

## Policy Briefing: Adoption of measures for international cooperation to eliminate tobacco advertising, promotion and sponsorship

Fourth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control 15-20 November 2010, Punta del Este, Uruguay

### Recommendation

The Framework Convention Alliance recommends that the fourth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control decide to adopt and implement the recommendations on measures that would contribute to elimination of cross-border tobacco advertising, promotion and sponsorship (Annex to document FCTC/COP/4/10), ensuring that, where appropriate, the recommended measures are also applied in respect of domestic tobacco advertising, promotion and sponsorship. The decision should:

- Request Parties to identify contact points on matters of tobacco advertising, promotion and sponsorship and inform the Convention Secretariat of any changes in contact details, and to provide for the contact points to receive and respond to notifications from other Parties of cross-border advertising, promotion and sponsorship originating in their territory;
- Establish a website for information sharing about tobacco advertising, promotion and sponsorship, and request Parties and accredited observers to provide information to the Convention Secretariat to be shared through the website;
- Establish, as part of the website, a facility for observers and members of the public to report instances of cross-border advertising, promotion and sponsorship, and request Parties to promote public awareness of cross-border tobacco advertising, promotion and sponsorship and the availability of the reporting facility;
- Establish a standing expert group to monitor and report to the Conference of the Parties on relevant developments in tobacco advertising, promotion and sponsorship and propose any necessary revisions to the guidelines for implementation of Article 13 and arrangements for international cooperation; and
- Note the need for further amendments to the reporting instrument to accurately reflect the provisions of Article 13 and the guidelines, which should be adopted in a revised version of the reporting questionnaire.

### **Background**

Under Article 13 of the WHO Framework Convention on Tobacco Control (FCTC), Parties must undertake a comprehensive ban of *all* tobacco advertising, promotion and sponsorship within a period of five years after entry into force of the Convention (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). 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 recognises Parties' sovereign right to ban cross-border tobacco advertising, promotion and sponsorship *entering* their territory.

Parties make these commitments recognising that 'a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products'. As noted in the Foreword to the Convention, 'global marketing' and 'transnational tobacco advertising, promotion and sponsorship' are two factors that have significantly contributed to the 'explosive increase in tobacco use'. The tobacco

industry operates at the global level, deploying very significant resources to aggressively market its products, and moving quickly to exploit any loopholes in restrictions on advertising, promotion and sponsorship and to develop new and innovative means of promotion. Against this background, Parties to the FCTC recognise that responding to the globalised tobacco epidemic 'calls for the widest possible international cooperation' (Preamble).

International cooperation to eliminate tobacco advertising, promotion and sponsorship is required for three main reasons. First, the exchange of information about common problems, and successes and failures in addressing these problems, assists all Parties in implementing their obligations effectively. Second, Parties which are further ahead in the implementation of comprehensive bans can offer significant assistance to those in the early stages of implementation, including technical assistance and transfer of legal and other expertise. Third, in respect of cross-border advertising, promotion and sponsorship, the problem that each Party faces is, by its nature, cross-border, meaning that no Party can address it alone. Cooperation is required to respond to cross-border forms of advertising, promotion and sponsorship including communication through '[c]ontemporary media platforms such as the Internet, films and direct broadcast satellite', advertising and promotion via products or publications that move between States, and international event sponsorship.

Parties have built the foundations for the necessary international cooperation through the process of elaborating and adopting guidelines for implementation of Article 13, addressing both the domestic and cross-border elements of their obligations.<sup>1</sup> However, as recognised in the guidelines and recommendations of the working group, further action by the Conference of the Parties (COP) is necessary. The third session of the COP (COP-3) decided that the fourth session (COP-4) should further consider the working group's recommendations with respect to international cooperation, taking into consideration a report by the Convention Secretariat on the implications of these recommendations.<sup>2</sup> The Report of the Convention Secretariat (document FCTC/COP/4/10) indicates that implementation of the recommendations is feasible and will require a further decision or decisions by the COP.

### **The recommended measures**

The guidelines for implementation of Article 13 recognise that '[e]ffective international cooperation will be essential to the elimination of both domestic and cross-border tobacco advertising, promotion and sponsorship'. They note relevant commitments made by Parties 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), 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) of the Convention, and recognise 'that Parties would benefit from sharing information, experience and expertise in respect of *all* tobacco advertising, promotion and sponsorship, not only cross-border tobacco advertising, promotion and sponsorship'.

The Framework Convention Alliance (FCA) fully supports the adoption of the recommendations on measures for international cooperation that would contribute to the elimination of cross-border tobacco advertising, promotion and sponsorship (Annex to document FCTC/COP/4/10). As stated in the guidelines, the recommended measures 'are also beneficial' to eliminate domestic advertising, promotion and sponsorship, and should be applied broadly where appropriate. COP-4 should decide to:

- Request Parties to identify dedicated contact points on matters of tobacco advertising, promotion and sponsorship, and to exchange information about particular instances of cross-border advertising, promotion and sponsorship through their contact points;

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<sup>1</sup> '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)); 'Guidelines for implementation of Article 13 (Tobacco advertising, promotion and sponsorship)' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, third session, decision FCTC/COP3(12)).

<sup>2</sup> 'Measures that would contribute to the elimination of cross-border advertising, promotion and sponsorship (in relation to Article 13)' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, third session, decision FCTC/COP3(14)).

- Establish a website to be used as a 'knowledge hub' for Parties, accredited observers and the public;
- Establish, as part of the website, a facility for observers and members of the public to report instances of cross-border advertising, promotion and sponsorship;
- Establish a standing expert group to monitor and review relevant developments and recommend any necessary revisions to the guidelines and arrangements for international cooperation; and
- Amend the reporting instrument to accurately reflect the provisions of Article 13 and the guidelines.

FCA agrees with the Convention Secretariat's recommendation that related measures recommended by the working group, including technical and financial cooperation and cooperation with other relevant bodies, be adopted within broader efforts to implement relevant articles (including, in particular, Articles 22 and 26).

### **Contact points**

FCA supports the working group's recommendation that the COP request Parties to 'identify a contact point on matters of tobacco advertising, promotion and sponsorship to the Convention Secretariat and notify the Convention Secretariat of any changes in details'. Such a contact point may be the same as the national coordinating mechanism or focal point required under Article 5.2 of the FCTC, or may be a particular staff member or unit within or separate to the national focal point. As noted in the Report of the Convention Secretariat, 'advertising, promotion and sponsorship may fall within the jurisdiction of different entities in different Parties'. The identification of a contact point in each Party will significantly facilitate cooperation to eliminate tobacco advertising, promotion and sponsorship by providing clear channels of communication.

FCA also supports the working group's recommendation that Parties, 'when notified by another Party of cross-border tobacco advertising, promotion and sponsorship that appears to originate, or have originated, from its territory, acknowledge the notification and inform the notifying Party within a reasonable time of any investigation or other action taken in response to the notification'. The working group recommended such notification and response procedures both as a matter which may be considered for inclusion in a possible future protocol on cross-border tobacco advertising, promotion and sponsorship, and as a measure which could be taken without a protocol, with transmission of notifications to be carried out 'in a manner to be decided by the Conference of the Parties'.

Noting the broad mandate of the COP under Article 23 of the Convention and the significant obligations in respect of international cooperation to which Parties have already committed, including the obligation in Article 13.6 to 'cooperate in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising', FCA agrees with the working group's recommendation that the COP request Parties to acknowledge notifications from other Parties and inform the notifying Party of any action taken in response. FCA considers that these notifications and responses should be made by Parties' designated contact points on matters of tobacco advertising, promotion and sponsorship.

### **Website**

FCA supports the working group's recommendation that a website be established as a 'knowledge hub' through which Parties' contact points on matters of tobacco advertising, promotion and sponsorship can be identified, and information can be shared on matters such as:

- Relevant legislation, regulations and jurisprudence;
- Breaches and suspected breaches, and pending investigations or enforcement action;
- Persons or entities engaged in tobacco advertising, promotion and sponsorship;
- New and emerging methods and forms of tobacco advertising, promotion and sponsorship;
- Developments in technology;
- Relevant education, training or public awareness programs;
- Research needs and opportunities; and
- Experts who can provide relevant technical assistance and training.

Such a website should, as far as possible, use the existing infrastructure of the Convention Secretariat and WHO. As noted in the Report of the Convention Secretariat, Parties already exchange a range of information through the database of Party reports on the Secretariat's website. The reporting system provides a framework for Parties to share some relevant information at two and three year intervals, including on legislation, regulations and jurisprudence, education, training or public awareness programmes, and needs and opportunities for financial and technical assistance. It should be noted that the website dedicated to sharing information about tobacco advertising, promotion and sponsorship would need to be carefully designed to allow information to be shared more frequently, to allow for a wider range of information to be shared, to allow for information to be provided by accredited intergovernmental and nongovernmental observer organisations, and to ensure that information can be accessed effectively, such as by a subject matter search function.

FCA supports the recommendation of the working group that the 'knowledge hub' website have three sections to allow for access to certain information to be restricted, but considers that all information should be publicly available unless access restricted to Parties or Parties and accredited observers is specifically requested by the Party or other entity sharing the information. Restrictions might be necessary, for example, on information about: suspected breaches of relevant legislation or regulations; pending investigations or enforcement action; and certain new and emerging methods and forms of advertising, promotion and sponsorship, developments in technology, and research needs and opportunities. Should restricted access be requested, the Convention Secretariat staff member responsible for the website would upload the information only onto the Party-restricted site, or the Party and observer-restricted sites, as applicable.

FCA also supports the recommendation that the website include 'a facility for reporting instances of cross-border advertising, promotion and sponsorship'. This recommendation builds on that of the expert group on cross-border advertising established by the first session of the COP (COP-1) that an international 'knowledge hub' include 'an easy-to-use internet "hotline" through which reports or complaints about cross-border tobacco advertising, promotion and sponsorship could be made by members of the public'.<sup>3</sup> As recognised in the guidelines: 'Engaging the support of the community to monitor compliance and report violations of laws against tobacco advertising, promotion and sponsorship is an essential element of enforcement'.

FCA considers that the sections of the website accessible to observers and members of the public should include a facility for reporting instances of advertising, promotion or sponsorship that appear to be cross-border. Such reports should be transmitted by the Convention Secretariat staff member responsible for the website to the contact point of the Party or Parties concerned. As the guidelines recognise, in order for members of the community to perform a monitoring and reporting role, 'they must be made aware of the problem and understand the law and the ways in which they can act on breaches'. To facilitate an effective reporting facility, the COP should request Parties to promote public awareness of cross-border advertising, promotion and sponsorship and the availability of the facility.

### **Expert group**

FCA supports the working group's recommendation that a standing expert group be established to keep the COP up to date on relevant developments in technology and best practices for responding to cross-border advertising, promotion and sponsorship, and monitor and review the guidelines and arrangements established to facilitate international cooperation. FCA considers that the expert group's mandate should extend to both domestic and cross-border advertising, promotion and sponsorship.

The expert group should comprise independent experts from each of the six WHO regions and from accredited intergovernmental and nongovernmental observer organisations, and should meet annually. It should be mandated to review all relevant information relating to implementation of Article 13, including that available on the proposed website with respect to emerging forms of tobacco

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<sup>3</sup> 'Elaboration of protocols' (World Health Organization, Conference of the Parties to the WHO Framework Convention on Tobacco Control, first session, decision FCTC/COP1 (16)); '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).

advertising, promotion and sponsorship and best practices in responding to them, and to propose to the COP any necessary revisions to the guidelines and mechanisms of international cooperation to eliminate tobacco advertising, promotion and sponsorship. The expert group should also communicate to the Convention Secretariat staff member responsible for the website the names and contact details of experts identified in the course of its work ‘who can provide technical assistance and training to Parties on relevant matters’, as well as any identified research needs or opportunities.

### **Reporting instrument**

The Report of the Convention Secretariat indicates that ‘[t]he recommendations made by the working group on the need to revise the questions contained in the reporting instrument of the WHO FCTC have already been implemented’. While noting that some revisions were made to the questions on implementation of Article 13 in the Phase 2 (Group 2 questions) of the reporting instrument, FCA does not consider that the amended questions ‘reflect the principal provisions of the guidelines on Article 13’, as recommended by the working group. FCA is concerned that the questions reflect an interpretation that is, in a number of important ways, not consistent with Article 13 and the guidelines. If not amended, these errors in the reporting instrument may have serious consequences for Parties’ understanding and implementation of their obligations with respect to tobacco advertising, promotion and sponsorship.

FCA’s primary concern is that if a Party answers ‘yes’ to the question in 3.2.7.1 as to whether it has instituted a comprehensive ban on all tobacco advertising, promotion and sponsorship – the core obligation to which Parties have committed under Article 13 (subject to any constitutional constraints) – question 3.2.7.2 asks whether the ban covers a range of specified forms of advertising, promotion and sponsorship. The implication is that a Party could have a comprehensive ban, yet not have banned some (or indeed any) of these forms of advertising, promotion and sponsorship. This is inconsistent with the terms of Article 13, which requires a comprehensive ban on ‘all tobacco advertising, promotion and sponsorship’ – broadly defined in accordance with Article 1 – and with the guidelines, which contain detailed recommendations with respect to the scope of the comprehensive ban required, including an ‘indicative (non-exhaustive) list of forms of advertising, promotion and sponsorship that fall under the ban’. With the exception of depiction of tobacco or tobacco use in entertainment media products (which the guidelines recognise may be ‘tobacco advertising and promotion’, but need not be completely banned), each of the forms of advertising, promotion and sponsorship listed in question 3.2.7.2 should be included under a comprehensive ban.<sup>4</sup> Therefore, by answering ‘yes’ to the question as to whether it has instituted a comprehensive ban, a Party should be indicating that it has banned each of the listed forms. If any of these forms of advertising, promotion and sponsorship are not banned, the ban should not be described as a ‘comprehensive ban’.

FCA is also concerned that the questionnaire directs a Party that answers ‘yes’ to the question as to whether it has instituted a comprehensive ban to skip the questions in 3.2.7.6-3.2.7.9, relating to implementation of Article 13.4. This direction is inconsistent with the recognition in the guidelines that ‘some very limited forms of relevant commercial communication, recommendation or action might continue to exist after a comprehensive ban has been implemented’, meaning that Parties that have implemented comprehensive bans may still be required to meet some obligations under Article 13.4.

FCA recognises that drafting questions on implementation of Article 13 is difficult. This is primarily because the terms ‘tobacco advertising, promotion and sponsorship’ cover so many different kinds of activities, and the relationship between Articles 13.2 and 13.3 and parts of Article 13.4 is difficult to discern. Recognising these difficulties, FCA considers that it is imperative that guidance be drawn

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<sup>4</sup> On ‘display and visibility of tobacco products at points of sale’, see para 8 and para 14 of the guidelines, and the third bullet point in the Appendix; on ‘the domestic Internet’ and ‘the global Internet’, see the last bullet point in the Recommendation following para 11, paras 18-21, para 48, paras 58-59, and the first bullet point in the Appendix; on ‘brand stretching and/or brand sharing’, see para 8, paras 22-24, and the sixth bullet point in the Appendix; on ‘product placement as a means of advertising or promotion’, see para 8, para 30, and the seventh bullet point of the Appendix; on ‘tobacco sponsorship of international events or activities and/or participants therein’, see paras 7-8, the third bullet point in the Recommendation following para 59 and the nineteenth bullet point in the Appendix; on ‘socially responsible’ contributions or activities, see paras 25-28 and the nineteenth bullet point of the Appendix; on ‘cross-border advertising, promotion and sponsorship originating from your territory’, see paras 46-50; on ‘cross-border advertising, promotion and sponsorship entering your territory’, see paras 51-52.

from the guidelines for implementation of Article 13 in amending the questions in a revised version of the reporting questionnaire.

Parties should be directed to answer 'yes' to a question as to whether they have instituted a comprehensive ban on all tobacco advertising, promotion and sponsorship only if all the forms of tobacco advertising, promotion and sponsorship included in the Appendix to the guidelines are banned, including cross-border forms (both in-flowing and out-flowing). If a Party answers 'no' to a question as to whether it has instituted a comprehensive ban, information should be requested on whether it is precluded by its constitution or constitutional principles from undertaking a comprehensive ban, and detailed information should be requested about its restrictions on advertising, promotion and sponsorship. Consistent with the approach adopted in the guidelines, all Parties should be requested to provide information about their application of the measures in Article 13.4 to forms of advertising, promotion and sponsorship not or not yet prohibited.