

Analysis of Implementation of Guiding Principles of FCTC Article 5.3 Concerning Restriction of the Influence of the Tobacco Industry on Anti-Tobacco Decision-Making in Ukraine

The third session of the Conference of the Parties to the WHO FCTC in 2008 unanimously adopted Guiding Principles such implementation of Article 5.3 of the FCTC, which, among other things, include the point that there is a fundamental and irreconcilable conflict between the tobacco industry's interests and public health policy interests. The essence of the conflict is the fact that the tobacco industry wants people to consume more tobacco products, while public healthcare aspires to minimize the use of such products. The Guiding Principles declare that any contacts between the public authorities and the tobacco industry should be accountable and transparent, and propose to public authorities to establish the procedure which would make the tobacco industry and those who work in its interests transparent as well.

The guideline principles of implementation of Article 5.3 of the FCTC contain eight primary recommendations, which are followed by a more detailed explanation:

1. Raise awareness about the addictive and harmful nature of tobacco products and about tobacco industry interference with Parties' tobacco control policies.
2. Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur.
3. Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry.
4. Avoid conflicts of interest for government officials and employees.
5. Require that information provided by the tobacco industry be transparent and accurate.
6. Denormalize and, to the extent possible, regulate activities described as "socially responsible" by the tobacco industry, including but not limited to activities described as "corporate social responsibility".
7. Do not give preferential treatment to the tobacco industry.
8. Treat State-owned tobacco industry in the same way as any other tobacco industry.

1. Raise awareness about tobacco industry interference with policy

Key recommendations from the Guiding Principles of implementation of Article 5.3 of the FCTC:

Parties should, in consideration of Article 12 of the Convention, inform and educate all branches of government and the public about the addictive and harmful nature of tobacco products, the need to protect public health policies for tobacco control from commercial and other vested interests of the tobacco industry and the strategies and tactics used by the

tobacco industry to interfere with the setting and implementation of public health policies with respect to tobacco control.

Parties should, in addition, raise awareness about the tobacco industry's practice of using individuals, front groups and affiliated organizations to act, openly or covertly, on their behalf or to take action to further the interests of the tobacco industry.

The Law of Ukraine “On Measures of Prevention and Reduction of Use of Tobacco Products and Their Harmful Influence on People’s Health”¹ declares the priority of healthcare policy over the financial, tax and corporate interests of economic entities whose activity is connected with the tobacco industry and of participation of individuals and groups of citizens whose activity is not connected to the tobacco industry in the actions taken to prevent and reduce the consumption of tobacco products and their harmful influence on the public health. However, this standard remains largely declarative, since public authorities do not organize any specific actions to raise awareness about tobacco industry interference with the state policy.

According to the resolution of the Cabinet of Ministers of Ukraine #1371 of September 13, 2002 “On the Procedure of Participation of the Central Executive Public Authorities in the Activity of International Organizations of Which Ukraine is a Member,” the Ministry of Healthcare of Ukraine is defined as the agency responsible for compliance with the obligations which follow Ukraine’s membership in the World Health Organization, including the WHO FCTC. That is why it is the Ministry of Healthcare which accounts for organization or initiation of actions recommended by the Guiding Principles of implementation of Article 5.3

The Second National Report of the Ministry of Healthcare “Control over Tobacco in Ukraine”² included a rather short chapter entitled “Restriction of the influence of the tobacco industry on the decision-making in the area of tobacco control.”

The center for tobacco control of CSO Zhyttia regularly publishes materials on the practice of the tobacco industry of using certain individuals, advanced groups and related organizations which act openly or secretly on their behalf and organize events in the interests of the tobacco industry.

Recommendations

- 1) Prepare a document on tactics and strategies used by the tobacco industry to obstruct passage and implementation of public healthcare policy in the area of tobacco control and send it from the Ministry of Healthcare to other public institutions.**
- 2) During preparation of the Third National Report Control over Tobacco in Ukraine by the Ministry of Healthcare to include a separate chapter with a detailed description of instances of the tobacco industry and related organizations interfering with policy and measures taken to counteract such interference.**

¹ <http://sfs.gov.ua/media-tsent/novini/259999.html>

² <http://sfs.gov.ua/media-tsent/zmi/207710.html>

2. Establish measures to limit interactions with the tobacco industry and ensure the transparency of those interactions that occur

Key recommendations from the Guiding Principles of implementation of Article 5.3 of the FCTC:

2.1 Parties should interact with the tobacco industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products.

2.2 Where interactions with the tobacco industry are necessary, Parties should ensure that such interactions are conducted transparently. Whenever possible, interactions should be conducted in public, for example through public hearings, public notice of interactions, disclosure of records of such interactions to the public.

State Fiscal Service (SFS) is forced to interact with representatives of the tobacco industry concerning payment of taxes and other issues regulated by the Law of Ukraine “On the State Regulation of Production and Circulation of Ethyl Alcohol, Cognac and Fruit Alcohols, Alcoholic Beverages and Tobacco Products,” because it is according to this Law that the SFS issues licenses for production, export, import and trade of tobacco products (Articles 14, 15 of the Law) and performs control over observance of this Law (Article 16 of the Law).

However, this interaction is not transparent enough. For instance, on July 26, 2016, SFS experts held a working meeting with representatives of Ukrtiutiu association, where they discussed new legislation in the area of circulation of excise products and problematic issues of taxation of enterprises in this area³. The announcement of the meeting was posted on the SFS website after it was held, and specific materials of the meeting have not been disclosed.

Recommendations

1. To prepare and pass the draft law which will ensure transparency and legitimacy of communication with public officials, define the legislative framework of organization and implementation of lobbying in Ukraine.

2. To introduce methods, prohibitions, guarantees and basic principles of lobbying in it. To establish basic requirements to the subject of lobbying and the customer of lobbying services, the public officials (whose regulatory activity is the object of lobbying), their rights and obligations, requirements concerning state supervision and control over lobbying activity, liability for violations.

3. To create a free open online State Register of Lobbying with obligatory state registration of subjects of lobbying and systematic reporting on lobbyists, expenses for lobbying and its customers, lobbyist contacts (including those initiated by public officials and agencies) in it.

³ <http://sfs.gov.ua/diyalnist-/regulyatorna-politika-/regulyatorna-politika/arhiv/2016-rik/68412.html>

3. Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry.

Key recommendations from the Guiding Principles of implementation of Article 5.3 of the FCTC:

3.1 Parties should not accept, support or endorse partnerships and non-binding or non-enforceable agreements as well as any voluntary arrangement with the tobacco industry or any entity or person working to further its interests.

3.4 Parties should not accept, support or endorse any offer for assistance or proposed tobacco control legislation or policy drafted by or in collaboration with the tobacco industry.

In March of 2015, SFS and Ukrtiutiun association signed the Plan of Measures for Counteraction to Illegal Trade of Tobacco Products⁴. Signing such an action plan contradicts the recommendations of the Guiding Principles of Article 5.3 of the FCTC. The plan text is not publicly available.

SFS twice (in 2016⁵ and 2017⁶) submitted the Draft resolution of the Cabinet of Ministers of Ukraine “On Establishment of the Amount of Minimal Selling Wholesale and Retail Prices for Tobacco Products, Tobacco and Industrial Tobacco Replacements.” In the Regulatory Influence Analysis it is stated that “*introduction of minimal selling wholesale and retail prices for tobacco products, tobacco and industrial tobacco replacements will have a positive impact on the financial results of tobacco companies.*” There are reasons to believe that the offers have been developed in cooperation with the tobacco industry.

On September 6, 2017, Ukrtiutiun association announced that it had suggested the plan of annual increase of the specific excise tax for tobacco products by 20⁷. These suggestions are also included in draft law 6683⁸, submitted by 4 MPs. The draft law also basically proposes to introduce minimal prices for cigarettes, which is why there are reasons to believe that the suggestions have been developed in collaboration with the tobacco industry.

In 2014, the Conference of the Parties to the WHO developed guiding principles for implementation of Article 6 of the FCTC. In chapter 1.6 of the Guiding Principles the following is stated: “*The development, implementation and enforcement of tobacco tax and price policies as part of public health policies should be protected from commercial and other vested interests of the tobacco industry, including tactics of using the issue of smuggling in hindering implementation of tax and price policies, as required under Article 5.3 of the WHO FCTC and consistent with the guidelines for its implementation as well as from any other actual and potential conflicts of interests.*”

Unfortunately, committees of the Verkhovna Rada and government agencies regularly hold closed meetings with representatives of the tobacco industry on the issues of taxation of tobacco products and support legislative initiatives developed by tobacco corporations.

⁴ <http://sfs.gov.ua/media-tsentr/zmi/207710.html>

⁵ <http://sfs.gov.ua/diyalnist-/regulyatorna-politika-/regulyatorna-politika/arhiv/2016-rik/68412.html>

⁶ <http://sfs.gov.ua/diyalnist-/regulyatorna-politika-/regulyatorna-politika/2017-rik/71564.html>

⁷ <https://ukranews.com/interview/1759-valentyna-khomenko-nelzya-postoyanno-yspolzovat-povyshenye-akcyza-na-tabak-dlya-latanyya>

⁸ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62231

Recommendations

1. Reject draft agreements or other documents developed in cooperation with the tobacco industry and develop documents which would be fully in line with the FCTC and its guiding principles (see a positive example in Appendix 1 – approval of the Order of the Cabinet of Ministers of Ukraine of August 23, 2017 #570-r on Strategy of Counteraction to Illegal Production and Circulation of Tobacco Products for the Period until 2021).

2. To develop and approve regulatory documents which provide for:

a. Prior notification of the Ministry of Healthcare on work meetings with representatives of the tobacco industry concerning changes to legislative and regulatory acts (including taxation of tobacco products) to enable representatives of the MoH and relevant CSOs to participate in such meetings and read all relevant documents of the meeting.

b. Obligatory sending of all written documents (including electronic documents) submitted to government or parliament agencies from representatives of the tobacco industry and which are directly or indirectly connected with questions or regulation or taxation of tobacco products to the MoH.

4. Avoid conflicts of interest for government officials and employees

Key recommendations from the Guiding Principles of implementation of Article 5.3 of the FCTC:

4.1 Parties should mandate a policy on the disclosure and management of conflicts of interest that applies to all persons involved in setting and implementing public health policies with respect to tobacco control, including government officials, employees, consultants and contractors.

4.2 Parties should formulate, adopt and implement a code of conduct for public officials, prescribing the standards with which they should comply in their dealings with the tobacco industry.

4.8 Parties should not allow any person employed by the tobacco industry or any entity working to further its interests to be a member of any government body, committee or advisory group that sets or implements tobacco control or public health policy.

4.9 Parties should not nominate any person employed by the tobacco industry or any entity working to further its interests to serve on delegations to meetings of the Conference of the Parties, its subsidiary bodies or any other bodies established pursuant to decisions of the Conference of the Parties.

4.10 Parties should not allow any official or employee of government or of any semi/quasi-governmental body to accept payments, gifts or services, monetary or in kind, from the tobacco industry.

4.11 Taking into account national law and constitutional principles, Parties should have effective measures to prohibit contributions from the tobacco industry or any entity working to further its interests to political parties, candidates or campaigns, or to require full disclosure of such contributions.

The national target social program of reducing the harmful influence of tobacco on public health for the period until 2012, which was approved by Regulation of the Cabinet of Ministers of Ukraine #940 of September 3, 2009, provided for reduction of the influence of the tobacco industry on decision-making in the area of tobacco control through introducing changes to legislative acts concerning limitation of interaction between central and local public authorities with the tobacco industry and ensuring the transparency of such interactions during in the decision-making process in the area of tobacco control. Unfortunately, these tasks of the Program have not been fulfilled, and the Program itself was canceled by the Regulation of the Cabinet of Ministers of Ukraine of June 22, 2011 #704.

In 2016, the International Center for Policy Studies (which received multiple grants from Philip Morris) tried to include their representative to the Ukrainian delegation at the Seventh session of the Conference of the Parties to the FCTC in Delhi (India), offering full refund for all pertinent expenses. Thanks to disclosure of connections between ICPS and the tobacco industry, their representative was eventually not included in the delegation.

Recommendations

- 1. Introduce changes to the legislative acts concerning limitation of interaction between central and local public authorities and the tobacco industry. Also ensure transparency of such interactions in the process of decision making in the area of tobacco control.**
- 2. Determine criteria for recognizing an organization as such which acts in the interests of the tobacco industry which would therefore mean that conflict of interest legislation would apply to them as well.**
- 3. Enforce obligatory written declaration of any real or potential conflict of interest (or lack thereof) for any public official who makes decisions on provisions concerning regulation or taxation of tobacco products.**

5. Require that information provided by the tobacco industry be transparent and accurate

There are various examples of publication of such information in Ukraine.

Information on maximum retail prices of manufacturers and importers of tobacco products is submitted to the SFS and it published on SFS' website twice a month⁹.

The SFS website also contains Unified State Register of Equipment for Industrial Production of Cigarettes¹⁰.

According to Article 9.1 of the Law of Ukraine "On the State Regulation of Production and Circulation of Ethyl Alcohol, Cognac and Fruit Alcohols, Alcoholic Beverages and Tobacco Products,"¹¹ each manufacturer or importer of tobacco products is obliged to provide information on the ingredients of tobacco products meant for sales on the customs area of Ukraine to the central executive agency which implements national policy in the area of sanitary and epidemic wellbeing of the population annually, by February 1 of the year following the report year.

⁹ <http://sfs.gov.ua/cigars>

¹⁰ <http://sfs.gov.ua/dovidniki--reestri--perelik/reestri/191577.html>

¹¹ <http://zakon0.rada.gov.ua/laws/show/481/95-Bp>

Recommendations

To compile a list of information which manufacturers or importers of tobacco products submit to public authorities and establish the procedure of comprehensive publication of such information to the maximum possible extent.

To approve draft law 2820 which contains the list of reporting information in accordance with the EU Directive to be submitted by tobacco companies to central authorities. Thus, passage of the draft law will significantly improve compliance with the Guiding Principles of Article 3 of the WHO FCTC.

6. Denormalize and, to the extent possible, regulate activities described as “socially responsible” by the tobacco industry, including but not limited to activities described as “corporate social responsibility”.

According to Article 6 of the Law of Ukraine “On Measures of Prevention and Reduction of Use of Tobacco Products and Their Harmful Influence on People’s Health” of September 16, 2012, in Ukraine, the following is prohibited:

- providing financial or other support from tobacco manufacturers or connected organization to events and activities, individuals or groups, including political parties or individual politicians, athletes and sports teams, artists or artist groups, educational establishments of all forms of ownership;
- conducting awareness campaigns and events for the population, including those concerning prevention of smoking among the youth, with the direct or indirect financial support of manufacturers of tobacco products or related organizations;

Unfortunately, there are facts of tobacco corporations providing financial assistance to certain organizations in Ukraine. It shows that the aforementioned legislative provision is violated. It may be connected with lack of actual liability for such violations.

Recommendations

1. Publish facts of violations of the relevant provisions of Article 16 of the Law of Ukraine #2899. Compile a list of organizations, events and individuals who received financial or other support from manufacturers of tobacco products or related organizations.

2. Establish criteria for recognizing an organization as such which is “connected with the tobacco industry.”

3. To offer changes to the legislation to establish penalty for both those who provide and receive financial or other support from manufacturers of tobacco products or related organizations.

7. Do not give preferential treatment to the tobacco industry.

According to Article 10 of the Law of Ukraine “On Measures of Prevention and Reduction of Use of Tobacco Products and Their Harmful Influence on People’s Health,” it is prohibited to support manufacturing (import) of tobacco and tobacco products for sales in the customs area of Ukraine in the form of public financing, provision of financial aid, financial guarantees, grants, subsidies, subsidized loans from the funds of the National Budget of Ukraine and local budgets to respective economic entities.

At the same time, support of proposals of certain corporations concerning creation of more attractive conditions for business contradicts this norm. Such activity, reflected in this report, may include:

- delaying of implementation of draft law #2820 and #4030a, which supports preferential regime for cigarette manufacturers concerning flavors, marking, reporting and marketing;

- blocking of increase in ad valorem excise taxes despite this taxation regime being more profitable for the state; support of increase of only the specific excise tax in the excise growth plan for 7 years¹² will lead to loss of potential budget revenue from excise taxes in 2018 in the amount of UAH 2 billion and invalidation of this type of taxation in the future. It is evident that this proposal is lobbied by manufacturers of expensive cigarettes who find it beneficial to apply the same excise tax rates across the market (both cheap and expensive cigarettes).

8. Treat State-owned tobacco industry in the same way as any other tobacco industry

There are no state-owned tobacco enterprises in Ukraine.

¹² http://biz.nv.ua/ukr/experts/skipalskiy_a/chi-dijdemo-mi-do-jeuropejskih-tsin-na-sigareti-u-2025-rotsi-2235297.html

An example of successful counteraction to the tobacco industry: approval of the Strategy of Counteraction to Illegal Production and Circulation of Tobacco Products for the Period until 2021

In August, 2016, the Ministry of Finance of Ukraine submitted for public discussion the draft regulation of the Cabinet of Ministers of Ukraine “On Approval of the Strategy of Counteraction to Illegal Production and Circulation of Tobacco Products for the Period until 2021.” The concept note attached to the project openly stated that it had been developed “*jointly with representatives of law enforcement agencies and the Ukrainian Association of Tobacco Manufacturers ‘Ukrtiutiun.’*”

One of the tasks of the strategy project was “*activization of exchange of information in the area of counteraction to illegal production and circulation of tobacco products between central executive agencies and economic entities which execute production, wholesale and retail trade of tobacco products, their associations.*”

The State Fiscal Service was supposed to be appointed the national coordinator in the area of counteraction to illegal production and circulation of tobacco products in Ukraine and was supposed to organize “*working meetings with the participation of representatives of national authorities (including law enforcement agencies) involved in implementation of the Strategy and manufacturers of tobacco products concerning editing, updating and reviewing the Plan of Measures for Implementation of the Strategy.*” Which means that all measures in the Strategy had to be approved by representatives of the tobacco industry.

The project also mentioned that “*industry association of manufacturers of tobacco products can provide the National Coordinator with the results of research commissioned by it concerning the volumes of tobacco products on the market which were illegally produced and illegally imported to the customs area of Ukraine. The research results, in case of their provision to the National Coordinator, are taken into account when the National Coordinator assesses the effectiveness of Strategy implementation.*”

The draft Strategy mentioned neither the Framework Convention, nor the FCTC Protocol on liquidation of illegal trade of tobacco products. In fact, it contradicted Article 5.3 of the FCTC.

To counteract such a draft Strategy, letters signed by MP I. Lutsenko were prepared and sent to the Ministry of Finance in 2016, saying that “*the draft act has been developed in collaboration with representatives of law enforcement authorities and Ukrainian Association of Tobacco Manufacturers ‘Ukrtiutiun,’ which contradicts Ukraine’s international obligations and the Ukrainian law. When the updated draft Strategy in the area of illegal production and circulation of tobacco products is developed, it is necessary to ensure the protection of this Strategy from the influence of commercial and other corporate interests of the tobacco industry.*” Similar letters were sent from the Ministry of Healthcare of Ukraine as well. Therefore, Strategy which served the interests of tobacco manufacturers was suspended and the discussion around it proceeded to include WHO FCTC provisions.

When the draft Strategy was discussed in 2017, MoH and the Governmental Office on European and Euroatlantic Integration took a resolute stance and insisted that the Strategy should comply with FCTC provisions.

As the result, the Cabinet of Ministers of Ukraine, with their regulation of August 23, 2017 #570-r, approved the Strategy of Counteraction to Illegal Production and Circulation of Tobacco Products for the Period until 2021¹³.

In the Strategy approved by the CMU it is stated that it has been developed in accordance with the WHO Framework Convention on Tobacco Control and EU-Ukraine Association Agreement.

The Strategy includes a number of provisions which directly comply with the requirements of Article 5.3 of the FCTC, for instance, it is mentioned that “*counteraction to the efforts by the tobacco industry to undermine or subvert tobacco control efforts concerning fighting against illegal trade of tobacco products*” should be ensured.

The Strategy provides for increasing the responsibility for violations in the area of illegal production and circulation of tobacco products, in particular of economic entities which have obtained licenses for retail and wholesale trade of tobacco products or for manufacturing of tobacco products.

The Strategy provides for introduction of a joint system of tracking of movement of tobacco products together with the EU and other countries, at the same time, it declares that *creation of such a system cannot be delegated to tobacco product manufacturers or related organizations.*

The agencies declared responsible for organizational coordination for implementation of this Strategy are SFS and MoH, which, when necessary, organize and conduct working meetings with the participation of representatives of public authorities (including law enforcement agencies) involved in the implementation of the Strategy, and *citizen groups whose activity is not connected with the tobacco industry* to prepare and review the plan of measures necessary for implementation of the Strategy¹⁴.

¹³ <http://www.kmu.gov.ua/control/uk/cardnpd?docid=250225276>

¹⁴ Контроль над тютюном в Україні. Другий національний звіт. /Красовський К.С., Андреева Т.І., Григоренко А.А., Поліщук М.Є., Скіпальський А.П., Стойка О.О. – МОЗ України, ДУ УІСД МОЗ, 2014. -128 с.