ASSESSMENT OF THE TOBACCO INDUSTRY INTERFERENCE IN THE REGULATION OF NOVEL TOBACCO PRODUCTS IN KENYA

POLICY BRIEF | AUGUST 2022

Purpose of the Assessment

It explains reasons for the present situation on oral nicotine pouches and the path trodden to get to this point with regard to regulation for the same and tobacco industry actions affecting the former. It analyses the interference of the tobacco industry in the regulation of oral nicotine pouches in the Kenyan market.

What are Oral Nicotine Pouches

These are white pre-portioned permeable pouches containing either de-hydrated tobacco-derived nicotine or synthetic nicotine, but no tobacco leaf, dust, or stem. They contain flavoring, sweeteners and plant-based fibers. Oral nicotine pouches are similar in appearance and use to snus but do not contain tobacco. Consumers place these pouches between the lip and gum; sucking on the contents, using saliva to dissolve the contents of the pouch into oral mucosa, whereupon nicotine is absorbed into the blood stream through the mucous membranes. Nicotine pouches last longer in the mouth compared to snus and deliver higher amounts of nicotine to the consumer's system.

Origin

Trans-National Tobacco companies (TTCs) started mass manufacture of these following exploration of studies showing apparent reduced mortality among snus users compared to those consuming combustible cigarettes (the Swedish Experience) sometime after 2015. With the increased public awareness and consequent caution over health risks posed by use of conventional cigarettes coupled with subsequent stiffer regulatory measures imposed on these by government authorities, the industry pivoted towards massive investment in research, manufacture and marketing infrastructure of novel nicotine products particularly on these oral nicotine pouches. TTCs sought out opportunities to market these products in countries with an existing market for snus or conversely in those where tobacco snus is currently banned. Given their relatively brief existence as retailed industry products in the tobacco and nicotine products market, there is a paucity of settled research findings on the specific harmful effects of nicotine pouches. Trans-National Tobacco Companies (TTCs) have moved to exploit this gap in their promotion and advertising of said products as less harmful and thus better for consumers.

These were promoted and advertised by the industry as safer products in contrast to cigarettes hence tagged a viable pathway to harm reduction as far as tobacco products use is concerned. This was done with a view to securing the industry's long-term future from a product sustainability and profit stand point.

Introduction in Kenya

BAT begun marketing its lyft nicotine pouches in Kenya in 2019. Per the above assertion, BAT-Kenya promoted this as a healthier modern oral nicotine delivery product designed to significantly boost switching from combustible tobacco products to novel smokeless tobacco products. It was promoted at social engagements, entertainment concerts and festivals where packages of it were handed out as free tokens to youth and promotional messages either from influencers or directly from the firm were replete on social media platforms. Kenya as in other LMICs, was marked as a prime market for promoting use of nicotine pouches for the reason that electronic nicotine delivery devices were less popular, affordable, or available due to regulatory, financial or other restrictions. After announcing their intention to sell nicotine pouches in Kenya, BAT launched Lyft in the country around July 2019.

Instances of Tobacco Industry Interference in the Regulation of Oral Nicotine Products

(a) The irregular registration of LYFT as a pharmaceutical product;

Originally Lyft was approved by the Pharmacy and Poisons Board (PPB) for sale in the Kenyan market as a pharmaceutical product per the Pharmacy & Poisons Board Act.

BAT-Kenya applied for this registration despite its knowledge this was not a pharmaceutical product or a poison. The law places this product under the category of tobacco and nicotine products. The firm conveniently sidestepped the correct registration procedure to suit their business interests.

Ministry of Health surveillance of the sale of the product later found that the pouches were sold contrary to the Act which required that pharmaceutical products be sold only at licensed premises by registered pharmacists. Following this, the cabinet secretary for health declared the licensing of the product and the manner of its sale and distribution to have contravened the law hence unlawful. He directed the Pharmacy and Poisons Board to tender a comprehensive report on the criteria and procedure used to finalize the said registration. Sales of the product were proscribed until further notice by the ministry.

Lyft has since been designated as a tobacco product with the cabinet secretary for health directing that it complies with all the regulations attendant to tobacco products prior to re-introduction into the Kenyan market.

(b) The tobacco industry's promotional/ Corporate Social Responsibility activities for its products during the COVID-19 pandemic;

At the on-set of the COVID-19 pandemic in Kenya, BAT-Kenya was one of the first major donors to the COVID-19 Emergency Response Fund. This was ironic as the firm's profit-making products when consumed were found to significantly increase victims' risk of infection, getting severe COVID leading to hospitalization and increased risk of mortality for COVID-19 patients.

Subsequent to the donations, tobacco products were soon listed as part of essential goods the Business Emergency Response Centre set-up by a committee under the Ministry of Industrialization, Trade and Enterprise Development. Manufacturers, producers and suppliers of these goods were thus allowed to remain operational throughout the crisis/ lockdown period remaining mobile during lockdowns. This inevitably drew sharp castigation from tobacco control advocates given it was at cross-purposes with the government's fight against the covid-19 pandemic.

(c) The campaign by BAT for a tax relief on its Oral Nicotine Pouch manufacturing plant;

In June 2020, the company announced its plans to build a new plant in Nairobi to produce nicotine pouches, and for Kenya to become a regional export hub for the product. This was tagged as a strategy to divert its product line away from the conventional tobacco products that have experienced pressure from government through increased taxes and levies.

The firm approached the Kenya Revenue Authority (KRA) in September 2020 to request a tax- relief for the nicotine pouches to be manufactured at the plant i.e. exemption from imposed excise duty for two years. It claimed this would spur the manufacture and processing of the pouches and establish distribution networks for local sales and exports within the East African region further citing the large foreign direct investment and potential job creation opportunities for locals as basis for grant of the request while adding that pouches were a healthier alternative to combustible conventional products hence should not be taxed as strictly.

Per the Tobacco Control laws, the relevant authorities are directed not to grant any incentives, privileges, benefits or any other preferential treatment to the tobacco industry to establish or run their business. Following a spirited campaign by stakeholders in opposition to this proposal the request was declined.

(d) The industry's campaign for lesser excise taxes on these products within the budget process.

In the 2021/2022 budget statement, the Treasury Cabinet Secretary proposed a maiden excise duty imposition of Kshs. 5000 per kg on oral nicotine products. This was a win for tobacco control stakeholders and health advocates. However, when deliberated on, the National Assembly Committee on Finance & National Planning after public input set a reduced rate of Kshs. 1200 per kg which was subsequently adopted by parliament in its deliberations to the chagrin of the Kenyan tobacco control community.

This followed strong proposals by the tobacco industry to engineer the huge reduction. It flew in the face of


A sample of Nicotine pouches

policy and legal provisions on tobacco products fiscal policy.

Additional aspects of industry interference

(a) Bribery attempts; In early 2021, it was reported that a PR agency working for BAT-Kenya attempted to bribe a journalist investigating the company's campaign to target young non-smokers as potential new clients for its novel tobacco products. The agency employee sought to obtain details of the investigation.

(b)Attempts to pass standards covering the manufacture, distribution and sale of oral nicotine products via a front group.

(c) Litigation by front groups challenging enforcement of Tobacco Control regulations by Nairobi county's Tobacco Control unit where in orders were granted for a joint consultative forum between the restaurant association and the enforcement unit to be constituted to formulate bylaws to govern regulation of tobacco products

Ministry of Health Position on Oral Nicotine Products

Claims from the tobacco industry and harm reductionist groups alluding to the less harmful/safer nature of these products have grown stronger with time. It has also been said that these pouches are recommended in therapy for tobacco and nicotine addicts.

The ministry has proffered a staunch rebuttal of the claims indicating that all medicines and recommended drugs in their tobacco and nicotine cessation guidelines and programs are totally unrelated to oral nicotine pouches neither do they share similar composition elements with the latter. The ministry is keen to sensitize the public on this misconception.

Recommendations for Effective Regulation of this product following the Assessment

1. Improve enforcement of bans or regulatory mechanisms by the relevant regulators. There is a need to crack-down on non-compliant brands prevalent in the market.
2. Establish stricter controls on the importation of these novel products in order to effectively stop smuggling and/or counterfeiting of these products across country borders.
3. Need for increased resources for various enforcement entities to give effect to better regulation/control and enforcement.
4. Need for enhanced laws and regulations (tobacco control laws) to curb loop-holes exploited by the industry to the detriment of the regulators, stakeholders and the public.
5. Need to mobilize resources to facilitate scientific studies for better understanding of the harmful effects of these novel tobacco products including laboratory testing.
6. Deeper involvement in the budget processes and fiscal policy proposals to counter industry manoeuvres in these processes and concurrently achieve allocation of more resources towards regulation and enforcement with regard to these products
7. Advocate for stringent application or amendment of election/political financing laws to curb the influence of the tobacco industry in affecting policy and legislation
8. Integrate all tobacco control stakeholders in policy formulation and implementation covering said products for better streamlined, counter-actions to industry strategies.
9. A strong sensitization campaign involving all stakeholders to spread awareness among the public on the threat of novel tobacco products.
10. Propose integration of tobacco control elements and other drug abuse threats in the national educational curriculum.
11. Finalization of the Tobacco Control Fund regulations in order to activate the Tobacco Control Fund.

Conclusion

Our assessment of the instances of industry interference in tobacco and nicotine products control in Kenya illustrated that as the world struggled to contain the COVID-19 pandemic, the tobacco industry strategically evolved its product line to reign in its customers old and new so as to maintain its profits. It posed as an entity concerned with society's health while simultaneously pushing products which exacerbate COVID-19 effects and add financial strain to health systems.

Its actions were driven primarily by profits. Public health was a distant second. It utilized its innovation and resources to ensnare new customers for its products while attempting to sidestep health policy and regulatory mechanisms.

However, the actions of most in the Health ministry and government in general coupled with relentless efforts of those in civil society, media, social organizations, parents' associations and other stakeholders to counter and limit industry influence in tobacco and nicotine products regulation has helped to shape a promising regulatory landscape. While more must be done to improve the current situation, foot soldiers abound to sustain the movement.

STOP.

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