

## **Manual on the powers of officers in respect of certain tobacco products under Section 138 of the Finance Act 2001**

This document should be read in conjunction with section 138 of the Finance Act 2001  
and Section 78 of the Finance Act 2005

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## **1. Introduction**

Section 138 of the Finance Act 2001 (as substituted by section 49 of the Finance (No. 2) Act 2013) provides Revenue officers with powers in respect of certain tobacco products. Where an authorised officer<sup>1</sup> has reasonable grounds for believing that a person is committing or has committed an offence under section 78 of the Finance Act 2005, the officer may require that person to –

- give his/her name, address and date of birth,
- provide all information in relation to the tobacco products concerned which is in the person's possession or procurement, as may be reasonably required by the officer, and
- give the officer any tobacco products concerned for examination.

Where an officer has reasonable grounds to believe that any tobacco products concerned are contained in a receptacle the officer may search and examine the receptacle and may require any person who has possession, custody or control of the receptacle to give the receptacle to the officer and provide access to the receptacle if necessary.

An officer may examine any tobacco products concerned and in instances where an officer has reasonable grounds to believe that such tobacco products are contained in a receptacle the officer may require a person who has possession, control or custody of the receptacle to provide the officer with the receptacle and provide access to the receptacle where necessary. Having received the receptacle the officer may conduct a search and examination of the receptacle.

The powers conferred in section 138 of the Finance Act are also exercisable by members of An Garda Síochána.

## **2. Dealing With the Public and Conducting Questioning**

### **2.1. Dealing with the public**

When determining what level of enforcement action is appropriate, officers should exercise good professional judgement and discretion at all times. Any action taken should be appropriate to the circumstances encountered and proportionate to the suspected offence.

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<sup>1</sup> Authorised Officer: an officer of the Revenue Commissioners authorised by them in writing to exercise the powers conferred on officers by Chapter 4 of Part 2 of the Finance Act 2001 (s133 FA 2001, as amended).

A key element of such work is ensuring that tasks are completed with minimum confrontation and high levels of professionalism. Using a professional and sensitive approach can turn a potentially difficult encounter into a successful outcome. Members of the public should always be dealt with in a calm, courteous, and even-handed manner. An insensitive word or attitude can easily lead to complications, accusations or complaints.

## **2.2. Conducting Questioning**

Prior to conducting questioning pursuant to section 138 a Revenue officer should display his/her authorisation card and identify himself/herself as a Revenue officer. The officer should invoke and explain the powers that s/he is exercising and explain his/her intended actions.

When questioning a person the officer should -

- a) Require the person to provide his/her name, address and date of birth.
- b) Require information about any tobacco products in that person's possession.
- c) Where appropriate, require access to receptacle(s) in that person's possession (see Section 4 below).
- d) Record all questions asked, replies received and anything else of note in an official notebook (see Section 3.1).
- e) Advise the person of the outcome of the engagement and any follow-up action that may occur.

Any replies to questions other than those outlined at a) must be provided voluntarily by the person being questioned. If the person is led to believe s/he is obliged to answer any questions other than those outlined at a) then the information provided is at risk of being rendered non-voluntary and may be deemed to be inadmissible as evidence.

The powers under section 138 of the Finance Act 2001 are used where an officer has reasonable grounds for believing that a person has committed an offence. At the outset of an engagement involving section 138 powers the person should be cautioned as follows -

*"You are not obliged to say anything unless you wish to do so, but anything you say will be taken down in writing and may be given in evidence"*

After a caution has been issued the Revenue officer should ask the person if s/he understands the caution and the person's reply should be noted.

## **2.3. Notetaking**

As far as is possible, contemporaneous notes should be taken. While an officer may not be able to compile comprehensive notes that cover every aspect of an engagement, the officer should ensure that all important aspects are recorded.

Notes should include a detailed record of all relevant information such as the location, the time, the circumstances of the engagement (including the relevant legislation) and the physical characteristics of the person concerned. It is important that the Revenue officer takes a careful note of any conversation that takes place, including questions asked and replies received. The officer should also record details of any evidence uncovered or produced. Notes that are not taken contemporaneously should always be completed within 24 hours of the incident occurring. Notebooks are liable to be important evidence in any subsequent legal action and the relevant entries may be examined in detail by legal personnel and/or a Judge.

### **3. Searching for tobacco products**

In order to search a receptacle an officer must have reasonable grounds to suspect that the receptacle contains tobacco products which relate to an offence under section 78 of the Finance Act 2005.

The grounds for conducting a search must be clear in the officer's mind as this may be challenged in subsequent legal proceedings. Consideration should be given on a case-by-case basis to the type of receptacle, whether or not it is being used for its intended purpose, if there is an attempt to conceal the receptacle, and whether the receptacle's contents are obviously displayed or not.

A search of a receptacle should be conducted at the place where the person is stopped and questioned. An officer cannot instruct the owner or person in charge of the receptacle to accompany him/her to another place to conduct the search. However, if the original place is considered to be dangerous or inappropriate or may cause embarrassment to the owner or person in charge of the receptacle the search may be conducted in another place that is adjacent or nearby if both parties are agreeable to the change of location.

#### **3.1. Search of person**

An officer may not search a person's body or clothing on the person for tobacco products under any circumstances.

#### **3.2. Detention/Seizure of tobacco products**

Where an officer suspects that tobacco products are liable to forfeiture under section 78 of the Finance Act 2005 the products may be detained under section 140(1) of the Finance Act 2001 or seized under section 141 of that Act.

If the owner or person in possession of the goods is present the officer concerned should issue a Notice of Detention or a Notice of Seizure, as appropriate, and explain to the person the grounds on, and the legislation under, which the tobacco products are being seized/detained and the process that will follow. If the officer is unable to issue the Notice of Detention or Notice of Seizure at the time of detention/seizure or if the owner

of the tobacco products is not present a Notice of Detention or a Notice of Seizure should be promptly forwarded by registered post.

Where the goods are detained the officer should undertake further enquiries and determine, within one month of the day of detention, whether the tobacco products should be seized as liable to forfeiture or released, as provided in section 140(4) of the Finance Act 2001.

### **3.3. Evidence**

Any evidence gathered should be recorded and stored in evidence bags under lock and key as soon as is practicable after the engagement is completed.

## **4. Refusal to engage with Revenue / departing the scene**

If a person -

- refuses to answer questions,
- refuses to provide tobacco products in his/her possession for examination,
- refuses to provide a receptacle for searching,
- refuses to provide access to a receptacle, or
- attempts to depart the scene of an engagement with a Revenue officer,

the officer should explain his/her statutory powers to the person and explain that if the person does not cooperate s/he may be accused of –

- failing to comply with a requirement of section 138 of the Finance Act 2001, which is an offence under section 123 of that Act, or
- obstructing or interfering with a Revenue officer in the exercise or performance of powers or duties, which is an offence under section 1078(2)(j) of the Taxes Consolidation Act 1997.

### **4.1. Detention of a person**

If a Revenue officer requires a person to remain at the scene of an engagement until enquiries are completed the officer should reason with the person and seek their agreement to assist with Revenue's enquiries. In the event that a person refuses to comply with a Revenue officer or attempts to depart the scene the instructions at section 4 and 4.2 should be followed.

### **4.2. Attempting to depart the scene**

Force may not be used to prevent a person from departing the scene of an engagement. The personal safety of the Revenue officer(s) should always be the first consideration in

such situations and an officer must decide whether a situation has reached a stage where it would be prudent to withdraw rather than attempt to continue with an engagement. In any instance where a person departs the scene of an engagement a report is to be submitted at the earliest opportunity to the officer's line manager with a view to the institution, where appropriate, of legal proceedings.

## Appendix 1 - Section 138 Finance Act 2001

### Powers of officers in respect of certain tobacco products

Section 138 substituted by Section 49 of the Finance (No. 2) Act 2013 with effect from 18 December 2013

138. (1) Where an officer or a member of the Garda Síochána has reasonable grounds for believing that a person is committing or has committed an offence under section 78 of the Finance Act 2005, then the officer or member may -

(a) require the person to give to that officer or member -

(i) the name, address and date of birth of that person,

(ii) all such information in relation to the tobacco products concerned as may reasonably be required by that officer or member and which is in the possession or procurement of that person, and

(iii) any tobacco products concerned for examination,

(b) examine any tobacco products concerned,

(c) where the officer or member has reasonable grounds to believe that any tobacco products concerned are contained in any receptacle, carry out such search and examination of that receptacle as may be required to establish that such an offence is being, or has been, committed in respect of those tobacco products,

(d) require any person who has possession, custody or control of a receptacle referred to in paragraph (c) —

(i) to give the receptacle to the officer or member, and

(ii) to provide access to the receptacle, as may be required by the officer or member for the purposes of that paragraph,

and

(e) detain the person for as long as is reasonably required for the purposes of this section.

(2) For the purposes of paragraphs (c) and (d) of subsection (1), a receptacle does not include any article of clothing on the person concerned.



## Appendix 2 - Section 78 Finance Act 2005

### Offences in relation to tax stamps

Section 78(1): amended by s76 2012 FA with effect from 31 March 2012	78. (1) [It is an offence under this subsection] for any person to contravene or fail to comply with any provision of this Chapter or any regulation made under section 83 or any condition imposed under this Chapter or under such regulation in relation to such provision.
Section 78(2): “€3,000” substituted by “€5,000” by s77 FA 2008 and applies as respects an offence committed on a day after 13 March 2008	(2) Without prejudice to any other penalty to which a person may be liable, a person convicted of an offence under subsection (1) is liable on summary conviction to a fine of [€5,000].
Section 78(3): amended by Section 56 of the Finance Act, 2013 with effect from 27 March 2013	(3) With the exception of cases where payment of tobacco products tax is permitted under section 73(2) to be subject to the provisions governing other tobacco products it is an offence under this subsection to invite an offer to treat for, offer for sale, keep for sale or deliver [sell or deliver,] or be in the process of delivering specified tobacco products otherwise than in a pack or packs to which a tax stamp, by means of which tobacco products tax at the appropriate rate has been levied or paid in respect of such tobacco products, is affixed to each such pack in the prescribed manner unless such invitation, offer, sale or delivery takes place under a suspension arrangement.
	(4) It is an offence under this subsection to counterfeit, alter or otherwise make fraudulent use of, or to be knowingly concerned in holding, selling or dealing in a counterfeited or altered tax stamp.
Section 78(5)(a): “€3,000” substituted by “€5,000” by s77 2008 FA and applies as respects an offence committed on a day after 13 March 2008	(5) Without prejudice to any other penalty to which a person may be liable, a person convicted under subsection (3) or (4) is liable-  (a) on summary conviction, to a fine of €5,000 or, at the discretion of the Court, to imprisonment for a term not exceeding 12 months or to both, or  (b) on conviction on indictment, to a fine not exceeding €126,970 or, at the discretion of the Court, to imprisonment for a term not exceeding 5 years or to both.
Section 78(5A) inserted by s101(B) FA 2010 with effect from 3 April 2010	[(5A) Section 13 of the Criminal Procedure Act 1967 shall apply in relation to an offence under this section as if, in place of the penalties specified in subsection (3) of that section, there were specified in that subsection the penalties provided for by subsection (5)(a) of this section, and the reference in subsection (2)(a) of section 13 of the Criminal Procedure Act 1967 to the penalties provided for in subsection (3) of that section shall be construed and apply accordingly.]
	(6) In a prosecution for an offence under subsection (3), it shall be presumed until the contrary is shown-  (a) that tobacco products tax had not been paid in respect of any pack or packs which do not have a tax stamp affixed thereto,  (b) that in respect of any pack or packs which do not have a tax stamp affixed thereto-  (i) section 104(2), of the Finance Act 2001 does not apply,  (ii) the pack or packs are not being held under a suspension arrangement and  (iii) the Commissioners have not permitted, under section 73(2), payment

of the tax to be subject to the provisions governing tobacco products other than specified tobacco products,

(c) in the case of a prosecution for keeping for sale or delivery, that the tobacco products concerned were so kept and were not kept for private use,

(d) that a thing is a cigarette or other tobacco product where, in the opinion of an officer of the Commissioners, it is contained in any form of packaging which, by virtue of any wording thereon, its shape and other characteristics, is indicative of the contents consisting of one or more than one cigarette or of another tobacco product and the officer so states that opinion.

(7) Any tobacco products or stamps in respect of which an offence has been committed under this section, any goods packed with or used to conceal such tobacco products and any vehicle or conveyance in which such tobacco products are found in, on or in any manner attached to, are liable to forfeiture.

(8) Where an offence under this section is committed by a body corporate and the offence is shown to have been committed with the consent or connivance of any person who, when the offence was committed, was a director, manager, secretary or other officer of the body corporate or a member of the committee of management or other controlling authority of the body corporate, that person shall also be deemed to be guilty of an offence and may be proceeded against and punished as if guilty of the first-mentioned offence.