

Policy Briefing: Elaboration of recommendations on appropriate means to support implementation of Article 19 (Liability)

Fourth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control 15-20 November 2010, Punta del Este, Uruguay

Recommendation

The fourth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control should request that the Convention Secretariat, under the guidance of the Bureau, and with the assistance of competent authorities within WHO, in particular the Tobacco Free Initiative, as well as Parties particularly interested in the issue and relevant intergovernmental and nongovernmental organisations with specific expertise, elaborate a report to support implementation of Article 19 (Liability), including:

- a global review of relevant experiences in legal action taken against the tobacco industry or otherwise in support of tobacco control;
- a summary of common challenges encountered in relation to such legal action, including barriers to commencing legal action, and of measures taken to overcome these challenges; and
- a list of recommendations, based on the global review and summary and taking account of work being done in relevant international fora, on appropriate means by which the Conference of the Parties could support Parties in their legislative and other activities in accordance with Article 19,

and submit that report to the Conference of the Parties for consideration at its fifth session.

Background

Parties to the WHO Framework Convention on Tobacco Control (FCTC) recognise 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 tobacco control measures Parties agree to implement under the FCTC, and an important tobacco control strategy in its own right.

Under Article 19, Parties to the FCTC 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 Convention, within the limits of national legislation, policies, legal practices and applicable existing treaty arrangements (Article 19.3).

Article 19 recognises the importance of all types of liability, including criminal and civil liability. It also recognises 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 provision of the FCTC, in the sense that its effective implementation will enhance the effectiveness of the implementation of other articles, and a provision dealing with a tobacco control strategy important 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 by holding those responsible liable. The importance of enforcement is recognised in the guidelines adopted by the COP to assist Parties in implementing their obligations under key provisions of the Convention, including Articles 8, 11 and 13.

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:

- deterring dishonest practices that increase the risk of liability – deterrence of 'intentional torts' is a main goal of the civil justice system;
- compensating injured parties, including both smokers and non-smokers exposed to tobacco smoke, their families, and health care systems;
- 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;
- educating the public about the health effects of tobacco use – lawsuits tend to attract extensive, free media coverage; and
- delegitimising the tobacco industry by exposing patterns of reprehensible conduct.

Legal action to establish liability can be difficult, particularly against a well-resourced defendant determined to fight legal action brought against it. The tobacco industry, with its global presence and resources greater than those available to many States, is universally known as an extreme example of such a defendant. To ensure the effectiveness of their legislative and other activities in accordance with Article 19, Parties may require support at the international level. The need for such support is recognised 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'.

A Party has requested that the fourth session of the Conference of the Parties (COP-4) consider Article 19, and the Secretariat has prepared a report to facilitate this consideration (document FCTC/COP/4/13).

The need for action

The Secretariat's report on implementation of Article 19 considers international approaches to liability in the field of international environmental law and summarises progress as reflected in Parties' reports on implementation of the Convention. The report makes clear that significant further work will be required to ensure effective implementation of Article 19, noting that 'globally, Article 19 is one of the few articles of the Convention for which no notable progress can be traced across the two reporting cycles (two-year reports and five-year reports)'. The majority of Parties report that they have not implemented measures dealing with criminal and civil liability for the purposes of tobacco control, that relevant criminal and/or civil liability actions have not been taken in their jurisdictions, and that they

have not taken any action against the tobacco industry for reimbursement of medical, social, and other relevant costs related to tobacco use.

The Framework Convention Alliance (FCA) considers that it is essential that COP-4 initiate action to assist Parties in effectively implementing Article 19. To facilitate consideration of appropriate means of support, COP-4 should request preparation of a detailed report for presentation to the fifth session of the COP (COP-5). The report should be prepared by the Convention Secretariat, under the guidance of the Bureau and with the assistance of other competent authorities, in particular the WHO Tobacco Free Initiative (TFI), as well as Parties particularly interested in the issue and relevant intergovernmental and nongovernmental organisations with specific expertise. It should include:

- a global review of relevant experiences in legal action taken against the tobacco industry or otherwise in support of tobacco control – including both civil and criminal legal action, and action taken by governments as well as by private individuals or entities;
- a summary of common challenges encountered in relation to such legal action, including barriers to commencing legal action, and of any measures taken to overcome these challenges; and
- a list of recommendations, based on the global review and summary and taking account of work being done in relevant international fora, on appropriate means by which the Conference of the Parties could support Parties in their legislative and other activities in accordance with Article 19 – including, for example, measures to promote and facilitate the exchange of information and the transfer of technical and legal expertise.