

FCA Policy briefing on reporting: Amendments to the Group 2 questions

The third session of the Conference of the Parties to the FCTC (COP-3) adopted ‘the format for submission of national reports for Group 2 questions as set out in the reporting instrument contained in document FCTC/COP3/16 Rev.1’, with a mandate to the Bureau ‘to adopt amendments to the Group 2 questions’. FCA understands that, at its meeting on 3-4 March 2009, the Bureau will have the opportunity to adopt such amendments.

FCA considers that in order to ensure that the reporting instrument is of the quality required to perform its functions, some amendments should be made. In this document, FCA outlines its suggestions for consideration by the Bureau.

FCA prepared a lengthier briefing paper for consideration by the Parties at COP-3, which included a number of recommendations for questions designed to gather information that would be of assistance in contextualizing Parties’ responses to questions, or in facilitating the provision of more complete responses.¹ While FCA still considers that it would be extremely useful to collect such information, and hopes that such information will be sought in the Group 3 questions, having observed the discussions at COP-3, FCA accepts that questions of such a nature will not be included in the Group 2 questions. FCA is therefore not further pursuing the inclusion of these questions.

FCA confines its comments here to amendments it considers critical to ensure the quality of the reporting instrument. Most of these proposed amendments are required either for the purposes of clarification or correction – there are a number of instances in which FCA considers that questions confuse or misstate the provisions of the Convention. FCA considers that it is imperative that these not appear in the final reporting instrument. Such questions have the potential not only to create unnecessary difficulties for Parties in completing their reports and to undermine the quality and usefulness of information likely to be provided, but also to negatively affect Parties’ understanding, and therefore implementation, of their obligations under the Convention. FCA considers that some amendments are also required where questions about key obligations have simply been omitted.

In addition, FCA recommends that the instructions in the reporting instrument make it clear that relevant documentation should be attached and details provided. As currently worded, the document indicates that Parties may provide yes/no answers without providing details or attaching documentation. If Parties complete the instrument in this way, their reports will be of very limited use.

Section 2: Tobacco consumption and related health, social and economic indicators

Throughout Section 2, questions regarding consumption, and health, social and economic indicators seek information broken down by category. Specifically, the questions request information distinguishing between ‘smoking tobacco’, ‘smokeless tobacco’ and ‘other tobacco (e.g., waterpipe)’. FCA considers that this categorization should be revised. As all tobacco products are either smoked or smokeless, it is difficult to comprehend what the term ‘other tobacco products’ is intended to refer to. The example provided is waterpipe, but this is a smoking tobacco product.

If the intention in dividing the questions into three categories is to elicit information that distinguishes between smoking and smokeless tobacco products, and, within the category of smoking tobacco products, between different kinds of smoking tobacco products, FCA considers that this would be a useful distinction. If so, FCA recommends that the three categories be amended to: ‘Cigarettes (including hand-rolled cigarettes)’, ‘Other smoking tobacco products’ and ‘Smokeless tobacco products’. If this is not the intention and this approach is not adopted, FCA recommends simply deleting the ‘other tobacco products’ category. This comment applies to questions [2.1.6](#), [2.5.1](#), [2.6.1](#) and [2.8.3](#). If three categories are used, FCA recommends that they also be used in question [2.9.1](#), which currently has only two categories (‘smoking tobacco products’ and ‘smokeless tobacco products’).

¹ Available online at: http://fctc.org/dmdocuments/COP3_policy_briefing_reporting.pdf.

Question 2.6: Seizures of illicit tobacco products

Questions [2.6.2](#), [2.6.3](#) and [2.6.4](#) ask for information with respect to ‘smuggled’ tobacco products, and question [2.6.5](#) for information with respect to ‘illicit or smuggled tobacco products’. FCA considers that each of these questions should be asked with respect to ‘*illicit*’ rather than ‘smuggled’ tobacco products. Questions relating to Article 15 should be broad enough to cover all kinds of illicit tobacco products, including smuggled, counterfeit and illicitly manufactured products. The term ‘smuggled’, which generally refers to goods moved illicitly across borders, but not to within border illicit activity, is not broad enough to cover all kinds of illicit tobacco products.

Section 3: Legislation, regulation and policies

The initial instructions for the majority of the questions in this section provide:

Have you adopted and implemented, where appropriate, legislative, executive, administrative or other measures or have you implemented, where appropriate, programmes on any of the following:

(Please check “Yes” or “No”. For affirmative answers, *you may* provide a brief summary in the space provided at the end of the sections *or* send the relevant documentation to the Secretariat. Please provide documentation in one of the six official languages, if available.)

FCA is concerned that the instructions do not expressly request that Parties provide explanations for affirmative answers and attach relevant documentation to their reports. Parties may either simply check ‘yes’ or ‘no’, without providing an explanation of an affirmative answer and/or attaching relevant documentation, or attach large volumes of documentation without explanation. In either case, it would be exceedingly difficult to understand the basis for Parties’ responses. This would not facilitate effective monitoring of implementation or assist Parties in learning from each other’s experiences. FCA recommends that the instructions remain as they appear in the Group 1 questionnaire:

Have you adopted and implemented legislative, executive, administrative or other measures on any of the following:

(Please check “Yes” or “No”. For affirmative answers, *please provide* a brief summary in the space provided at the end of [the Section] *and* attach the relevant documentation. Please provide documentation in one of the six official languages, if available and please specify sections of your legislation related to each “Yes” response.)

This comment applies to the instructions to questions 3.1.2, 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5, 3.2.6, 3.2.7, 3.2.8, 3.3.1, 3.3.2, 3.3.3, 3.4.1, 3.4.2 and 3.4.3.

FCA also notes that most of the questions in this section do not provide adequate spaces for the provision of further details for affirmative responses, but only a space at the very end of the section to ‘provide a brief description of the progress made in implementing Article [X] in the past three years or since submission of your last report’. FCA recommends that each question include the direction included in the Section 2 questions and in question 3.1.2: ‘If you answered “Yes” to any of the questions under [question X], please provide details in the space below’. This comment applies to the instructions to questions 3.1.1, 3.2.1, 3.2.3, 3.2.4, 3.2.5, 3.2.6, 3.2.7, 3.2.8, 3.3.1, 3.3.2, 3.3.3, 3.4.1, 3.4.2 and 3.4.3.

Question 3.1: General obligations

Question 3.1.2 – Article 5.3 (Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry)

Question [3.1.2.2](#) refers to implementation of Article 12(c). FCA recommends that either question 3.1.2 be expanded to include questions about a range of measures which Parties should take to protect their public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry – of which ensuring public access to information on the tobacco industry is one – or that question 3.1.2.2 be deleted and ensuring public access to information on the tobacco industry be included in the step-by-step instructions booklet as one example of a measure which may be included in responding to question [3.1.2.1](#). In either case, it is important that promotion of public access to

information under Article 12(c) also be dealt with in question 3.2.6, which asks for information about Parties' implementation of Article 12 (Education, communication, training and public awareness).

Question 3.2: Measures relating to the reduction of demand for tobacco

Question 3.2.2 – Article 8 (Protection from exposure to tobacco smoke)

FCA considers that questions 3.2.2.2 and 3.2.2.4 should be amended to reflect the guidelines for implementation of Article 8 adopted by the COP at its second session. In question 3.2.2.2, following 'private workplaces', FCA recommends the inclusion of an additional bullet point for '*motor vehicles used as places of work (e.g. ambulances, delivery vehicles)*', which are currently dealt with in question 3.2.2.4, regarding public transport. FCA notes that the Article 8 guidelines recognize that 'motor vehicles used as places of work (for example, taxis, ambulances or delivery vehicles)' are indoor workplaces (para 26). The guidelines recommend that 'public transport' be defined to include 'any vehicle used for the carriage of members of the public, usually for reward or commercial gain' (para 22). This definition would not seem to include ambulances or delivery vehicles. While taxis are recognized as both indoor workplaces (para 26) and means of public transport (para 22), FCA considers that it is preferable that Parties report on protection from exposure to tobacco smoke in taxis in question 3.2.2.4, regarding public transport, as currently drafted. Accordingly, FCA recommends that the current bullet point for 'motor vehicles used as places of work (for example, taxis, ambulances or delivery vehicles)' in question 3.2.2.4 (regarding public transport) be amended to '*taxis*'.

Noting that Article 8 requires Parties to adopt and implement measures not only in indoor workplaces, public transport and indoor public places, but also 'as appropriate, other public places' (i.e. outdoor public places), FCA recommends the inclusion of a question following question 3.2.2.6, as follows:

3.2.2.7

- protection from exposure to tobacco smoke in outdoor public places?

That question should be followed by a further question providing examples of relevant outdoor public places, as for each of the preceding questions, for example:

3.2.2.8

If you answered "Yes" to question 3.2.2.7, how comprehensive is the protection from exposure to tobacco smoke in the following outdoor public places:

- outdoor areas of bars, nightclubs, restaurants and cafes
- outdoor cultural facilities
- outdoor stadiums and sports facilities
- outdoor waiting areas for public transport
- outdoor areas adjacent to public buildings
- outdoor markets
- playgrounds/parks
- beaches
- other (please specify: field to be inserted)

As for questions 3.2.2.2, 3.2.2.4 and 3.2.2.6, the options 'Complete', 'Partial' and 'None' should be provided for the proposed questions in question 3.2.2.8.

In question 3.2.2.7, 'Protection from exposure to tobacco smoke in outdoor public places' should be added as a fourth bullet point.

FCA notes that Article 8 requires Parties to adopt and implement effective measures providing for protection from exposure to tobacco smoke in 'areas of existing national jurisdiction' and 'to actively promote' the adoption and implementation of effective measures at other jurisdictional levels. This is a particularly important obligation in Parties where the adoption and implementation of laws and policies providing for protection from exposure to tobacco smoke occurs either in part or primarily at the sub-national level. FCA therefore considers that questions should be added asking about Parties' promotion of the adoption and implementation of measures at sub-national level, to the extent that the

adoption and implementation of measures to provide protection from exposure to tobacco smoke do not fall within areas of existing national jurisdiction. FCA recommends the addition of the following questions:

3.2.2.10

Are there any aspects of the provision of protection from exposure to tobacco smoke pursuant to Article 8 that do not fall within your national jurisdiction?

3.2.2.11

If you answered “Yes” to question 3.2.2.10, have you taken action to promote, at other jurisdictional levels, the adoption and implementation of effective measures providing for protection from exposure to tobacco smoke?

3.2.2.12

If you answered “Yes” to question 3.2.2.11, please provide a brief summary of action taken to promote adoption and implementation in sub-national jurisdictions of effective measures providing for protection from exposure to tobacco smoke.

Question 3.2.5 – Article 11 (Packaging and labelling of tobacco products)

Noting that the obligations in Article 11.1(b) and 11.2 apply to ‘each unit pack and package of tobacco products’, and ‘any outside packaging and labelling of such products’ (defined in Article 11.4 as applying ‘to any packaging and labelling used in the retail sale of the product’, which would include, for example, cartons) – and that Parties may apply different requirements to these two categories of packaging and labelling – FCA considers that questions 3.2.5.3-3.2.5.13 should be drafted to facilitate the provision of full and accurate responses in relation to both categories. As presently drafted, these questions are asked only with respect to ‘each unit packet and package’.

FCA notes that the questions were amended at COP-3, with the words ‘each unit packet and package’ replacing the words ‘packaging and labelling’ in the draft questions. In FCA’s COP-3 briefing paper, we recommended amending the draft questions so that questions were asked specifically with respect to both categories – ‘each unit pack and package’ and ‘outside packaging and labelling’. We wrote:

FCA considers that questions 3.2.5.3 and 3.2.5.12 should each be separated into two questions, as follows:

3.2.5.3

- requiring that ~~packaging and labelling~~ *each unit pack and package of tobacco products* carry health warnings describing the harmful effects of tobacco use?

3.2.5.[X]

- *requiring that any outside packaging and labelling of tobacco products carry health warnings describing the harmful effects of tobacco use?*

3.5.5.12

- requiring that ~~packaging and labelling~~ *each unit pack and package of tobacco products* contain information on relevant constituents and emissions of tobacco products?

3.2.5.[X]

- *requiring that any outside packaging and labelling of tobacco products contain information on relevant constituents and emissions of tobacco products?*

FCA continues to recommend this approach. However, if this recommendation is not adopted, FCA considers that the amendments made at COP-3 should be reversed and the original language proposed in FCTC/COP/3/16 – “packaging and labelling” – be used. This language would at least allow Parties to report on both categories – ‘unit pack and package’ and ‘any outside packaging and labelling’. This could be facilitated by clearly defining ‘packaging and labelling’ in the step-by-step instructions to include both categories.

Question 3.2.6 – Article 12 (Education, communication, training and public awareness)

FCA recommends the inclusion of an additional bullet point in question 3.2.6.4 for ‘adverse health consequences of tobacco production?’, which is part of the obligation to promote public awareness under Article 12(f).

FCA also recommends the inclusion of an additional question, following question 3.2.6.4, with respect to Parties’ implementation of their obligations under Articles 12(c) and 12(f) to adopt and implement effective measures to promote public access to information. This key aspect of Article 12 is not currently dealt with in the questions. FCA recommends the inclusion of the following question:

- public access to:
 - a wide range of information on the tobacco industry?
 - information on the adverse health, economic and environmental consequences of tobacco production and consumption?

FCA considers that question 3.2.6.5 is not sufficiently broad to accurately reflect the requirements of Article 12(e). This question should seek information on Parties’ implementation of their obligation to ‘adopt and implement effective legislative, executive, administrative or other measures to promote awareness and participation of public and private agencies and nongovernmental organizations not affiliated with the tobacco industry in developing and implementing intersectoral programmes and strategies for tobacco control’. This question should not depend on the provision of an affirmative response to question 3.2.6.1, which refers to Parties’ obligations with respect to educational and public awareness programs under Articles 12(a), 12(b), and 12(f). FCA recommends that the introductory part to 3.2.6.5 be redrafted as follows:

- awareness and participation of the following agencies and organizations in development and implementation of intersectoral programmes and strategies for tobacco control:

Question 3.2.7 – Article 13 (Tobacco advertising, promotion and sponsorship)

FCA is seriously concerned that the questions reflect an interpretation of Article 13 that is, in a number of important ways, not consistent with either the wording of Article 13 or the guidelines for its implementation adopted at COP-3. FCA considers that, if not amended, these errors in the reporting instrument will have serious consequences for Parties’ understanding, and therefore implementation, of their obligations under Article 13.

First, if a Party answers ‘yes’ to the question in 3.2.7.1 as to whether it has instituted a comprehensive ban on all tobacco advertising, promotion and sponsorship – the core obligation to which Parties have committed under Article 13 (subject to any constitutional constraints) – question 3.2.7.2 asks whether the ban covers certain specified forms of advertising, promotion and sponsorship. The implication is that a Party could have a comprehensive ban, yet not have banned some (or indeed any) of these specified forms of advertising, promotion and sponsorship. This is inconsistent with the terms of Article 13, which requires a comprehensive ban on ‘all tobacco advertising, promotion and sponsorship’ – broadly defined in accordance with Article 1 of the Convention – and with the guidelines for implementation of Article 13, which contain detailed recommendations with respect to the scope of the comprehensive ban required, including an ‘indicative (non-exhaustive) list of forms of advertising, promotion and sponsorship that fall under the ban’. With the exception of depiction of tobacco or tobacco use in entertainment media products (which the guidelines recognize may be ‘tobacco advertising and promotion’, but need not be completely banned), the guidelines recommend that each of the forms of advertising, promotion and sponsorship listed in question 3.2.7.2 be included under a comprehensive ban.² Therefore, by answering ‘yes’ to the question as to whether it has instituted a

² On ‘display and visibility of tobacco products at points of sale’, see para 8, para 14, and the third bullet point in the Appendix; on ‘the domestic Internet’ and ‘the global Internet’, see the last bullet point in the Recommendation following para 11, paras 18-21, para 48, paras 58-59, and the first bullet point in the Appendix; on ‘brand stretching and/or brand sharing’, see para 8, paras 22-24, and the sixth bullet point in the Appendix; on ‘product placement as a means of advertising or promotion’, see para 8, para 30, and the seventh bullet point of the Appendix; on ‘tobacco sponsorship of international events or activities and/or participants therein’, see paras 7-8, the third bullet point in the Recommendation following para 59 and the

comprehensive ban, a Party should be indicating that it has banned each of the listed forms. If any of these forms of advertising, promotion and sponsorship are not banned, the ban should not be described as a 'comprehensive ban'.

Second, a Party that answers 'yes' to the question as to whether it has instituted a comprehensive ban is directed to skip the questions in 3.2.7.6-3.2.7.9, relating to implementation of Article 13.4. This direction is inconsistent with the recognition in the guidelines that 'some very limited forms of relevant commercial communication, recommendation or action might continue to exist after a comprehensive ban has been implemented', meaning that Parties that have implemented comprehensive bans may still be required to meet some obligations under Article 13.4.

Third, if a Party answers 'no' to the question as to whether it has instituted a comprehensive ban, question 3.2.7.3 requests information about the Party's restrictions on tobacco advertising, promotion and sponsorship only if it indicates that it is precluded by its constitution or constitutional principles from undertaking a comprehensive ban. This means that Parties that have not or not yet instituted a comprehensive ban for reasons other than constitutional constraints are not requested to provide any information at all about their restrictions on tobacco advertising, promotion and sponsorship.

FCA recognizes that drafting questions on implementation of Article 13 is difficult. This is the case primarily because the terms 'tobacco advertising, promotion and sponsorship' cover so many different kinds of activities, and the relationship between Articles 13.2 and 13.3 and parts of Article 13.4 is difficult to discern. Recognizing these difficulties, FCA considers that it is imperative that guidance be drawn from the guidelines for implementation of Article 13 in amending the questions (and in providing further guidance on answering the questions in the accompanying step-by-step instructions booklet).

FCA recommends that the questions be redrafted as follows:

Have you adopted and implemented legislative, executive, administrative or other measures:

3.2.7.1

- instituting a comprehensive ban on all tobacco advertising, promotion and sponsorship?

Parties should be directed by the step-by-step instructions booklet to answer 'yes' to this question only if all the forms of tobacco advertising, promotion and sponsorship included in the Appendix to the guidelines are banned. If a Party answers 'no', information should be requested about its restrictions on advertising, promotion and sponsorship.

FCA considers that useful information about Parties' restrictions short of a comprehensive ban could best be provided in response to a question in the following form:

3.2.7.2

If you answered 'No' to question 3.2.7.1:

- banning or restricting the following forms of tobacco advertising, promotion and sponsorship:
 - List of forms of advertising, promotion and sponsorship drawn from the Appendix to the guidelines, with three possible answers: 'Ban', 'Restrictions', and 'None'.
- are you precluded by your constitution or constitutional principles from undertaking a comprehensive ban?

While this question would become a lengthy part of the questionnaire, this is an inevitable product of the number of available forms of tobacco advertising, promotion and sponsorship. FCA considers that the only practicable alternative would be to ask a basic 'yes/no' question, such as:

- restricting all tobacco advertising, promotion and sponsorship?
- banning or restricting some tobacco advertising, promotion and sponsorship?

nineteenth bullet point in the Appendix; on 'socially responsible' contributions or activities, see paras 25-28 and the nineteenth bullet point of the Appendix; on 'cross-border advertising, promotion and sponsorship originating from your territory', see paras 46-50; on 'cross-border advertising, promotion and sponsorship entering your territory', see paras 51-52.

Such a question would be unlikely to elicit the kind of detailed information which could be provided in response to a list of examples of forms of advertising, promotion and sponsorship.

Consistent with the approach to Article 13.4 adopted in the guidelines, the following questions should then be asked:

3.2.7.3

Whether you answered “Yes” or “No” to question 3.2.7.1:

- prohibiting, in any forms of tobacco advertising, promotion or sponsorship not or not yet prohibited, promotion of tobacco products by means that are false, misleading, deceptive or likely to create an erroneous impression about their characteristics, health effects, hazards or emissions?
- requiring that health or other appropriate warnings or messages accompany all forms of tobacco advertising, promotion or sponsorship not or not yet prohibited?
- requiring disclosure by the tobacco industry to relevant governmental authorities of information on its engagement in any forms of tobacco advertising, promotion or sponsorship not or not yet prohibited?
If you answered “Yes”, making this information available to the public?
- cooperating with other Parties in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising?
- imposing penalties for cross-border tobacco advertising, promotion and sponsorship entering your territory that are equal to penalties applicable to domestic advertising, promotion and sponsorship originating from your territory?

Question 3.3: Measures relating to the reduction of the supply of tobacco

Question 3.3.1 – Article 15 (Illicit trade in tobacco products)

In respect of question 3.3.1.1, FCA repeats the comments made above with respect to questions 3.2.5.3-3.2.5.13 on Article 11. The relevant obligation in Article 15.2 applies to ‘all unit packets and packages of tobacco products and any outside packaging of such products’. The revision made to this question at COP-3 – amending ‘packaging’ to ‘all unit packs and packages’ – removes the opportunity to provide a response with respect to ‘outside packaging’. FCA recommends that question 3.3.1.1 be followed by a separate question about outside packaging, as follows:

- requiring marking of any outside packaging of tobacco products to assist in determining the origin of the product?

If this recommendation is not adopted, FCA considers that the original language in the draft questions – ‘packaging’ – should be used, with ‘packaging’ defined in the step-by-step instructions to include ‘all unit packs and packages and any outside packaging of tobacco products’.

FCA recommends the inclusion of an additional question to ask about Parties’ implementation of Article 15.4(b) – a critical aspect of Article 15 that has been omitted from the reporting instrument. FCA recommends that the following question be included following question 3.3.1.7:

- providing appropriate penalties and remedies against illicit trade in tobacco products, including counterfeit and contraband cigarettes?

Question 3.4.3 – Article 20 (Research, surveillance and exchange of information)

In question 3.4.3.4, FCA recommends that, to reflect the content of Articles 20.4 and 20.3, additional bullet points be included for ‘*information on the manufacture of tobacco products*’, ‘*data on tobacco consumption*’, and ‘*data on social, economic and health indicators related to tobacco consumption*’.