

## **Briefing 9: Elaboration of a first report on Article 19 (Liability)**

**Third session of the Conference of the Parties to the  
WHO Framework Convention on Tobacco Control  
17-22 November 2008, Durban, South Africa**

### **Recommendation**

**The third session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control should request the Convention Secretariat to elaborate, in consultation with Parties particularly interested in the issue, a first report on liability for submission to the fourth session of the Conference of the Parties.**

### **Background**

Under Article 19 of the WHO Framework Convention on Tobacco Control (FCTC), Parties agree, for the purpose of tobacco control, to consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate (Article 19.1). Parties also agree to cooperate in exchanging information through reports to the Conference of the Parties (COP), including information on legislation, regulations and pertinent jurisprudence, and information on the health effects of tobacco consumption and exposure to tobacco smoke (Article 19.2), and to afford one another assistance in legal proceedings relating to civil and criminal liability consistent with the FCTC, within the limits of national legislation, policies, legal practices and applicable existing treaty arrangements (Article 19.3).

Parties to the FCTC recognize as a guiding principle for the achievement of the objective of the Convention that: 'Issues relating to liability, as determined by each Party within its jurisdiction, are an important part of comprehensive tobacco control' (Article 4.5). Liability is about the enforcement of legal obligations – these may be obligations to the state under its laws or regulations (with criminal sanctions or civil penalties attaching for breaches) or obligations owed to individuals or groups (such as under principles of negligence). Dealing effectively with liability is both critical to the success of the regulatory measures Parties agree to implement under the FCTC, and an important tobacco control strategy in its own right.

Key provisions of the FCTC, including Article 8 (Protection from exposure to tobacco smoke), Article 11 (Packaging and labelling of tobacco products), Article 13 (Tobacco advertising, promotion and sponsorship) and Article 15

(Illicit trade in tobacco products), require Parties to implement ‘effective’ regulatory measures for the purposes of tobacco control. To be ‘effective’, these measures must be more than laws on the books – they must be enforced in practice, with legal obligations created and breaches of these obligations effectively deterred and punished.

In addition to enforcement of tobacco control laws, liability established through litigation, both by Parties and by private individuals or entities, has significant potential to reduce the extensive harm to public health caused by tobacco products. The potential positive results of legal action against manufacturers of tobacco products over the harms caused by tobacco – including product liability, medical cost recovery, or rights-based litigation – include:

- compelling tobacco manufacturers to raise prices to cover their actual or anticipated liabilities – higher costs lower tobacco consumption, especially among children and teenagers, who are more price-sensitive than adults;
- deterring dishonest practices that increase the risk of liability – deterrence of ‘intentional torts’ is a main goal of the civil justice system;
- educating the public about the health effects of tobacco use – lawsuits tend to attract extensive, free media coverage;
- compensating injured parties, including both smokers and non-smokers exposed to tobacco smoke, their families, and health care systems; and
- delegitimizing the tobacco industry by exposing patterns of reprehensible conduct.

Article 19 recognizes the importance of all types of liability, including criminal and civil liability. It also recognizes the importance of cooperation between Parties both in relation to particular legal proceedings and more generally through the exchange of relevant information. Article 19 is both a cross-cutting Article, in the sense that its effective implementation will enhance the effectiveness of the implementation of other Articles of the FCTC, and an Article that includes a tobacco control strategy that is important in its own right.

### **The need for further work**

Legal action to establish liability can sometimes be difficult, particularly against a well-resourced defendant determined to fight legal action brought against it. The tobacco industry is universally known as an extreme example of such a defendant. To ensure the effectiveness of their approaches to liability, Parties to the FCTC may require support at the international level. The need for such support is recognized in Article 19.5, under which Parties agree that:

The Conference of the Parties may consider, if possible, at an early stage, taking account of the work being done in relevant international fora, issues related to liability including appropriate international

approaches to these issues and appropriate means to support, upon request, the Parties in their legislative and other activities in accordance with this Article.

The Framework Convention Alliance (FCA) considers that, in order to facilitate its consideration of issues related to liability, the third session of the COP (COP-3) should request the Convention Secretariat to elaborate, in consultation with Parties particularly interested in the issue, a first report on liability for submission to the fourth session of the COP (COP-4). A first report on liability should:

- summarize relevant experiences in legal action taken against the tobacco industry or otherwise in support of tobacco control;
- identify common challenges encountered and possible responses to these challenges;
- identify lessons learned; and
- identify issues on which further work may be useful.