Framework.

8.5. Evaluating progress

The Intergovernmental Committee should set regular intervals at which the progress in addressing each priority is evaluated. This may be done either at the member state level or at the COMESA level or both depending on the type of priority that is being evaluated.

8.6. Monitoring effectiveness

The Intergovernmental Committee must also set periodic reviews to ensure that the measures imposed are effective. This is crucial to effectively combatting illicit trade as the illicit traders are likely to modify behaviour in accordance with the measures taken either at national nor regional level.



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