

Briefing 2:
Adoption of guidelines for implementation of Article 5.3
(Protection of public health policies with respect to tobacco
control from commercial and other vested interests of the
tobacco industry)

Third session of the Conference of the Parties to the
WHO Framework Convention on Tobacco Control
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Recommendation

The Framework Convention Alliance considers that effective guidelines for implementation of Article 5.3 (Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry) are urgently needed, and recommends that the third session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control revise the draft guidelines (Document FCTC/COP/3/5) in order to adopt guidelines that provide strong, clear guidance to Parties in implementing this critical Article.

Background

The tobacco industry is the single biggest obstacle to effective implementation of the WHO Framework Convention on Tobacco Control (FCTC). The tobacco industry's interests are in direct conflict with the goals of tobacco control and the objective of the FCTC, as set out in Article 3, 'to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke'. The conflict between the tobacco industry's interests and the objective of tobacco control is fundamental and irreconcilable: while the tobacco industry seeks to maximize consumption of its inherently deadly products, tobacco control aims to protect and promote public health by reducing tobacco consumption and exposure to tobacco smoke.

Under Article 5.3, Parties to the FCTC agree that: 'In setting and implementing their public health policies with respect to tobacco control, [they] shall act to protect these policies from commercial and other vested interests of the tobacco industry'. Effective implementation of Article 5.3 is critical to the success of the Convention as a whole. The tobacco industry does, and always has done, everything it can do to undermine tobacco control, deploying vast resources to obstruct, delay, and weaken the setting and implementing of

tobacco control policies, often through calculated, covert, and fraudulent means.¹ Now is the critical period for Parties' implementation of the FCTC, and the tobacco industry is actively working to prevent effective implementation of all of the key measures to which Parties have committed under the Convention.²

The need for guidelines to assist Parties in implementing Article 5.3 was recognized by the Conference of the Parties (COP) at its first session (COP-1), where Parties acknowledged 'the need to address issues related to Article 5.3' through the elaboration of guidelines for its implementation.³ At its second session (COP-2), the COP decided to establish a working group to elaborate guidelines and to present, if possible, draft guidelines to the third session of the COP (COP-3).⁴ The working group has presented draft guidelines (Document A/FCTC/COP/3/5).

The draft guidelines

The Framework Convention Alliance (FCA) considers that, while the draft guidelines elaborated by the working group are commendable in a number of respects, they require revision in order to ensure that COP-3 adopts guidelines that provide clear, strong guidance to Parties in implementing the critical commitment they have made under Article 5.3.

FCA has prepared detailed comments and textual recommendations to assist the COP in revising the draft guidelines. These are set out in the document 'Comments on the Draft guidelines for implementation of Article 5.3 of the Convention on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry (Document FCTC/COP/3/5)', available at www.fctc.org ('FCA's Comments'). This policy briefing provides a brief overview of FCA's position, highlighting key aspects of the draft guidelines that FCA considers require strengthening and/or clarification, and summarizing the key elements that FCA considers should be included in the guidelines.

¹ See generally World Health Organization Committee of Experts on Tobacco Industry Documents, *Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization* (2000), available at www.who.int/tobacco/en/who_inquiry.pdf; World Health Organization, *Tobacco Industry and Corporate Responsibility ... An Inherent Contradiction* (2004), available at http://www.who.int/tobacco/communications/CSR_report.pdf; Pan American Health Organization, *Profits Over People, Tobacco Industry Activities to Market Cigarettes and Undermine Public Health in Latin America and the Caribbean* (2002), available at http://www.paho.org/English/DD/PUB/profits_over_people.pdf; Y Salooje and E Dagli, 'Tobacco industry tactics for resisting public policy on health' (2000) 78(7) *Bulletin of the World Health Organization*, available at <http://www.scielo.br/pdf/bwho/v78n7/v78n7a07.pdf>.

² See, for example, S Albuja and D Daynard, 'The FCTC and the adoption of domestic tobacco control policies: the Ecuadorian experience', *Tobacco Control* (in press).

³ 'Elaboration of guidelines for implementation of the Convention' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, first session, decision FCTC/COP1(15)).

⁴ 'Elaboration of guidelines for implementation of Articles 5.3, 9 and 10, 11, 12 and 14' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, second session, decision FCTC/COP2(14)).

Key aspects that require strengthening and/or clarification

The key aspects of the draft guidelines that, in FCA's view, require strengthening and/or clarification are as follows:

Appropriate wording

FCA considers that there are a number of sections of the draft guidelines that are worded inappropriately, compromising the effectiveness of the guidance provided. Two important sections of text in which inappropriate wording is used are the following:

- Paragraph 8 refers to tobacco control measures that Parties to the FCTC are 'recommended' to implement, and states that the draft guidelines 'aim at protecting against unlawful or unethical interference' by the tobacco industry and those that work to further its interests.

The measures referred to as 'recommended' are, in fact, legally *required* to be implemented by Parties to the FCTC. FCA considers that it would be inappropriate for guidelines for implementation of the FCTC to suggest that Parties are merely *recommended* to implement measures that they are bound to implement under the treaty, and suggests that the word 'recommended' be replaced with the word 'required'.

The words 'unlawful or unethical' may suggest that there are some forms of tobacco industry interference that are ethical and/or lawful and that may be allowed. Article 5.3 requires Parties to protect their tobacco control policies from *any* tobacco industry interference. FCA considers the use of the potentially limiting terms 'unlawful or unethical' in guidelines for implementation of Article 5.3 to be inappropriate, particularly given the unethical nature of the tobacco industry's business. All industry interference is unethical, and all industry interference is covered by the requirement to protect under Article 5.3.

- Guiding principle 1 states that: 'Tobacco products are legal but lethal'. FCA considers that this cannot, in fact, be regarded as a 'guiding principle'. The text below this 'guiding principle' (paragraph 10) acknowledges that there is a 'fundamental' and 'irreconcilable' 'conflict of interest between the tobacco industry's interests and public health policy'. FCA considers that this acknowledgement should be in guiding principle 1. In FCA's view, this is an extremely important amendment to make to the draft guidelines. Guiding principle 1 of guidelines for implementation of Article 5.3 needs to convey strongly and clearly the fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy. The fact that tobacco products are legally available for sale to adults in most Parties' jurisdictions is not relevant to this conflict, and should not be mentioned in the guiding principles.

Interactions with the tobacco industry

Recommendation 2 of the draft guidelines provides critical guidance on interactions with the tobacco industry, stating that Parties should: ‘Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur’. Because interactions with the tobacco industry provide opportunities for the industry to interfere with the setting and implementing of tobacco control policies, this recommendation is of fundamental importance to the implementation of Article 5.3. FCA considers that it is critical that the guidelines provide strong, clear guidance on both elements of the recommendation: limiting interactions with the tobacco industry; and ensuring the transparency of any interactions that occur.

Limiting interactions

FCA considers that paragraphs 16 and 17 and Recommendations 2.1-2.4 of the draft guidelines require revision, as set out in FCA’s Comments, to ensure the provision of strong, clear guidance on limiting interactions with the tobacco industry. Paragraph 16 makes the important recommendation that: ‘To prevent interference with public health policies with respect to tobacco control, governments should interact with the tobacco industry only when necessary ...’. However, this recommendation is qualified by the words ‘in line with the principle of good governance’. ‘Good governance rules’ are then referred to again in recommendation 2.2 and ‘governance rules’ in recommendation 2.3. FCA considers the term ‘good governance’ to be both vague and potentially limiting. ‘Good governance’ means different things in different places and contexts, meaning that it cannot provide clear guidance to Parties, and often connotes active participation of ‘stakeholders’ in policy development and implementation. While active ‘stakeholder’ participation is appropriate in many contexts, it is not appropriate when dealing with the tobacco industry, due to the fundamental and irreconcilable conflict between the industry’s interests and the objectives of tobacco control.

FCA considers that the guidelines should clearly recommend that: *Parties should interact with the tobacco industry only when, and to the extent, strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products.*

Ensuring the transparency of any necessary interactions

FCA considers that paragraph 17 and Recommendations 2.1-2.3 of the draft guidelines require revision, as set out in FCA’s Comments, to ensure the provision of strong, clear guidance on ensuring the transparency of any necessary interactions with the tobacco industry. This second critical element of recommendation 2 is also recognized in guiding principle 2 – ‘Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent’ – and paragraph 11 – ‘Parties should ensure that any engagement with the tobacco industry on matters related to tobacco control or public health is accountable and

transparent'. FCA considers that recommendations 2.1, 2.2 and 2.3 do not offer the clear guidance that Parties need in relation to ensuring transparency of interactions with industry. The recommendations are vaguely worded, with references to 'established transparency rules', 'on request', 'existing good governance rules', 'public consultation' and 'existing, strict governance rules'.

FCA considers that the guidelines should clearly recommend that: *Where interactions with the tobacco industry are necessary, Parties should ensure that these interactions are conducted transparently. Wherever possible, interactions should be conducted in public, such as through public hearings. Where this is not possible, public notice of interactions should be given, records should be kept of the interactions, and these records should be disclosed to the public in a timely manner.*

Conflicts of interest on the part of government institutions

The need to avoid conflicts of interest for government institutions is recognized in paragraph 20 of the draft guidelines. However, Recommendation 4 and paragraph 19 refer only to conflicts of interest for government officials and employees. As government institutions may have conflicts of interest without any individual government official or employee having a personal conflict of interest, FCA considers that it is important that government institutions be specifically included in Recommendation 4 and in paragraph 19.

Employment of persons who have worked in the tobacco industry

In Recommendation 4.4, FCA considers that the sentence 'This recommendation should also operate in the opposite direction' does not provide helpful guidance. Recommendation 4.4 addresses circumstances in which a public office holder intends to leave a position in which he or she has had a role in setting or implementing public health policies with respect to tobacco control and to engage in an occupational activity with a tobacco industry entity. It recommends that the relevant public institution have the right to forbid such a move or to give approval subject to conditions. FCA understands the intention of the sentence 'This recommendation should also operate in the opposite direction' to be to recommend that where a person who has been engaged in an occupational activity with a tobacco industry entity intends to take up a position within government related to setting or implementing public health policies with respect to tobacco control, the government have the right to forbid such a move or give approval subject to conditions. Read literally, however, the current wording would recommend that a Party require that a person intending to move from the tobacco industry to government should inform the *tobacco industry* of his or her intention, with the tobacco industry having the opportunity to forbid the intended move or impose conditions on the intended move. This is clearly not the intention of the recommendation.

FCA considers that the sentence 'This recommendation should also operate in the opposite direction' should be deleted and replaced with a separate, additional recommendation, that: *Parties should require applicants for positions in public office relating to setting or implementing public health policies with respect to tobacco control to inform them of any previous occupational activity with any tobacco industry entity, whether gainful or not. Parties should not appoint to any position relating to setting or implementing public health policies with respect to tobacco control a person who has engaged in an occupational activity with any tobacco industry entity in the preceding five years.*

Contributions by the tobacco industry to government institutions

FCA considers that Recommendation 4.8 of the draft guidelines, which applies to the acceptance of payments, gifts or services from the tobacco industry by governmental or quasi-governmental officials or employees, and is critically important to the avoidance of conflicts of interest, should also apply to such contributions to governmental or quasi-governmental institutions themselves, with exceptions for legally mandated payments such as taxes, licensing fees and penalties.

Tobacco industry 'corporate social responsibility' activities

The draft guidelines correctly recognize in paragraph 23 that tobacco industry 'corporate social responsibility' is 'a marketing and public relations strategy that falls within the Convention's definition of advertising, promotion and sponsorship'. The draft guidelines on Article 13 (Tobacco advertising, promotion and sponsorship) contain recommendations on 'corporate social responsibility' in the context of Parties' specific and clearly stated obligation under Article 13 to undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship (unless prevented from doing so by their constitution or constitutional principles, in which case the obligation is to apply restrictions on all tobacco advertising, promotion and sponsorship). FCA considers that it is important that recommendation 6 and recommendations 6.1-6.3 reflect the content of Article 13 and the draft guidelines on Article 13, and explicitly acknowledge that any tobacco industry 'corporate social responsibility activities' that take place have not been banned, or not yet been banned, under Article 13.

Incentives, privileges and benefits to tobacco industry entities

FCA considers that the words 'privileged treatment' in Recommendation 7 of the draft guidelines should be replaced with the broader wording '*incentives, privileges or benefits*' used in Recommendation 7.1. FCA notes that this broader wording is more consistent with guiding principle 4.

Enforcement

Paragraph 28 of the draft guidelines recommends that Parties have enforcement mechanisms that enable them to comply with their obligations under Article 5.3. FCA considers that it is important that a recommendation be included that: *Parties should introduce and apply criminal, civil and/or administrative sanctions that are effective, proportionate and dissuasive to support their laws and regulations implementing Article 5.3.*

Key elements

FCA considers the following guiding principles and major recommendations to be the key elements for inclusion in the revised guidelines. The detailed guidance that FCA considers should be provided to Parties in implementing these key principles and recommendations, including suggested amendments to the draft text and sections of text that FCA considers should be adopted unchanged, is set out in FCA's Comments.

Guiding principles

Principle 1: There is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy.

Principle 2: Parties, when dealing with the tobacco industry or those working to further its interests, should be accountable and transparent.

Principle 3: Parties should require the tobacco industry and those working to further its interests to operate and act in a manner that is accountable and transparent.

Principle 4: Because their products are lethal, tobacco industry entities should not be granted incentives to establish or run their businesses.

Recommendations

(1) Raise awareness about the addictive and harmful nature of tobacco products and about tobacco industry interference with Parties' tobacco control policies.

(2) Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.

(3) Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry and tobacco industry voluntary codes of conduct.

(4) Avoid conflicts of interest for government institutions, officials, and employees.

(5) Require the tobacco industry to provide comprehensive and accurate information about its activities.

(6) Denormalize any tobacco industry “corporate social responsibility” activities not banned or not yet banned under Article 13 (Tobacco advertising, promotion and sponsorship).

(7) Do not give incentives, privileges or benefits to tobacco industry entities.

(8) Treat State-owned tobacco industry entities in the same way as any other tobacco industry entity.