



## FCA Policy briefing: FCTC Article 19 - liability

### Key recommendations

- COP should adopt the recommendation of the Expert Group to request the Convention Secretariat to:
  - Enable and encourage the voluntary sharing of relevant information, experience and expertise among the Parties through a protected website;
  - Develop a database of legal and scientific experts with experience in tobacco litigation, including liability, and establish a mechanism for the recommendation of experts on request of Parties engaged in relevant actions; and
  - Prepare, maintain and make available to Parties a comprehensive list of the existing resources that may assist Parties in dealing with civil and criminal liability and other legal challenges where necessary.
  
- COP should extend the mandate of the Expert Group created in accordance with its decision FCTC/COP5(9) to continue its valuable work and in particular to:
  - Include additional criminal and international expertise;
  - Complete research into the remaining areas of law, including criminal liability; and
  - Based on existing best practices identified in Annex 3 of the Expert Group's report, elaborate essential legal elements and/or model laws that could be adopted by the widest possible range of Parties to advance Article 19 implementation.
  
- As Article 19 is a complex technical area of the treaty that stretches beyond public health expertise, Parties will need to work closely with an array of domestic and international legal experts. Parties should be encouraged to identify experienced lawyers within Ministries of Justice to participate in the work of the Expert Group in conjunction with the Secretariat. This will ensure multisectoral coordination and the capacity-building of those in government who might be tasked with engaging in legal actions on behalf of their governments.

### Background

As has been extensively documented in a number of legal cases, including those contained in Annex 1 of the Expert Group's report, tobacco companies have aggressively promoted the uptake and consumption of their highly addictive products while concealing their harmful effects. In addition, tobacco companies have undermined, often through the legal system, governments' efforts to

regulate the sale and manufacture of tobacco products and to inform the public about the dangers of tobacco use.

A number of courts in different jurisdictions around the world have already found tobacco companies liable for civil wrongs, including fraud, in the way that they have manufactured sold and marketed their products.

Some Parties have already adopted legislation, or used their existing laws, to litigate against the tobacco industry. However, according to the Convention Secretariat's report to COP6 (FCTC/COP/6/5), only 26 percent of Parties filing reports in 2014 had civil liability measures specific to tobacco control in place, and few of these have actually filed suit against tobacco companies to recover health-care costs.

It is clear from the report of the Expert Group that legal cultures and systems vary greatly and a one-size-fits all approach will be impossible. Not all legislative options would be appropriate for all jurisdictions or all types of litigation.

The Expert Group identified seven broad areas of civil and criminal liability that could be facilitated by the adoption of legislation appropriate for specific legal cultures and systems. These include legislation to:

1. Enable victims to use class action procedures;
2. Enable states, insurers and health care providers to recover health-care costs;
3. Facilitate claims for injunctive relief in relation to the conduct of tobacco companies;
4. Facilitate 'public interest' litigation to allow anyone to take legal action to enforce tobacco control measures or pursue remedies for tobacco industry conduct;
5. Amend the rules of procedure and/or evidence to facilitate civil claims for compensation and other forms of relief;
6. Amend and/or codify liability standards and available legal defences to facilitate civil claims against the tobacco industry;
7. Create and strengthen civil and criminal offences to enforce tobacco control measures

In order to assist Parties to litigate against the tobacco industry or to draft legislation to enable them to do so, international cooperation and the exchange of information, as well as other forms of technical assistance, will be critically important. The Expert Group has recommended that support for Parties should focus on implementation of Article 19 at the national level. Its suggestions for enabling critical exchange of information include a protected website and the creation of a referral system for access to relevant expertise.

### **Conclusion**

FCA considers that the Conference of the Parties should adopt the recommendations in the Expert Group report. In view of the highly technical nature of the subject matter, COP should extend the mandate of the existing working group to develop further guidance to the Parties in the form of essential legal elements and/or model laws that can be adapted at the national level to facilitate the implementation of Article 19. It should provide resources for meetings of the Expert Group as well as the identification of further legal expertise, particularly in the field of criminal law.

Finally, COP should mandate the Convention Secretariat to produce a comprehensive list of existing resources, develop a database of legal and scientific experts with experience in tobacco litigation, and create a protected website to enable and encourage cooperation and exchange of information.