



This document relates to item 5.1 of the provisional agenda

Seventh Session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control,  
7-12 November 2016, New Delhi

### FCA Policy Briefing

## Status of the Protocol to Eliminate Illicit Trade in Tobacco Products

#### Key recommendations

- FCA recommends that COP7 establish an inter-governmental working group (IGWG) to hold meetings in 2017 so that FCTC Parties have an opportunity to begin work on addressing key issues of ITP implementation as soon as possible. The COP should provide clear guidance on the IGWG's agenda and documentation;
- FCA recommends that the mandate of the expert panel be extended. Apart from tasks to support implementation and ratification of the ITP, the Expert Panel should be invited to provide input to the agenda for IGWG and assist with development of necessary documentation for its meetings;
- COP7 should allocate sufficient resources both for the IGWG meetings and the work of the expert panel;
- COP7 should send a clear message reminding Parties that any solutions to illicit trade in tobacco products which are provided by, on behalf, under the influence, designed, facilitated or owned by the tobacco industry, directly or indirectly, do not fulfill requirements of the ITP and are unacceptable. A decision on this matter should be adopted at COP7.
- FCA calls on all Parties to the FCTC to advance with implementation of Article 15 of the FCTC which contains practical measures on how to address illicit trade in tobacco products.

#### Why this is important

Tackling illicit flows in tobacco products is key to effective implementation of FCTC Article 6. Practical measures on what governments should do in this regard are included in the FCTC itself, under Article 15. Moreover, four years ago, the fifth session of the FCTC Conference of the Parties (COP5) adopted the Protocol to Eliminate Illicit Trade (ITP).

At COP7, critical decisions will need to be made on how to step up global, regional and country-level efforts to address illicit trade in tobacco products and ensure timely preparations for the first session of the Meeting of the Parties (MOP1) to the ITP.

## **Preparations for MOP1**

In its report to COP7, the Convention Secretariat suggests that there is a chance the ITP will enter into force in 2017<sup>1</sup>. This situation could result in a delay of 12 months, or longer, between the ITP's entry into force and MOP1. That is because, according to the text of the Protocol, MOP1 must be held immediately before or immediately after the next regular session of the COP<sup>2</sup>. The next regular session occurring after a 2017 entry into force would be COP8, which will be held in late 2018<sup>3</sup>.

Whether MOP1 takes place immediately before or after COP8, there will be no international action to address implementation of the ITP until late 2018. This is a particular problem with respect to Article 8.1 as there is a five-year deadline for implementation, and there are significant technical and governance issues which need to be resolved by international negotiation to ensure that an effective "global information-sharing focal point" can be established.

In order to address this situation and ensure that work on implementing time-bound provisions of the ITP begins as soon as possible, the Secretariat is proposing the following two options:

- COP7 sets up an inter-sessional mechanism with a mandate to work on issues that need to be agreed upon at MOP1. This essentially means that substantial technical discussions, in particular with respect to the provisions of Article 8 (implementation of which is time bound) would take place through this inter-sessional mechanism even before formal negotiations begin at MOP1 around COP8.
- Six months after the ITP enters into force, an extraordinary session of the COP could be held and MOP1 could take place then.

Holding MOP1 at the time of an extraordinary session of the COP has, in FCA's view, two drawbacks. First, the timing of MOP1 would be unpredictable, as it cannot be determined until after 40 ratifications have taken place. In addition, holding MOP1 at the time of an extraordinary session may pose many procedural challenges and undermine the credibility of the MOP. This is because the text of the Protocol clearly states that MOP1 "shall be convened by the Convention Secretariat immediately before or immediately after the next regular session of the Conference of the Parties". This text is contained in the Protocol, to which 23 countries and the European Union have already become Parties. Given the importance of MOP1, the session should take place exactly as agreed upon, that is at the time of a regular COP session.

FCA, therefore, recommends that COP7 establish an inter-sessional mechanism, such as an inter-governmental working group (IGWG), so that FCTC Parties have an opportunity to begin work on addressing key issues of ITP implementation as soon as possible. The IGWG should meet in 2017, and necessary budgetary provisions should be made in the existing budget and workplan to make this happen.

## **Benefits of holding an IGWG in 2017**

There are a number of good reasons why Parties should meet to discuss the ITP in 2017. Some governments are already considering putting in place national and regional tracking and tracing

---

<sup>1</sup> COP7 report FCTC/COP/7/5 para 27

<sup>2</sup> Article 33.1 of the ITP states "A Meeting of the Parties is hereby established. The first session of the Meeting of the Parties shall be convened by the Convention Secretariat immediately before or immediately after the next regular session of the Conference of the Parties following the entry into force of this Protocol."

<sup>3</sup> COP7 report FCTC/COP/7/35 para 5

regimes which will need to interact smoothly with the global information-sharing focal point. For example, by the end of 2017 the European Union will need to adopt its own technical standards for a tracking and tracing system<sup>4</sup>. Holding an IGWG meeting in 2017 will help ensure that the EU system, as well as systems currently implemented or developed by other countries, are compatible with any future global tracking and tracing regime as mandated by ITP Article 8.1.

Another reason that governments might benefit from global discussions on implementing ITP provisions is to exchange experiences, best practices and lessons learned. While there is a need to advance implementation of time-bound provisions, namely under Article 8, many other provisions of the ITP, as well as obligations under FCTC Article 15, provide important practical and tactical suggestions on how to address illicit trade in tobacco products, including:

- Other measures to control the supply chain of tobacco, tobacco products and manufacturing equipment such as licencing (Article 6), due diligence (Article 7), record keeping (Article 9) and security and preventative measures (Article 10);
- Sanctions and penalties (Articles 14-18);
- International co-operation and information exchange to enhance law enforcement (Article 27); and
- Technical support, capacity building and assistance to enable the objective of the Protocol to be reached.

### **IGWG preparations and agenda**

To ensure a productive IGWG meeting takes place in 2017, COP7 should take time to discuss its agenda and necessary preparatory work. Parties may wish to particularly propose specific points that should be included on the agenda and provide guidance on how the agenda will be finalised. The COP should also identify key information and documents that will need to be available ahead of the meeting.

In FCA's view, the following five broad areas of work could be included in the meeting agenda:

- Architecture and arrangements for the global information-sharing focal point;
- Implementation of ITP measures at country and, where appropriate, regional level;
- Provision of technical assistance to support ITP implementation;
- Strategies to address tobacco industry efforts to undermine implementation of the ITP;
- Involvement of inter-governmental organisations in implementing the ITP.

Suggestions for possible topics that could be addressed under each of these areas are provided below.

#### *Global information-sharing focal point*

At the outset of an IGWG meeting, governments should share their views on the architecture and arrangements for the global information-sharing focal point. It will be important to identify key elements of tracking and tracing regimes and the ways in which they will need to interact with the global system, and with each other, while being in accordance with the ITP provisions. Only once structural parameters are identified, should governments address technical specifications of the global focal point.

#### *Implementation of the ITP provisions at country level*

---

<sup>4</sup> See details at: [http://ec.europa.eu/health/tobacco/docs/implementation\\_plan\\_en.pdf](http://ec.europa.eu/health/tobacco/docs/implementation_plan_en.pdf)

Exchange of views on the global information-sharing focal point will likely need to be followed by discussions on technical aspects of national and regional tracking and tracing regimes. Governments could discuss benefits and drawbacks of existing systems and minimum international specifications on traceability. Aside from their technical specifications, governments may also share experiences on acquiring these regimes through procurement and other strategies that lead to putting in place cost-effective solutions. In addition, governments may find it useful to exchange views on how to minimise undue influence of vendors and to prevent corruption.

Governments should also discuss implementation of other provisions of the ITP, such as supply chain controls and sanctions and penalties. IGWG can begin the work needed to clarify priority areas for development of guidelines to the ITP to help ensure that implementation at country level is in line with best practices.

#### *Available and necessary technical assistance*

Many governments are likely to require technical assistance with ITP implementation. Apart from addressing immediate needs, discussions could focus on how to best assess the nature and size of illicit trade at country level or regionally. Tools such as situational or threat analysis could be particularly helpful in this regard. Some governments already have comprehensive strategies in place and can help provide best practice examples which can assist those yet to put in place comprehensive measures to tackle the illicit trade in tobacco prior to entry into force of the Protocol.

#### *Involvement of inter-governmental organisations in implementing the ITP*

Aside from technical assistance provided by governments, a number of intergovernmental organisations (IGOs) may contribute to ITP implementation. In fact, ITP Article 35 states that the MOP may request cooperation of competent IGOs to provide support with ITP implementation. The IGWG may discuss specific requests for assistance to be endorsed by MOP1, particularly with regards to the United Nations Office on Drugs and Crime (UNODC) and the World Customs Organisation (WCO). In addition, discussions could focus on overlapping international commitments under the ITP and the UN Convention Against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC).

#### *Tobacco industry efforts to undermine implementation of the ITP*

Sharing experience on industry tactics and agreeing strategies to address these tactics could be an additional objective of IGWG negotiations. The industry attempts to influence government decisions on how to address illicit trade, particularly by promoting its own tracking and tracing technology called CODENTIFY.

CODENTIFY was developed by Philip Morris International (PMI) and licenced to the other major transnational tobacco manufacturers. It is a coding system that the tobacco industry wants governments to adopt as a solution to their obligations to fight illicit tobacco trade, particularly as mandated by the ITP. It is not a transparent or open source system, and although Philip Morris has attempted to distance itself from CODENTIFY, which was 'acquired' by a company called Inexto, Inexto retains close links with PMI through its management and governance. According to the FCTC Secretariat, CODENTIFY does not meet the requirements of ITP Article 8.2: that the tracking and tracing system should be "controlled by the Party".<sup>5</sup>

---

<sup>5</sup> See FCTC website - The Protocol to Eliminate Illicit Trade in Tobacco Products: Questions and Answers: <http://www.who.int/fctc/protocol/faq/en/index2.html#R18>

During the IGWG meeting, governments should also discuss the applicability of FCTC Article 5.3 and its guidelines on the implementation of different ITP provisions. For example, while the tobacco industry might need to be involved in providing some of the information for the tracking and tracing regimes, it should not be involved in the regimes' management and analysis. Parties will likely need clear guidance on the level of industry involvement, which should be developed as soon as possible so that Parties might benefit from it when making procurement decisions.

### **COP7 should say no to tobacco industry solutions to ITP**

Given the intensity of tobacco industry efforts to influence government decisions on technical solutions to ITP implementation, COP7 should take immediate action. It should send a clear message reminding Parties that any solutions to illicit trade in tobacco products which are provided by, on behalf, under the influence, designed, facilitated or owned by the tobacco industry, directly or indirectly, do not fulfil requirements of the ITP and are unacceptable. A decision on this matter should be adopted at COP7.

### **The role of the Panel of Experts**

At COP6, Parties agreed to enhance availability of technical assistance for implementation of the ITP by setting up a panel of experts. As per that decision, the panel is currently composed of two experts per WHO region.

FCA welcomes the establishment of the panel and recommends its mandate be extended. Given the equal geographic representation and its technical competencies, the panel is in the best position to support preparations for the IGWG. In particular, the panel should be invited to provide expert input to the agenda for IGWG and assist with development of necessary documentation for the meeting.

At the same time, the panel should be requested to continue its work to support governments with implementation and ratification of the ITP. In particular, the work of the panel should focus on reviewing draft legislation, regulations, strategies and other documentation pertaining to countries' implementation of the Protocol. COP7 should allocate sufficient funding for the work of the expert panel, both in the current (2016-2017) and upcoming (2019-2018) budget and workplan.

### **No need to wait to fight illicit trade, implement Article 15 of the FCTC**

While COP needs to decide on important steps to support ratification and implementation of the ITP, all Parties to the FCTC should nonetheless advance implementation of Article 15 of the FCTC. Article 15.2 requires Parties to adopt and implement effective legislative, executive and administrative measures with regards to unique markings of tobacco products. These markings should indicate the destination where the product is meant to be sold. In addition, Article 15.2 also states that Parties should "consider, as appropriate, developing a practical tracking and tracing regime that would further secure the distribution system and assist in the investigation of illicit trade".

Countries do not need to wait for the Protocol to enter into force before taking measures to address illicit trade. In fact, putting in place measures to address illicit trade in tobacco products should go hand-in-hand with implementation of FCTC Article 6 on tobacco taxes.