



BRIEFING PAPER:
GUIDELINES ON ARTICLE 13 (TOBACCO
ADVERTISING, PROMOTION AND SPONSORSHIP) AND
A PROTOCOL ON CROSS-BORDER TOBACCO
ADVERTISING, PROMOTION AND SPONSORSHIP

**Second Session of the Conference of the Parties to the WHO FCTC
Bangkok, Thailand
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Recommendations

- 1. The second session of the Conference of the Parties should decide to immediately commence the development of guidelines on Article 13, including both its within-country and cross-border elements, in order to assist Parties in fulfilling their obligations under Article 13 within the timeframe accepted under the Article.**
- 2. The negotiation of a protocol on cross-border tobacco advertising, promotion and sponsorship should be deferred until the process of guideline development has clarified the matters that should be included in a protocol and those that are better dealt with in guidelines.**

Background

Under Article 13 of the FCTC, Parties to the Convention recognize that “a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products”. The Preamble to the Convention records the “serious concern” of Parties “about the impact of all forms of advertising, promotion and sponsorship aimed at encouraging the use of tobacco products”.

Accordingly, Parties agree to undertake “a comprehensive ban of all tobacco advertising, promotion and sponsorship” (Article 13.2) or, in the case of a Party “not in a position to undertake a comprehensive ban due to its constitution or constitutional principles”, to “apply restrictions on all tobacco advertising, promotion and sponsorship” (Article 13.3). The obligations apply to both within-territory advertising, promotion and sponsorship and, “subject to the legal environment and technical means available”, to cross-border advertising, promotion and sponsorship originating within a country’s territory. The comprehensive ban is required to be implemented within five years after entry into force of the Convention for a Party.

Article 13.4 also sets out a range of specific minimum obligations, including to:

- “prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions”;
- “require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship”;
- “restrict the use of direct or indirect incentives to encourage the purchase of tobacco products”;
- in the absence of a comprehensive ban, “require ... the disclosure to relevant authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited”; and
- “prohibit, or, in the case of a Party that is not in a position to prohibit due to its constitution or constitutional principles restrict, tobacco sponsorship of international events, activities and/or participants therein”.¹

¹ Given the strong obligations agreed to in Article 13.2, these minimum obligations are likely to be relevant only: to the very small number of Parties with constitutional constraints that prevent them

The terms “tobacco advertising and promotion” and “tobacco sponsorship” are broadly defined in Article 1 of the Convention. “Tobacco advertising and promotion” is defined to mean “any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly”. “Tobacco sponsorship” is defined as “any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly”.

The need for guidelines on Article 13 as a matter of priority

Article 13 is a strong provision, but it is a relatively general one. It does not, for example, list all of the many kinds of advertising, promotion and sponsorship in which the tobacco industry and its agents engage. It does not identify all of the entities (the various kinds of companies and individuals) that engage in or facilitate tobacco advertising, promotion and sponsorship.

In light of the generality of Article 13, Parties will benefit significantly from detailed guidelines to assist them in giving effect to their obligations under it. This is recognized in Article 7, which *requires* the COP to “propose appropriate guidelines for the implementation” of the provisions of Article 13.

Guidelines on Article 13 should deal with both within-territory and cross-border advertising, promotion and sponsorship. Parties have assumed obligations with respect to both and need guidance on both. In any case, with developments in technology, it is often difficult to separate within-territory from cross-border advertising, promotion and sponsorship. For example, internet content uploaded in the territory of one Party can be accessed immediately both within the territory of that Party and in the territory of other Parties. Advertising at a sporting event in the territory of one Party may be viewed at the event itself, or by those watching the event on television or over the internet, whether in the territory of that Party or the territory of another. Guidelines will be particularly useful in assisting Parties to deal with incoming cross-border advertising, promotion and sponsorship, over which they may have fewer means of direct, practical control than advertising, promotion and sponsorship originating within their own territory.

The development of guidelines on Article 13 should be a high priority for the COP given the recognized relationship between tobacco advertising, promotion and sponsorship and consumption of tobacco products, and the five year implementation timeline for Article 13 accepted by the Parties. A number of Parties will need to comply with their obligations under Article 13 by February 2010, meaning that guidelines would need to be adopted at the third session of the Conference of the Parties to be able to meaningfully assist these Parties in implementation.

from undertaking a comprehensive ban; in the very limited communication that may be allowed in a Party that does have a comprehensive ban (for example, any information allowed to be provided at the point of sale should not be false, misleading or deceptive and should be accompanied by health warnings or other appropriate warnings or messages); and for Parties that are constitutionally able to undertake a comprehensive ban, in the five year transition period between entry into force of the Convention and the requirement to undertake a comprehensive ban.

What guidelines on Article 13 might include

1. The kinds of advertising, promotion and sponsorship that need to be covered by measures adopted by Parties

It is essential that measures adopted by Parties under Article 13 apply to *all* forms of tobacco advertising, promotion and sponsorship, as is required by Article 13. Where measures are not comprehensive, the tobacco industry simply shifts its marketing to areas that remain unregulated. Parties would benefit from a comprehensive list of the kinds of advertising, promotion and sponsorship to which the measures they adopt should apply.² Such a list would be particularly useful given the changes that technology has brought to marketing practices. Legislation dealing with tobacco advertising, promotion and sponsorship, and related monitoring and enforcement practices, need to keep pace with developments in technology and marketing practices, and Parties would benefit from guidelines that assist them in ensuring that their legislation and monitoring and enforcement practices do so.

Guidelines on Article 13 could provide a list of all forms of tobacco advertising, promotion and sponsorship, both “traditional” and “new” (including likely future forms). These could include: print; television (including satellite); radio (including satellite); billboards; internet (both web access and email); mobile phone; display of products in retail outlets; the provision of free samples or “premiums” with purchase; incentive promotions (such as frequent purchaser programs, coupons and rebates); direct mail; viral marketing; product placement in films, video games, theatre and other cultural products; advertising on clothing; brand-stretching or trademark diversification;³ sponsorship of events, prizes, persons or organizations; and “corporate social responsibility” programs.

The identification of all of these forms of advertising, promotion and sponsorship can assist Parties not only in drafting appropriately comprehensive legislation, but in ensuring that they have appropriate monitoring mechanisms and enforcement procedures in place to allow them to enforce their legislation. This is not to suggest that legislation needs to refer specifically to all forms of advertising, promotion and sponsorship for all forms of advertising, promotion and sponsorship to be covered – it could be worded generally and/or include words such as “including but not limited to” where appropriate – but it would nevertheless be useful for Parties to have a clear sense of the kinds of advertising, promotion and sponsorship which should be monitored and against which their legislation should be enforced.

2. Entities whose behaviour needs to be covered by measures adopted by Parties

It is essential that measures adopted under Article 13 apply to all entities that engage in tobacco advertising, promotion and sponsorship, be it through commissioning, creating, producing, placing or disseminating the advertising, promotion or sponsorship. Again, Parties would benefit from a list of such entities. They might include not only the tobacco industry itself (which is defined in Article 1 as “tobacco manufacturers, wholesale distributors and importers of tobacco products”), but also

² It would be important to specify that such a list is not intended to be exhaustive, for example by using words such as “including but not limited to”.

³ This involves the use of branding or brand elements on non-tobacco products and services.

tobacco retailers, advertising agencies, media buyers, publishers, broadcasters, internet service providers, internet content providers, mobile phone content providers and so on.⁴

3. How to cover different entities

Guidelines can give Parties guidance on how certain categories of entities that do not themselves initiate or engage in tobacco advertising, promotion and sponsorship, but unwittingly provide a platform for it, should be dealt with, i.e. what they should be required to do or to refrain from doing. For example, it may be unreasonable for an internet service provider to be required to monitor all content to which it facilitates access, whereas it would be reasonable to require it to block access once notified that it is facilitating access to tobacco advertising, promotion or sponsorship.

Again, the identification of all relevant entities will assist not only in the drafting of legislation, but also in ensuring effective compliance monitoring and enforcement.

4. Sanctions

Guidelines can give Parties guidance on the use of sanctions – for example, the need to have fines large enough to act as a deterrent to the tobacco industry, and the possibility of alternative sanctions, such as cancellation of licence to operate and funding of corrective action.

5. Health warnings and other warnings or messages

Wherever any form of tobacco advertising, promotion or sponsorship is not prohibited – for example, in a Party in which constitutional considerations preclude the undertaking of a comprehensive ban, or in any purely factual information allowed to be provided at the point of sale about the availability of tobacco products – guidelines can provide Parties with guidance on the size, placement, content and form of health warnings and of other appropriate warnings or messages.

6. False, misleading or deceptive advertising

Guidelines can assist Parties in understanding what might constitute “false, misleading or deceptive” advertising, promotion or sponsorship, or advertising, promotion or sponsorship that is “likely to create an erroneous impression about its characteristics, health effects, hazards or emissions” and thereby in prohibiting such advertising, promotion or sponsorship.⁵

7. Information on expenditure

Guidelines can give Parties guidance as to what information about expenditure on tobacco advertising, promotion and sponsorship should be collected from the tobacco industry, how it can be collected, and how it might be communicated to the public.

⁴ Again, it would be important to specify that such a list is not intended to be exhaustive, for example by using words such as “including but not limited to”.

⁵ Note that here the guidelines may complement the guidelines developed on such elements of packaging and labelling: Article 11.1(a).

8. International cooperation

Guidelines can give guidance on the way in which Parties can take the necessary cooperative measures required to deal with tobacco advertising, promotion and sponsorship, and particularly cross-border tobacco advertising, promotion and sponsorship pursuant to their existing obligations under Article 19 (liability), Article 20 (research, surveillance and exchange of information), Article 21 (reporting and exchange of information) and Article 22 (cooperation in areas of scientific, technical and legal expertise. This possibility is mentioned in paragraph 20 of the expert group's report.

9. Role of the Secretariat

Guidelines can give guidance on the role that the Secretariat could play in assisting Parties with implementation of Article 13 and in facilitating the necessary international cooperation.

The need to develop guidelines on Article 13 *before* commencing negotiation of a protocol on cross-border advertising, promotion and sponsorship

Article 13.8 requires the Parties to the Convention to “consider the elaboration of a protocol setting out appropriate measures that require international collaboration for a comprehensive ban on cross-border advertising, promotion and sponsorship”. The expert group established by the COP to develop a template for a protocol on cross-border advertising, promotion and sponsorship has released its report [A/FCTC/COP/2/10].

The expert group's template is a very useful one, setting out possible elements of a future protocol on cross-border advertising, promotion and sponsorship including provisions dealing with: identification of contact points within Parties; information collection and sharing; scientific and technical cooperation; technical and financial assistance; investigation and pursuit of legal action; exercise of jurisdiction; recognition and enforcement of foreign judgments; and coordination of activities.

Nevertheless, it is the view of FCA that it would be premature for the COP to commence negotiations on a protocol on cross-border tobacco advertising, promotion and sponsorship, before it has at least begun to develop guidelines on Article 13. It would be difficult for Parties to reach agreement on the kinds of measures for international cooperation that would likely be included in a protocol on cross-border tobacco advertising, promotion and sponsorship before they have discussed in detail the substantive obligations they have already assumed under Article 13. This is alluded to in the expert group's report (paras 12 and 16).

As the expert group's report notes (para 10), Parties have already agreed to strong obligations under Article 13, which apply equally to within-country advertising, promotion and sponsorship and to that originating within their territory and receivable in the territory of other Parties. In addition, Article 13.7 confirms the sovereign right of Parties to ban incoming tobacco advertising, promotion and sponsorship. As the expert group's report notes (para 12), in these circumstances, it is not clear whether a protocol would need to create new substantive obligations and rights. Whether such a

need exists cannot be known until a detailed discussion has taken place regarding the obligations already assumed under Article 13. The appropriate forum through which this discussion should occur is the development of guidelines on Article 13.

Given that the COP is *required* by Article 7 to propose guidelines on Article 13, this should occur before the commencement of negotiation of a protocol on cross-border tobacco advertising, promotion and sponsorship. If protocol negotiation were to commence before Parties had at least begun to develop guidelines on Article 13, it appears inevitable that negotiation would be stalled, or perhaps even suspended, when Parties realize that the guideline development process would have to commence before protocol negotiation could commence. Given the large cost and resource implications of negotiating a protocol, this is a scenario that should be avoided.

Proposing that the development of guidelines on Article 13 should be the next step taken by the COP on this issue is not in any way to downplay the importance of effectively addressing cross-border advertising, promotion and sponsorship, but rather to suggest a process that will allow cross-border advertising, promotion and sponsorship to be addressed as quickly and as effectively as possible. Parties are already obliged to take measures to deal with cross-border tobacco advertising, promotion and sponsorship, and they need guidance in implementing these measures *now*. A protocol will inevitably take time – probably years – to negotiate and adopt and then enter into force. Domestic implementation of existing obligations, including both within-country and cross-border elements, should occur as soon as possible.

FCA also agrees with the suggestion made by the expert group (para 20) that before commencing protocol negotiations, more thought should be given to whether there might be ways of achieving the mechanisms of cooperation that a protocol might cover through means other than a protocol. Given that, as already noted, the Convention itself contains obligations on liability (Article 19), research, surveillance and exchange of information (Article 20), reporting and exchange of information (Article 21), and cooperation in areas of scientific, technical and legal expertise (Article 22), it may be that some or all of these can be accomplished with respect to cross-border advertising, promotion and sponsorship through guidelines, ordinary decisions of the Parties or other alternative mechanisms other than a protocol. As mentioned earlier, this is something that should be considered as part of the guideline development process.

Civil society participation in the development of guidelines

The important role of civil society in the implementation and further development of the FCTC is recognized in the preamble to the Convention and in Article 4.7. Civil society should be invited to actively participate in the development of the guidelines, as has been the case for guideline development work so far undertaken by the COP (on Article 8 and Articles 9 and 10, pursuant to the decision of the first session of the Conference of the Parties “to invite the relevant intergovernmental and nongovernmental organizations with specific expertise in the guideline matters to actively participate and contribute to the further elaboration and development of the guidelines, as per request from the Convention Secretariat”).⁶

⁶ FCTC/COP1(15) Elaboration of guidelines for implementation of the Convention, para 6.

ANNEX

Evaluation of guidelines on Article 13 against the criteria for prioritization of work on guidelines adopted at the first session of the Conference of the Parties⁷

1. ***Request from Parties:*** *there is an expressed need for the guidelines to assist Parties in implementing the Framework Convention.*

Yes. Many Parties have requested technical assistance to develop legislation to implement their Article 13 obligations. Guidelines would be of assistance to these and all other Parties.

2. ***Existing work on the topic:*** *there is relevant existing work, e.g. Tobacco Free Initiative guidelines, so guidelines can be developed more quickly and efficiently.*

Yes. The working documents of the expert group on cross-border tobacco advertising, promotion and sponsorship will contain useful material. Many countries have legislation – relating both to tobacco and to other areas of content regulation – that could be used to inform best practice guidelines. There is a large volume of academic and practical literature on the regulation of advertising, promotion and sponsorship, both within-territory and cross-border, and tobacco and other kinds of content.

3. ***International value added:*** *international guidelines may be of particular assistance to Parties to implement some obligations, while involving a number of Parties allows expertise and costs to be shared.*

Yes. Parties can learn from other Parties' experiences – both successes and challenges – in addressing tobacco advertising, promotion and sponsorship and other areas of content regulation. In particular, Parties can learn from each other's experiences how best to prevent legislative loopholes. The work needed to understand developments in technology and marketing practices is best done collaboratively between Parties, with the sharing of information, expertise and costs.

4. ***Potential impact of the measure covered by the guidelines:*** *measures are known to be effective at reducing the impact of tobacco.*

Yes. Bans on tobacco advertising, promotion and sponsorship are known to reduce tobacco consumption.

5. ***Ease of implementation:*** *this includes cost of implementation.*

Yes. Parties can easily use the guidelines to develop their legislation and their monitoring and enforcement practices.

6. ***Willingness of Parties to lead:*** *Parties have volunteered as key facilitators, partners or reviewers.*

It is anticipated that Parties will volunteer to do so at COP-2.

⁷ FCTC/COP1(15) Elaboration of guidelines for implementation of the Convention.

7. ***Outcome measurability:*** *this is relevant to reporting (Article 21) and the potential to measure and analyse data.*

Yes. Parties can report on the legislation they have enacted and the way they have monitored and enforced compliance.

8. ***Contribution to maintaining momentum in implementing the Framework Convention:*** *this is particularly important in the early stages of implementation.*

Yes. Bans on advertising, promotion and sponsorship are a critical tobacco control measure. Because most forms of advertising, promotion and sponsorship are highly visible, the appearance or absence of tobacco advertising, promotion and sponsorship within a country can be interpreted as a strong signal of a country's position on tobacco and tobacco control. It would be difficult for a country that still allowed tobacco advertising, promotion and sponsorship to project an image of being serious about FCTC implementation. Guidelines will assist Parties in adopting strong measures to deal with tobacco advertising, promotion and sponsorship.

9. ***Cost of guidelines development:*** *guidelines should be developed efficiently.*

Yes. Guidelines can be developed by Parties, with the input of civil society, sharing relevant expertise and experiences and consulting with relevant expert bodies – both national and international – as required.

10. ***International cooperation and cost sharing*** *are essential to effectively implement the elements of the guidelines.*

Yes. Without such international cooperation and sharing of information, expertise and experience, it is likely that many Parties' implementation of their Article 13 obligations will fall short of best practice. Many Parties will need information and guidance to assist them in complying with their obligations. International cooperation is also essential to enable Parties to deal effectively with cross-border tobacco advertising, promotion and sponsorship.