

TRANSPARENCY

Key recommendation

Add an article to Part II (General Obligations) or Part V of the Protocol (International Co-operation) enshrining the principle of maximum transparency with respect to interactions with the tobacco industry.

Introduction

A frequent topic of discussion at past INB sessions has been interaction with the tobacco industry. This reflects the complex nature of illicit trade control, particularly as compared to many other aspects of tobacco control. For example, in implementing Article 11 on packaging and labelling, it is a relatively simple matter to ensure complete transparency in government-industry interactions: relevant input from the tobacco industry is likely to be limited to unreliable claims about the possible speed of implementation, and this can be provided through a public process.

In implementing Article 15, and the Protocol, however, there is a range of possible interactions. Investigation of suspected criminal activity frequently requires a level of secrecy – it would likely be counterproductive, for example, if police officers were required to make public the names of suspects and potential witnesses they interviewed merely because the latter were employed by tobacco companies. Other types of auditing and enforcement activity may also generate frequent interaction with the tobacco industry, some of which cannot be immediately made public.

Having said this, there can be no doubt that FCTC Article 5.3 and Article 5.3 Guidelines apply to the implementation of Parties' Article 15 obligations and, in future, to their Protocol obligations. While most aspects of illicit trade control are not normally carried out by agencies whose primary mandate is public health, the Protocol is to be adopted by the FCTC Conference of the Parties (COP). The COP decision that created the INB (FCTC/COP2(12)) explicitly reaffirmed "the importance of Article 5.3 of the WHO Framework Convention on Tobacco Control, which requires the Parties to act to protect their public health policies from commercial and other vested interests of the tobacco industry in accordance with national law".



This was carried over in the negotiations on draft Article 7, which (in 7.13) specifies: “Each Party shall ensure that its designated competent national authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of the provisions of this Article.”

This provision is welcome. However, there is no clear reason for mentioning Article 5.3 obligations only in the context of Article 7 implementation. We suggest that a more general obligation, in Part II or Part V of the Protocol, would be more helpful for Protocol implementation.

Transparency as a safeguard against regulatory capture

Articles 6 and 8, as drafted by the informal working group, specifically qualify a Party’s obligations as being “in accordance with its national law[s] or legally binding and enforceable agreements”. As mentioned in our brief about Supply Chain Control, FCA’s view is that these references should be deleted, as they appear to allow Parties to contract out of Protocol obligations via agreements with unspecified third parties.

However, the language proposed by the informal working group does highlight an important point: Parties have a wide range of agreements with tobacco companies about different aspects of illicit trade control. While the European Union (EU) agreements with major tobacco companies have attracted the most attention, Canada also signed agreements with three companies during the course of Protocol negotiations; many more countries have memoranda of understanding with tobacco companies, particularly on customs issues.¹ It is reasonable to assume that for every agreement that has been made public, there were one or more attempts to negotiate agreements that failed. It is also reasonable to assume that there are many agreements whose existence and/or text have not even been made public.

Tobacco companies’ motivations for entering into agreements with governments may vary:

- In some cases, agreements may settle or forestall litigation;
- Agreements may have public relations value for companies, as part of so-called “Corporate Social Responsibility” strategies;
- Agreements may allow companies to nudge governments into concentrating their enforcement efforts on the aspects of illicit trade that are particularly advantageous to tobacco companies – particularly enforcement of industry trademarks, i.e. a focus on “counterfeit”;
- Agreements may provide companies with more credibility and access to lobby governments against vigorous FCTC implementation, particularly with respect to Article 6 (tax and price measures) and, more recently, Article 11. (Cf. Discussions about plain packaging.)

Of course, formal agreements are not always necessary in order for industry “co-operation” with governments to yield results for the industry. Tobacco companies have a long history of offering training or sponsoring meetings for tax, customs and police officials.

¹ Cf. the recent agreement between Imperial Tobacco and the French customs service, available on-line at <http://www.douane.gouv.fr/page.asp?id=4255> .

In short, tobacco companies have an incentive to pursue a “regulatory capture” strategy – pushing government agencies to defend the companies’ private interests rather than the general public interest. To be effective in controlling illicit trade, and for good governance reasons, Parties have an interest in safeguarding against regulatory capture – and the single biggest safeguard is transparency.

It is worth emphasising that this is not simply a matter of prudent domestic policy – Parties have an interest in other Parties maintaining appropriate levels of transparency. For example, a Party that is trying to decide its priorities with respect to illicit trade control may need to evaluate information on illicit trade trends that it receives from its major trading partners. To do so, it would clearly be useful to know whether information from its partners is more or less influenced by the tobacco industry.

FCA accordingly proposes a new article, to be added to either Part II or to Part V, which would read:

In implementing their obligations under this Protocol, Parties shall ensure the maximum possible transparency with respect to any interactions they may have with the tobacco industry, including, inter alia, any relevant activities, agreements, understandings or undertakings.

FCA would also draw Parties’ attention to the discussion of “Corporate Social Responsibility” in Article 5.3 guidelines, and particularly recommendations 6.1 and 6.2, which are equally applicable to efforts to control illicit trade in tobacco products:

- *Parties should ensure that all branches of government and the public are informed and made aware of the true purpose and scope of activities described as socially responsible performed by the tobacco industry;*
- *Parties should not endorse, support, form partnerships with, or participate in activities of the tobacco industry described as socially responsible.*

Public communications promoting “partnerships” with the tobacco industry should accordingly be avoided as much as possible.