

Key recommendations on the Revised Chairperson's text for a protocol on illicit trade in tobacco products

Third session of the Intergovernmental Negotiating Body
on a protocol on illicit trade in tobacco products
28 June – 5 July 2009, Geneva, Switzerland

The Framework Convention Alliance (FCA) has prepared detailed comments and recommendations designed to strengthen, clarify and simplify the Revised Chairperson's text. They are presented in 'Comments on the Revised Chairperson's text for a protocol on illicit trade in tobacco products (FCTC/COP/INB-IT/3/3)', available at www.fctc.org.

This document highlights key recommendations made in FCA's Comments. References to draft Article numbers are those used in the 'FCA Recommended Text' in FCA's Comments, which proposes some renumbering of the Revised Chairperson's text.

Parts I and II: Introduction and General obligations

FCA broadly supports the revised draft Preamble, Article 3 (Scope of the protocol) and Article 4 (General obligations). FCA recommends that:

- draft Article 1 (Use of terms) should be revised to ensure that clear definitions of all key terms are included; and
- draft Article 2 (Relationship between the Protocol and other agreements and legal instruments) should be limited to any necessary additions to Article 2 of the WHO Framework Convention on Tobacco Control (FCTC). In particular, draft Article 2.4, which would conflict with Article 2 of the FCTC, making Parties' rights, obligations and responsibilities under the protocol subordinate to all their 'other rights, obligations and responsibilities ... under international law', should be deleted.

Part III: Supply chain control

FCA recommends that, to avoid inconsistencies in and difficulties in applying the various proposed supply chain control measures, the activities to be covered should be clearly set out in a single list, with licensing, due diligence, record-keeping and security and preventive measures applying to legal and natural persons engaged in these activities. The activities covered, as proposed in draft Article 5.1 in FCA's Comments, should be:

- manufacturing, commercial import, commercial export, warehousing, brokering or wholesaling of tobacco products;
- manufacturing, commercial import, commercial export, brokering, wholesaling or retailing of manufacturing equipment used in the manufacture of tobacco products; and
- commercial import, commercial export, warehousing, primary processing, wholesaling or brokering of tobacco, excluding wholesaling or primary processing by the grower;

with, in most cases, encouragement to apply the measures to commercial growing of tobacco and retailing of tobacco or tobacco products (as proposed in draft Article 5.2).

Licensing

- FCA supports the proposed requirement that Parties prohibit covered activities except pursuant to a licence (draft Article 5.1);
- FCA supports the proposed requirement that Parties require the provision of information in licence applications, including information about the identity of the applicant, its proposed activities and any engagement in illicit trade, but recommends clarification of some of the relevant provisions (draft Article 5.3); and
- FCA recommends the inclusion of an additional requirement that Parties refuse to grant a licence if the applicant is unfit to carry out the activities (draft Article 5.3).

Due diligence

- FCA supports the proposed requirements that Parties require persons engaged in covered activities to (draft Article 6.2):
 - establish that persons with whom they engage in relevant transactions hold a valid licence, if applicable; and
 - obtain information about the purpose of relevant transactions;
- FCA does not consider that it is necessary for Parties to require persons engaged in covered activities to obtain all the information that persons with whom they engage in relevant transactions would be required to provide to authorities in a licence application;
- FCA recommends that persons engaged in covered activities be required to monitor relevant transactions and notify authorities of any suspicious activities or omissions (draft Article 6.3); and
- FCA supports the proposed requirement that persons who are unfit to conduct covered activities (including those who have engaged in illicit trade) be prevented from continuing to conduct the activities, but recommends that this 'blocking' be done by Parties' authorities rather than by private persons, by cancelling the person's license, where applicable, and taking effective measures to prevent other persons transacting with the person (draft Article 6.5).

Tracking and tracing

FCA supports the establishment of a global tracking and tracing system for tobacco products, including:

- requirements for marking of, and recording of information about, both locally manufactured and imported products, with obligations applying through to pack level;
- ready access to the information by Parties; and
- sharing of the recorded information between Parties.

FCA recommends the establishment of a working group at INB-3 to clarify the details of the system proposed in draft Article 7 of the Revised Chairperson's text.

Record-keeping

FCA broadly supports the proposed requirements for record-keeping by persons engaged in covered activities (draft Article 8).

Security and preventive measures

FCA supports the proposed requirements:

- that persons engaged in covered activities take all reasonably practicable measures to prevent diversion of tobacco products into illicit trade channels, and recommends that this requirement extend to tobacco and manufacturing equipment (draft Article 9.1);
- that Parties take measures to prevent ‘intermingling’ of tobacco products with non-tobacco products, but recommends that these apply not to any intermingling, but to ‘intermingling’ that conceals tobacco products from authorities or disguises them as non-tobacco products (draft Article 9.2);
- that Parties impose restrictions on forms of payment for transactions engaged in in pursuance of covered activities, but recommends clarification of the proposed provision (draft Article 9.3); and
- that persons engaged in covered activities be required to supply only in amounts commensurate with reasonably anticipated consumption or use in the intended market of use or retail sale (draft Article 9.4).

Sale by remote means, including internet

FCA broadly supports the proposed requirement that Parties prohibit telecommunication-based sales of tobacco and tobacco products (the second option proposed in draft Article 10 of the Revised Chairperson’s text) – but recommends that the ban apply only to retail sales, and not to business-to-business transactions. It should also be extended to cover:

- retail sales of tobacco or tobacco products by *any* remote means;
- knowingly providing services that facilitate payment for such sales; and
- knowingly transporting or delivering tobacco or tobacco products the subject of such sales.

Free-trade zones

FCA broadly supports the proposed requirement that no tax, regulatory, or similar advantages in free-trade zones apply to tobacco, tobacco products or manufacturing equipment, but recommends that the provision be clarified to explicitly require Parties to prohibit the introduction of these items into free-trade zones (draft Article 11), except:

- by a natural person for personal use; or
- for sale to persons ordinarily present in the zone, provided duties, taxes or other charges ordinarily applicable are applied.

Duty-free sales

FCA recommends that Parties be required to prohibit all sales of tax-reduced, tax-free, duty-reduced and duty-free tobacco or tobacco products to international travellers, not only those occurring in free-trade zones (draft Article 12).

Part IV: Offences and sanctions

- FCA considers that Parties should be required to establish a range of offences under the protocol, which may be criminal, civil or administrative (draft Article 13);
- FCA recommends that the proposed link between the protocol and the United Nations Convention against Transnational Organized Crime (UNTOC) be strengthened, with Parties agreeing (draft Article 15):
 - to ensure that the most serious forms of illicit trade are established as serious crime (ie punishable by a maximum penalty of at least 4 years imprisonment or a more serious penalty); and
 - to provide copies of their laws doing so to other Parties through the Secretariat;
- FCA supports the proposed requirement that Parties make offences subject to effective, proportionate and dissuasive sanctions, and recommends that these sanctions include licence suspension or cancellation, monetary sanctions and imprisonment (draft Article 15); and
- FCA broadly supports the proposed requirements relating to liability of legal persons, search and seizure, and special investigative techniques, and recommends that these apply not only to offences under the protocol, but to all forms of illicit trade (draft Articles 14, 16 and 19). FCA also broadly supports the proposed requirements relating to seizure payments and destruction, but recommends some clarification of the proposed provisions (draft Articles 17 and 18).

Part V: International cooperation

- FCA supports comprehensive provisions on information sharing in relation to prevention, detection, investigation and prosecution of illicit trade, and recommends the establishment of a working group at INB-3 to clarify and streamline the draft provisions (as proposed in relation to draft Articles 20, 21, 22, 24 and 26 of the Revised Chairperson's text); and
- FCA supports comprehensive provisions on cooperation in prevention, detection, investigation and prosecution of illicit trade, including law enforcement cooperation, but recommends that these provisions apply not only to offences under the protocol, but to all forms of illicit trade (draft Articles 23, 24, 25 and 26).

Parts VI, VII, VIII, IX and X: Institutional provisions

- FCA broadly supports the proposed requirements for reporting, institutional arrangements and financial resources, settlement of disputes, development of the protocol and final provisions, but recommends some clarifications to the proposed provisions (draft Articles 27-42); and
- FCA recommends the inclusion of an additional provision encouraging Parties to require tobacco manufacturers and other persons engaged in covered activities to meet the costs of implementation of the protocol, including through taxes, licence fees and monetary sanctions (draft Article 31.4).