



FCA RECOMMENDATIONS:
**GUIDELINES ON ARTICLE 13 (TOBACCO ADVERTISING,
PROMOTION AND SPONSORSHIP) AND
A PROTOCOL ON CROSS-BORDER TOBACCO ADVERTISING,
PROMOTION AND SPONSORSHIP¹**

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

The Preamble to the FCTC 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”. Parties recognize, under Article 13, that “a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products”. Accordingly, each Party must undertake “a comprehensive ban of all tobacco advertising, promotion and sponsorship”,² including both within-territory advertising, promotion and sponsorship and, “subject to the legal environment and technical means available”, cross-border advertising, promotion and sponsorship originating within its

¹ This document outlines FCA’s recommendations to the Conference of the Parties. Further information may be found in the FCA briefing paper ‘Guidelines on Article 13 (Tobacco Advertising, Promotion and Sponsorship) and a Protocol on Cross-Border Tobacco Advertising, Promotion and Sponsorship’, available online at www.fctc.org.

² Where a Party is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, the obligation is to “apply restrictions on all tobacco advertising, promotion and sponsorship”, which must, at a minimum, comply with the provisions of Article 13.4.

territory. The comprehensive ban is required to be implemented within five years after entry into force of the FCTC for a Party.

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 its generality, Parties will benefit significantly from detailed guidelines to assist them in giving effect to their obligations under Article 13. The need for such guidelines is recognized in Article 7, which requires the Conference of the Parties to the FCTC (COP) to “propose appropriate guidelines for the implementation” of Article 13.

The development of guidelines on Article 13 should be a high priority at the second session of the Conference of the Parties 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.

What guidelines on Article 13 might include

Guidelines on Article 13 might provide detailed guidance on a number of matters relevant to Parties’ implementation of their obligations, including:

- the kinds of advertising, promotion and sponsorship that their measures need to cover;
- the entities whose behaviour their measures need to cover;
- how to cover different entities;
- the use of sanctions;
- wherever any form of tobacco advertising, promotion or sponsorship is not prohibited, the size, placement, content and form of health warnings and of other appropriate warnings or messages;
- what might constitute false, misleading or deceptive advertising, promotion or sponsorship;
- what information about expenditure on tobacco advertising, promotion and sponsorship they should collect from the tobacco industry, how it can be collected, and how it might be communicated to the public;
- how they 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); and
- 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 FCTC 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 at its first session to develop a template for a protocol on cross-border advertising, promotion and sponsorship has released its report (A/FCTC/COP/2/10).

As the expert group’s report notes (para 10), Parties to the FCTC have already, under Article 13, agreed to strong obligations in respect of tobacco advertising, promotion and sponsorship originating within their territory and receivable in the territory of other Parties, and have recognised the sovereign right of Parties to ban tobacco advertising, promotion and sponsorship entering their territory. In these circumstances, it is not clear whether it is necessary to develop a protocol to create new substantive obligations and rights to deal with cross-border advertising, promotion and sponsorship. This is noted in the expert group’s report (para 12). Whether new substantive obligations and rights are needed cannot be known until a detailed discussion has taken place regarding the obligations already assumed under Article 13. The appropriate forum through which this 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. Until a detailed discussion has taken place regarding the substantive obligations agreed to under Article 13, it would be difficult for Parties to reach agreement on the kinds of measures for international cooperation that might be included in a protocol on cross-border tobacco advertising, promotion and sponsorship. This is alluded to in the expert group’s report (paras 12 and 16). The expert group also recommends (para 20) that 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, for example through implementation of Articles 19, 20, 21 and 22, or through guidelines or ordinary decisions of the Parties.

Parties to the FCTC 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.

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.