



ESSENTIAL ELEMENTS OF FCTC ARTICLE 5.3 IMPLEMENTING MEASURES

INTRODUCTION

FCTC Article 5.3 requires Parties to protect tobacco control policies from the commercial and other vested interests of the tobacco industry. This resource, informed by the Article 5.3 Guidelines, Article 5.3-specific measures enacted by Parties, and other relevant laws and policies, provides a framework for drafting domestic measures to implement Article 5.3.¹

Successful implementing measures –

1. define key terms in accordance with FCTC Article 1 and the FCTC Article 5.3 Guidelines;
2. apply the Guidelines recommendations,² at a minimum;³
3. impose legal duties of compliance on all entities in the tobacco industry,⁴ on all governmental and quasi-government entities,⁵ and on any entities or individuals acting for or to further the interests of either;
4. specify the body or bodies responsible for oversight and enforcement;
5. provide for a range of deterrent and proportionate sanctions for non-compliance;
6. empower and enable civil society to make complaints and undertake legal action for compliance; and
7. require evaluation of the effectiveness of the measures enacted, and of their enforcement.

1. DEFINING KEY TERMS

Key terms for implementing FCTC Article 5.3 include “tobacco industry”,⁶ “tobacco control policy”,⁷ and “government”.^{8 9} Defining these in accordance with the FCTC and its Guidelines will help avoid ambiguities and loopholes and facilitate comprehensive protection of tobacco control policies.

2. APPLYING PROVISIONS TO IMPLEMENT FCTC ARTICLE 5.3

Guidelines-based measures for effectively protecting tobacco control policies should--

Limit government-tobacco industry interactions to those necessary for effective regulation.¹⁰

At their core, successful Article 5.3 measures will insulate tobacco control policy development and implementation from the influence and interference of the tobacco industry and ensure transparency in any dealings and interactions that do occur. Insulation and transparency are necessary because of the irreconcilable conflict of interest arising from the deadly nature of tobacco products¹¹ and because of the industry’s relentless tactics to undermine effective tobacco control.¹²

Interactions with the tobacco industry should be allowed only if, and only to the extent, strictly necessary for effective regulation of the tobacco industry or tobacco products.¹³ Because of the wide range of

interactions the tobacco industry pursues with government in an effort to influence and undermine tobacco control, it will be important for governments to elaborate criteria¹⁴ and establish safeguards for making proper determinations about whether a given interaction, including communication, is necessary, and if so, how transparency in the interaction is to be assured.

Ensure transparency in the operations and actions of government and of the tobacco industry, especially the interactions, communications, and contacts between them.¹⁵

To fulfill these Guidelines recommendations, the following should be required, at a minimum:

-Conducting necessary interactions, when possible,¹⁶ through public hearings with advance notice and making documentation of the interactions publicly available. An affirmative obligation to create as well as disclose records of all interactions, communications, and contacts, will help ensure transparency.¹⁷

-Comprehensive requirements for periodic reporting by the tobacco industry on tobacco businesses' operations and activities, including business operations, lobbying activities, political and philanthropic contributions and other marketing activities and expenditures,¹⁸ and any information for fulfilling Article 12 obligations to promote and strengthen public awareness of tobacco control issues.¹⁹ Information from the reports should be made readily available to the public.²⁰

Prevent and manage tobacco-related conflicts of interest within government.²¹

Conflict of interest prevention measures within government should include, at a minimum, the following:

- A prohibition on tobacco industry representation on government bodies, boards, commissions, or other authorities involved in developing or implementing tobacco control policy, including COP delegations.²²
- Disclosure of any current, recent past, or intended future tobacco industry occupational activity²³ or other tobacco ties by individuals and entities with responsibility for tobacco control.²⁴
- A prohibition on hiring or retaining anyone in government with a tobacco-related conflict and regulation of the movement by officials and employees with responsibility for tobacco between government and the tobacco industry.²⁵
- A prohibition on tobacco industry contributions, services, gifts, and perquisites and their acceptance by any government entities or individuals working in government.²⁶
- A prohibition on, or if not possible, regulation of, tobacco industry contributions to political parties, candidates, and campaigns.²⁷
- A prohibition against tobacco investments by government entities and individuals in government.²⁸
- Standards of conduct for dealing with the tobacco industry.²⁹
- Requirements for documenting and reporting conflicts of interest, and other relevant transparency requirements.³⁰

Prohibit government from accepting unenforceable agreements or voluntary codes of conduct.³¹

Because the tobacco industry uses voluntary agreements/codes to avoid or delay effective and enforceable measures, government should be prohibited from accepting these in place of legally binding requirements.

Prohibit any government action that provides the tobacco industry with preferential treatment.³²

Government should be prohibited from granting special assistance, incentives, privileges, or benefits to tobacco companies to establish or run their businesses, including preferential tax treatment,³³ even if applied to businesses at large.

De-normalize the tobacco industry and its practices.

Implementation of all of the Guidelines recommendations will contribute to de-normalizing the tobacco industry. Direct Guidelines recommendations for accomplishing industry de-normalization include raising

awareness about tobacco industry tactics for undermining effective tobacco control³⁴ and prohibiting tobacco industry “corporate social responsibility” contributions³⁵ or any public disclosure of them.³⁶

Apply Article 5.3 implementing measures equally to state-owned tobacco industries.³⁷

All Guidelines recommendations should apply equally to any state-owned tobacco industry.³⁸ At a minimum, separating regulatory functions from those related to overseeing or managing the state-owned tobacco business should be required.³⁹

3. IMPOSING LEGAL DUTIES OF COMPLIANCE

Legal duties of compliance should be placed on all businesses in the tobacco industry. This would include, but not be limited to, lobbyists and front groups working on its behalf or to further its interests.⁴⁰ On the government side, most duties of compliance will apply to government entities and individuals with responsibility for tobacco control, which includes those that contribute to, or could contribute to, the formulation, implementation, administration, or enforcement of tobacco control policies.⁴¹ Some duties should apply government-wide, however, such as the prohibitions on accepting contributions from and granting preferential treatment to the tobacco industry.⁴²

4. SPECIFYING THE BODY OR BODIES RESPONSIBLE FOR OVERSIGHT

National tobacco control coordinating mechanisms established under FCTC Article 5.2(a) may be able to serve an Article 5.3 oversight function if they are able to exercise authority across all of government. If they do not have this authority, it may be necessary to establish more than one oversight body to oversee compliance within all branches of government. Where jurisdictions have established anti-corruption commissions that operate effectively, their structure and modes of operation may provide guidance for establishing Article 5.3 oversight.⁴³

5. PROVIDING A RANGE OF DETERRENT AND PROPORTIONATE PENALTIES

The full range of applicable penalties recommended in the Guidelines for implementing other FCTC articles should also apply to Article 5.3 legal measures. Penalties should be sufficiently large to deter violations and proportionate to the nature and seriousness of the violation and duties of the violator, and they should increase for repeat violations.

6. EMPOWERING AND ENABLING CIVIL SOCIETY TO MAKE COMPLAINTS AND TAKE LEGAL ACTION

The Guidelines recognize that civil society not affiliated with the tobacco industry can play an essential role in tobacco industry monitoring.⁴⁴ Consistent with provisions in the Articles 8, 11, and 13 Guidelines, civil society should be authorized to file complaints and bring legal actions to compel compliance.⁴⁵ Ready public access to required disclosures will help civil society fulfill its monitoring role.

7. REQUIRING EVALUATION OF THE EFFECTIVENESS OF ARTICLE 5.3 MEASURES AND THEIR ENFORCEMENT

Monitoring compliance, enforcement, and evaluation of the impact of Article 5.3 implementing measures should be undertaken and results should be made readily publicly available.⁴⁶ Monitoring and evaluation will enable the government to identify and take or recommend action to correct any barriers to oversight and enforcement and any weaknesses in the measures revealed.

Endnotes

¹ For example, many jurisdictions have right to information laws, restrictions on lobbying and political contributions, conflict of interest policies, and domestic measures implementing international good governance and conduct codes which may contain provisions useful, at least in part, for implementing Article 5.3.

² The Guidelines recommend measures agreed to by the FCTC Parties to ensure that efforts to protect tobacco control from tobacco industry interference are comprehensive and effective. As a subsequent agreement of the Parties, the Guidelines must be taken into account in interpreting the scope and content of Parties' obligations under the treaty, in accordance with Article 31 of the Vienna Convention on the Law of Treaties.

³ FCTC Article 2.1 encourages Parties to implement measures beyond those required by the treaty and the Guidelines strongly urge measures to implement measures beyond the Guidelines. *See* last para. of the Guidelines section titled "Purpose, scope and applicability".

⁴ Article 5.3 measures would generally apply broadly to include tobacco manufacturers, importers, and wholesalers and to entities and individuals working to further the interests of the tobacco industry.

⁵ Most of the Guidelines recommendations will apply to those government entities responsible for setting and implementing tobacco control policies. This is discussed further in the section on Imposing Legal Duties of Compliance.

⁶ FCTC Article 1(e).

⁷ FCTC Article 1(d). It should be made clear that "tobacco control policy" includes the development, implementation, administration, and enforcement of any tobacco control policy as well as any policy that has the capacity to affect tobacco control policy (e.g., agricultural and trade policies). *See* second and fourth paras. of the Guidelines under the section titled "Purpose, scope and applicability", explaining, respectively, that Parties should implement measures in all branches of government that have an interest in or capacity to affect tobacco control policy and that the Guidelines apply to persons, bodies, or entities that contribute to, or could contribute to, tobacco control policy.

⁸ "Government" is not defined in the FCTC or the Article 5.3 Guidelines, but the Guidelines make it clear that the term includes semi- or quasi-governmental institutions, bodies, boards, commissions and advisory groups in all branches of government at the national and sub-national levels, and the individuals working for or on behalf of government.

⁹ Article 5.3 measures also apply to regional economic integration organizations that are Parties to the treaty.

¹⁰ Guidelines Recommendation 2.

¹¹ Guidelines Guiding Principle 1.

¹² *See e.g.*, World Health Organization (WHO). Tobacco industry interference with tobacco control. Geneva: WHO; 2009. Available at: http://www.who.int/tobacco/resources/publications/tob_ind_int_cover_150/en/index.html. *See also*, Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization. A Report of the Committee of Experts on Tobacco Industry Documents. July 2009. Available at: http://www.who.int/tobacco/en/who_inquiry.pdf.

¹³ Guidelines Recommendation 2.1.

¹⁴ The development of policies and procedures for elaborating these criteria may be an appropriate means since it may be difficult to anticipate all necessary/unnecessary interactions.

¹⁵ Guidelines Recommendation 2.2 (Establish measures to ensure the transparency of government-tobacco industry transactions); Recommendation 5.1 (Apply measures to ensure that all operations and activities of the tobacco industry are transparent); Guidelines Recommendation 4.1 (Mandate a policy on the disclosure and management of conflicts of interest).

¹⁶ Guidelines Recommendation 2.2. Public participation or attendance and prior notice would not be possible in all cases, for example, with respect to compliance inspections. The inspection records should be made publicly accessible at the appropriate time after the inspection, however.

¹⁷ Again, elaborating criteria for record making and record keeping through policies and procedures may be an appropriate means.

¹⁸ All tobacco advertising, promotion, and sponsorship, including philanthropic contributions, should be covered under a tobacco advertising, promotion, and sponsorship ban. The Article 13 Guidelines recommend requiring this information even in the case of a complete ban to help determine compliance.

¹⁹ Guidelines Recommendation 5 (Require that information provided by the tobacco industry be transparent and accurate). *See*, specifically, Guidelines Recommendation 5.2 (Require the tobacco industry and those working to further its interests to periodically submit information on tobacco production, manufacture, market share, marketing expenditures, revenues and any other activity, including lobbying, philanthropy, political contributions and all other

activities not prohibited or not yet prohibited under Article 13 of the Convention); Guidelines Recommendation 5.3 (Require rules for the disclosure or registration of the tobacco industry entities, affiliated organizations and individuals acting on their behalf, including lobbyists); FCTC Article 12; and FCTC Article 13.4(d).

²⁰ Guidelines Recommendation 5.5; Article 13 Guidelines para. 42.

²¹ Guidelines Recommendation 4 (Avoid conflicts of interest for government officials and employees). While the requirements outlined below should be implemented through legal measures, policies and procedures can be appropriate means for elaborating specific criteria for determining what constitutes a conflict of interest, standards of conduct, specific disclosure requirements, etc.

²² Guidelines Recommendations 4.5, 4.8, 4.9.

²³ Guidelines Recommendation 4.5 provides that applicants for government positions with responsibility for tobacco control should be required to declare any current or previous occupational activity with the tobacco industry whether gainful or not. A comprehensive view of “occupational activity” for the purposes of Article 5.3 should include any kind of employment, contract, consulting, or other work or service, whether gainful or not, and whether full-time, part-time, occasional, temporary, or permanent.

²⁴ Guidelines Recommendations 4.1, 4.5.

²⁵ For example, mandatory cooling off periods before and after government service and confidentiality agreements could be required. Guidelines Recommendations 4.3, 4.4, 4.8.

²⁶ FCTC Article 13; Article 5.3 Guidelines Recommendations 4.10, 6.4.

²⁷ Guidelines Recommendation 4.11.

²⁸ In cases where the government owns the tobacco industry, this prohibition is not possible but Guidelines Recommendation 7.2 provides that those governments should ensure their investment does not prevent them from otherwise fully implementing the FCTC. In other cases, all government entities and any individuals working for government should be required to divest themselves of direct interests in the tobacco industry.

²⁹ Guidelines Recommendation 4.2.

³⁰ Guidelines Recommendation 4.1.

³¹ Guidelines Recommendations 3.1, 3.3, and 6.2. By establishing its own voluntary codes, the tobacco industry has been able to successfully argue that government regulations are unnecessary. These codes, according to an internal Phillip Morris document, “can be used as both a lobbying lever and an argument against not [sic] introducing formal legislation.” Philip Morris. Pakistan- Meeting in London, 1994. Available at:

<http://legacy.library.ucsf.edu/tid/dzz32e00>.

³² Guidelines Recommendations 7, 8.

³³ Guidelines Recommendations 7.1, 7.3.

³⁴ Guidelines Recommendation 6.1.

³⁵ Guidelines Recommendations 6.4. This prohibition should apply to both government recipients and to any other receiving entity pursuant to both FCTC Article 5.3 and the ban on tobacco sponsorship under FCTC Article 13.2.

³⁶ Guidelines Recommendation 6.3.

³⁷ Guidelines Recommendation 8 (Treat State-owned tobacco industry in the same way as any other tobacco industry).

³⁸ This would be subject to the exception noted in Recommendation 4.7 with regard to government financial interests in the tobacco industry.

³⁹ Guidelines Recommendation 8.2.

⁴⁰ See sixth para. of the Guidelines section titled “Purpose, Scope, and Applicability”.

⁴¹ See fourth para. of the Guidelines section titled “Purpose, Scope, and Applicability”.

⁴² Acceptance of tobacco industry contributions by any government entity would be prohibited under the sponsorship ban in Article 13. Granting preferential treaty by any government entity would be counter to the goals of the FCTC.

⁴³ Hong Kong’s Anti-Corruption Commission may provide some ideas for fashioning an Article 5.3 oversight body. A description is available at http://www.icac.org.hk/en/about_icac/os/index.html.

⁴⁴ Guidelines para. 33.

⁴⁵ Article 8 Guidelines para. 45; Article 11 Guidelines para. 65; Article 13 Guidelines paras. 66, 67.

⁴⁶ The Article 5.3 Guidelines do not address this, but a requirement for monitoring and evaluation would be consistent with the Article 8 Guidelines (paras. 46-48) and the Article 11 Guidelines (paras. 66-69, 71).

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