

Briefing 6:
**Adoption of guidelines for implementation of Article 13
(Tobacco advertising, promotion and sponsorship) and
recommendations on further measures relating to cross-
border tobacco advertising, promotion and sponsorship**

**Third session of the Conference of the Parties to the
WHO Framework Convention on Tobacco Control
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Recommendations

The Framework Convention Alliance strongly endorses the draft guidelines for implementation of Article 13 (Tobacco advertising, promotion and sponsorship) and recommendations on further measures that would contribute to the elimination of cross-border advertising, promotion and sponsorship (Document FCTC/COP/3/9), and recommends that the third session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control:

- adopt the draft guidelines (Annex 1) in full and without change;
- note the recommendations on elements for possible inclusion in a protocol on cross-border advertising, promotion and sponsorship (Annex 2), and defer consideration of the need for a protocol until the recommendations on other measures that would contribute to the elimination of cross-border advertising, promotion and sponsorship have been implemented; and
- adopt the recommendations on measures to facilitate international cooperation for the elimination of cross-border advertising, promotion and sponsorship (Annex 3), ensuring that, where appropriate, the recommended measures are also applied in respect of domestic tobacco advertising, promotion and sponsorship.

Background

It is well established that tobacco advertising, promotion and sponsorship increase tobacco consumption, and that comprehensive bans on tobacco



advertising, promotion and sponsorship decrease tobacco consumption.¹ Parties to the WHO Framework Convention on Tobacco Control (FCTC) recognize this with the strong obligations to which they have committed under Article 13: to undertake a comprehensive ban of *all* tobacco advertising, promotion and sponsorship within a period of five years after entry into force of the FCTC (unless prevented from undertaking a comprehensive ban by their constitution or constitutional principles, in which case they commit to applying restrictions on *all* tobacco advertising, promotion and sponsorship).

The comprehensiveness of bans on tobacco advertising, promotion and sponsorship is central to their effectiveness. Where only 'traditional' forms of advertising, promotion and sponsorship are banned, the tobacco industry finds other, often indirect or covert, ways to promote its products. Modern marketing techniques range far beyond 'traditional' means of promotion to include activities such as brand stretching, brand merchandising, point of sale promotion, packaging, product placement, corporate promotion and 'corporate social responsibility' activities. If bans apply only to some promotional strategies, the tobacco industry shifts its promotional resources to those forms of advertising, promotion and sponsorship that have not been prohibited.

To ensure that bans (or restrictions) under Article 13 apply to *all* tobacco advertising, promotion and sponsorship, Parties to the FCTC have agreed in Article 1 to very broad definitions of the relevant terms: 'tobacco advertising and promotion' means 'any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly'; 'tobacco sponsorship' means 'any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly'.

Thus, under the FCTC:

- 'tobacco advertising and promotion' extends to any kind of commercial activity: it applies not only to '*communications*', but also to '*recommendations*' or '*actions*', not only by the tobacco industry, but by any person or entity acting in a commercial context;
- 'tobacco sponsorship' applies to '*any form of contribution*', whether financial or otherwise, regardless of how or whether that contribution is acknowledged or publicized, and not only to contributions made by the tobacco industry, but to contributions made by any person or individual.

¹ See generally US National Cancer Institute, *The Role of the Media in Promoting and Reducing Tobacco Use* (Tobacco Control Monograph 19, US Department of Health and Human Services, National Institutes of Health, National Cancer Institute, August 2008), available online at <http://www.cancercontrol.cancer.gov/tcrb/monographs/19/index.html>. For more information on the findings of this major monograph, see FCA Fact sheet, 'The impact of tobacco marketing on tobacco consumption and the effectiveness of comprehensive bans: Findings of the monograph on *The Role of the Media in Promoting and Reducing Tobacco Use*', available at www.fctc.org. See also H Saffer and F Chaloupka, 'The effect of tobacco advertising bans on tobacco consumption' (2000) 19(6) *Journal of Health Economics* 1117-37; H Saffer, 'Tobacco advertising and promotion' in P Jha and FJ Chaloupka (eds), *Tobacco control in developing countries* (2000) 215-36.

Both terms:

- apply to activities that have a promotional '*aim, effect or likely effect*' – it does not need to be proved that an activity is intended to be promotional or that it has a promotional effect;
- apply to the promotion not only of particular tobacco products but of *tobacco use generally* – it is not only promotion of particular brands or products that is covered, but also promotion of smoking or other tobacco use; and
- apply where the promotion of a tobacco product or tobacco use is *indirect* and not only where it is direct, recognizing that promotion does not need to be direct to be effective.

Parties to the FCTC are required to address *cross-border* tobacco advertising, promotion and sponsorship as part of their comprehensive ban (or restrictions). As the Foreword to the Convention notes, the FCTC was 'developed in response to the globalization of the tobacco epidemic', with 'global marketing' and 'transnational tobacco advertising, promotion and sponsorship' two factors that have significantly contributed to the 'explosive increase in tobacco use'. Article 13 requires each Party, subject to the legal environment and technical means available to it, to include within its comprehensive ban (or restrictions) cross-border advertising, promotion and sponsorship *originating from* its territory; and recognizes Parties' sovereign right to ban cross-border tobacco advertising, promotion and sponsorship *entering* their territory. Parties agree to cooperate in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising, promotion and sponsorship, and to consider the elaboration of a protocol.

The Conference of the Parties (COP) has recognized the need both for guidance to Parties on implementation of their obligations under Article 13 and facilitation of international cooperation, particularly in addressing cross-border advertising promotion and sponsorship. At its second session (COP-2), the COP decided to establish a working group to:

- elaborate comprehensive draft guidelines on the implementation of both the domestic and cross-border elements of Article 13;
- present recommendations on key elements of a protocol on cross-border tobacco advertising, promotion and sponsorship, which would be complementary to these guidelines; and
- present recommendations on any other measures that would contribute to the elimination of cross-border tobacco advertising, promotion and sponsorship.²

² 'Elaboration of guidelines for implementation of Article 13' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, second session, decision FCTC/COP2(8)).

The draft guidelines and recommendations

The working group on Article 13 has presented a report (Document FCTC/COP/3/9) to the third session of the COP (COP-3) containing three Annexes, reflecting the three elements of its mandate:

- Annex 1 (Draft guidelines on the implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco advertising, promotion and sponsorship));
- Annex 2 (Recommendations on key elements of a protocol on cross-border advertising, promotion and sponsorship); and
- Annex 3 (Recommendations on any other measures that would contribute to the elimination of cross-border advertising, promotion and sponsorship).

The Framework Convention Alliance (FCA) congratulates the working group, and particularly the key facilitator Parties – the European Community, Finland and India – for the excellent work that they have done in elaborating draft guidelines and presenting recommendations with respect to a protocol and other measures relating to cross-border tobacco advertising, promotion and sponsorship. FCA considers that COP-3 should: adopt the draft guidelines elaborated by the working group (Annex 1) in full and without change; note for future consideration the recommendations on elements for possible inclusion in a protocol on cross-border advertising, promotion and sponsorship (Annex 2); and adopt the recommendations on measures to facilitate international cooperation for the elimination of cross-border advertising, promotion and sponsorship (Annex 3), ensuring that, where appropriate, the recommended measures are also applied in respect of domestic tobacco advertising, promotion and sponsorship.

FCA considers that the report prepared by the working group explains well both the draft guidelines and the recommendations with respect to international cooperation, and comments here only on some of their particularly important features.

Annex 1: Draft guidelines on the implementation of Article 13 of the WHO Framework Convention on Tobacco Control

FCA strongly supports the draft guidelines. The draft guidelines recognize the strong commitments that Parties to the FCTC have made under Article 13 and the breadth of the definitions of ‘tobacco advertising and promotion’ and ‘tobacco sponsorship’ that they have agreed upon. FCA agrees with the description of the draft guidelines (paras 1-2):

They draw on the best available evidence and the experience of Parties that have successfully implemented effective measures against tobacco advertising, promotion and sponsorship. They give Parties guidance for introducing and enforcing a comprehensive ban on

tobacco advertising, promotion and sponsorship, or, for those Parties that are not in a position to undertake a comprehensive ban owing to their constitutions or constitutional principles, for applying restrictions on tobacco advertising, promotion and sponsorship that are as comprehensive as possible.

These guidelines provide guidance on the best ways to implement Article 13 of the Convention in order to eliminate tobacco advertising, promotion and sponsorship effectively at both domestic and international levels.

If adopted, the draft guidelines will greatly assist Parties in effectively implementing Article 13. Key elements of the draft guidelines include:

Scope of a comprehensive ban

The draft guidelines outline the scope of a comprehensive ban on tobacco advertising, promotion and sponsorship with an excellent overview, followed by specific advice on a number of areas that may pose particular challenges.

The 'Overview' section underlines the strength and breadth of the obligations to which Parties have committed under Article 13. It highlights key aspects of the FCTC's definitions of 'tobacco advertising and promotion' and 'tobacco sponsorship', noting some contemporary forms of advertising and promotion (paras 7-8) including: sales and distribution arrangements (such as incentives schemes for retailers, display at points of sale, lotteries, free gifts and samples, discounts, competitions, and incentive promotions or loyalty schemes); hidden forms of advertising or promotion, such as insertion of tobacco products or tobacco use in various media contents; association of tobacco products with events or with other products in various ways; promotional packaging and product design features; and production and distribution of items that resemble cigarettes or other tobacco products. The 'Overview' acknowledges that promotional effects may be achieved not only through the depiction of tobacco brand names or trademarks, but also through use of corporate names, logos, colours or schemes of colours associated with tobacco products or tobacco companies, and other words, designs, images or sounds (para 9). It refers to a very useful Appendix to the draft guidelines, which contains an indicative (non-exhaustive) list of forms of tobacco advertising, promotion and sponsorship (para 11).

In relation to aspects of a comprehensive ban on tobacco advertising, promotion and sponsorship that may pose special challenges, key recommendations include the following:

- a ban on display and visibility of tobacco products at points of sale, recognizing that display of products is 'a key means of promoting tobacco products and tobacco use' (paras 12-13);
- a ban on tobacco product vending machines, recognizing that they are a means of advertising and promotion (para 14);
- a ban on advertising and promotion through product packaging, implemented by requiring plain packaging of tobacco products,

- recognizing that '[p]ackaging is an important element of advertising and promotion' and is used in various ways 'to attract consumers, promote products, and cultivate and promote brand identity' (paras 15-17);
- a ban on advertising and promotion on tobacco products themselves (paras 15-17);
 - a ban on internet sales of tobacco products, recognizing that internet sales of tobacco products inherently involve advertising and promotion (paras 18-21);
 - a ban on brand stretching and brand sharing (paras 22-24);
 - a ban on contributions from tobacco companies to any other entities for 'socially responsible causes', recognizing that such contributions constitute tobacco sponsorship (paras 25-28); and
 - a ban on tobacco companies publicizing any 'socially responsible' business practices (paras 25-28).

The draft guidelines acknowledge that 'a comprehensive ban on tobacco advertising, promotion and sponsorship need not interfere with legitimate types of expression, such as journalistic, artistic or academic expression or legitimate social or political commentary' (paras 29-30). They recommend that certain measures be taken with respect to the depiction of tobacco products or tobacco use in entertainment media products, such as films, theatre and games (para 31), including: certification that no benefits have been received for the depiction; a ban on the depiction of identifiable tobacco brands or tobacco brand images; requiring the display of prescribed anti-tobacco advertisements at the beginning of any entertainment media product that depicts tobacco products, use or images; and the implementation of a ratings or classification system that takes into account the depiction of tobacco products, use or images, and that ensures that entertainment media aimed at children do not depict tobacco products, use or imagery.

Consistency

The draft guidelines include a very useful section on 'Consistency', which underlines that Parties have both rights and obligations with respect to cross-border tobacco advertising, promotion and sponsorship. The section notes that each Party's obligations extend to cross-border tobacco advertising, promotion and sponsorship *originating from its territory* – such as publications and products printed or produced within its territory and material communicated from within its territory using cross-border communications technology – regardless of who the target of such material is, and recommends that Parties apply their measures to the conduct of their nationals operating in the territory of other States (paras 46-50). It also recommends that Parties make use of their sovereign right to ban cross-border tobacco advertising, promotion and sponsorship *entering their territory* (paras 51-52).

Responsible entities

The draft guidelines include a very useful section on 'Responsible entities', which recognizes the need to apply appropriate measures throughout the

marketing chain (paras 53-59). The section provides particularly useful guidance with respect to dealing with entities that do not produce or select promotional material, but provide access to it, such as internet content hosts, internet content navigators and internet access providers, with recommendations that such entities be required to remove content or disable access to content when they have received notice of it.

Domestic enforcement of laws on tobacco advertising, promotion and sponsorship

The draft guidelines provide very useful guidance on domestic enforcement of laws on tobacco advertising, promotion and sponsorship, including: implementation of effective, proportionate and dissuasive penalties (including fines, corrective advertising and license suspension or cancellation), with sanctions that outweigh the potential economic benefits to be derived from the advertising, promotion or sponsorship (paras 60-61); application of sanctions not only to individuals, but also to corporate entities, including those that can be held responsible for the conduct of related corporate entities outside the territory but with an effect within the territory (para 62); application of sanctions to the conduct of managers, directors, officers and/or legal representatives of corporate entities when they bear responsibility for the conduct (para 62); use of licensing as a method of controlling advertising, promotion and sponsorship (para 63); designation of a competent authority to monitor and enforce laws, and provision to the authority of necessary powers and resources (para 65); and the involvement of civil society in monitoring and enforcement (paras 66-68).

Public education and community awareness

The draft guidelines acknowledge the importance of promoting and strengthening public awareness in relation to tobacco advertising, promotion and sponsorship. They make useful recommendations on means of engaging the community in monitoring compliance and reporting violations of laws against tobacco advertising, promotion and sponsorship, recognizing that this is 'an essential element of enforcement' (paras 69-71).

International collaboration

The draft guidelines recognize that: 'Effective international cooperation will be essential to the elimination of both domestic and cross-border tobacco advertising, promotion and sponsorship' (para 72). They note relevant commitments already made by Parties to the FCTC with respect to international cooperation (para 73), and recommend that the recommendations made in Annex 3 of the working group's report to the COP (Recommendations on any other measures that would contribute to the elimination of cross-border advertising, promotion and sponsorship) also be considered in relation to domestic tobacco advertising, promotion and sponsorship, 'recognizing that Parties would benefit from sharing information, experience and expertise in respect of all tobacco advertising, promotion and sponsorship' (para 74).

Annex 2: Recommendations on key elements of a protocol on cross-border advertising, promotion and sponsorship

The working group has identified a number of areas which may be considered for possible inclusion in a protocol on cross-border tobacco advertising, promotion and sponsorship, should the COP decide to commence negotiations on a protocol. The recommendations build on the report of the expert group on cross-border tobacco advertising, promotion and sponsorship³ established by the COP at its first session (COP-1).⁴ FCA agrees that the areas listed – notification and response procedures, cooperation between enforcement agencies, exercise of jurisdiction and recognition and enforcement of foreign judgments – would be useful to consider for possible inclusion in a protocol on cross-border tobacco advertising, promotion and sponsorship, but considers that it is premature for a decision to be made on the negotiation of a protocol.

In Annex 3 of its report to the COP (Recommendations on any other measures that would contribute to the elimination of cross-border advertising, promotion and sponsorship), the working group has made a number of useful recommendations with respect to international cooperation to address cross-border tobacco advertising, promotion and sponsorship. The recommendations are made against the background that Parties have already undertaken strong obligations with respect to both domestic and cross-border tobacco advertising, promotion and sponsorship, and have made a number of important commitments with respect to international cooperation. If adopted by the COP, the recommended measures will significantly assist in the elimination of cross-border tobacco advertising, promotion and sponsorship. So, too, will implementation of the domestic elements of Article 13, in line with strong guidelines on implementation.

With negotiation of a protocol a very large undertaking, FCA considers that the COP should defer consideration of the need for a protocol until Parties have made further progress in implementing Article 13, in accordance with the guidance provided by guidelines for implementation of Article 13, and the recommendations on international cooperation made by the working group have been implemented and the COP can assess what added value a protocol might contribute.

³ 'Elaboration of a template for a protocol on cross-border tobacco advertising, promotion and sponsorship' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, second session, provisional agenda item 5.4.2, A/FCTC/COP/2/10, 19 April 2007).

⁴ 'Elaboration of protocols' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, first session, decision FCTC/COP1(16)).

Annex 3: Recommendations on any other measures that would contribute to the elimination of cross-border advertising, promotion and sponsorship

The working group has made a number of very useful recommendations on measures to facilitate international cooperation that would contribute to the elimination of cross-border tobacco advertising, promotion and sponsorship. FCA agrees with the view of the working group that 'international cooperation is essential to the elimination of both domestic and cross-border tobacco advertising, promotion and sponsorship' (para 1). Parties to the FCTC will need to share information about tobacco advertising, promotion and sponsorship and their experiences in trying to address it, and to cooperate in addressing particular instances of cross-border tobacco advertising, promotion and sponsorship.

As the working group notes (para 2), Parties have already undertaken substantial commitments with respect to international cooperation, including under: Article 13.6 (cooperation in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising); Article 19 (liability); Article 20 (research, surveillance and exchange of information), particularly Article 20.4 (exchange of publicly available, scientific, technical, socioeconomic, commercial and legal information, as well as information regarding the practices of the tobacco industry); Article 21 (reporting and exchange of information); Article 22 (cooperation in the scientific, technical, and legal fields and provision of related expertise); and Article 26 (financial resources).

With such commitments having already being made, the COP has an important role to play in putting in place the arrangements necessary to facilitate international cooperation. The working group's recommendations in this respect include:

- revisions to the COP's reporting instrument;
- establishment of a website for use as a knowledge hub and a means for notifying of particular instances of cross-border advertising, promotion and sponsorship;
- identification by Parties of a contact point on matters relating to tobacco advertising, promotion and sponsorship;
- agreement by Parties to respond to any notifications by other Parties that tobacco advertising, promotion and sponsorship appears to be originating, or to have originated, in their territory;
- the 'carr[ying] out at the international level' of a series of tasks, including: transmission of notifications of cross-border tobacco advertising, promotion and sponsorship; identification of experts who can provide technical assistance and training; updating of Parties on relevant developments; facilitation of the provision of technical assistance; assessment of research needs; liaison with relevant bodies; coordination of efforts with respect to new technologies; promotion of public awareness; and provision of regular reports on progress of Parties in implementing Article 13 and on the effectiveness of arrangements established to facilitate international cooperation;

- examination by the Convention Secretariat of mechanisms for providing assistance to give Parties effective access to arrangements established to facilitate international cooperation, particularly developing countries and countries with economies in transition; and
- establishment of an expert group on cross-border advertising, promotion and sponsorship.

FCA considers that COP-3 should adopt all of the recommendations made by the working group, and provide the resources necessary to allow the recommended arrangements to be implemented effectively. The COP should request that the tasks recommended to 'be carried out at the international level in a manner to be decided by the Conference of the Parties' be carried out by the Convention Secretariat.

It should be noted that there are a number of places in which the recommendations refer only to 'cross-border tobacco advertising promotion and sponsorship'. This should be understood in the context of the working group's mandate 'to present recommendations on ... measures that would contribute to the elimination of cross-border advertising, promotion and sponsorship'. FCA agrees with the recommendation made by the working group in para 74 of the draft guidelines that the COP consider applying any measures established to facilitate international cooperation not only to cross-border tobacco advertising, promotion and sponsorship, but also, where appropriate, to domestic tobacco advertising, promotion and sponsorship.