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Controlling Corporate Influence in Health Policy Making? Implementation of Article 5.3 of the Framework Convention on Tobacco Control, Residual Opportunity Structures for Policy Influence, and Political Adaptation

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Executive Summary

Strong implementation of Article 5.3 of the FCTC is considered to be a prerequisite of strong implementation of other articles of the Convention. Despite a majority of parties reporting some action in accordance with the Article, our findings indicate that its implementation creates a wide range of residual opportunities for policy influence.

- First, implementation of the guidelines is highly selective: a majority of parties act on less than a quarter of recommendations, which provides functional-based opportunities for policy influence.
- Second, implementation is primarily passive, achieved through conflict of interest, political financing and lobbying restrictions introduced independently of the FCTC. Such measures do not necessarily cover all policy actors with the potential to influence health policy and are commonly subject to exemptions, qualifications, and provisos, which fall short of the strong proposals contained in the guidelines. Consequently, they also create space for functional based opportunities for policy influence.
- Third, measures introduced in response to the FCTC are typically restricted to health ministries (and not extended to other ministries with policy briefs relevant to tobacco control), not explicit about whether they extend to third parties acting on behalf of the industry, and rarely put into effect the entire range of proposals outlined in specific recommendations. This weak and incomplete approach to implementation provides functional, agent, and venue-based opportunities for influence.
- Fourth, parties systematically overlook recommendations that facilitate industry monitoring. This facilitates residual opportunities for policy influence which are enabled by both weak and incomplete implementation of specific recommendations and gaps in the guidelines (see below).

- Fifth, in many cases implementation of the guidelines demonstrates a lack of joined up thinking, which, in some cases, diminishes the value of some actions in managing industry influence. There is, for instance, little merit in awareness raising measures if parties do not have substantive measures in place to exclude industry actors from health policymaking. Equally, measures restricting insider political activity which are nominally designed to apply to third parties are only likely to be effective where such actors are required to disclose their links to tobacco manufacturers. Finally, a number of parties implement guideline recommendations through uncodified, working norms, which, as some party reports make clear,[1] may leave implementation susceptible to changes in political administration.

In practice, weak implementation is likely to be driven by a combination of factors such as poor understanding of Article 5.3 and its guidelines (illustrated by widespread misreporting in party reports), difficulties in building cross-party and departmental support for restrictions on industry political activity, conflicts of laws, and industry opposition.[2] Recognition of the risks associated with weak implementation does not appear to be a sufficient condition of robust implementation. Lao, for instance, reports that its measures only apply to lower ranking, "technical officials", despite acknowledgement of the industry's practice of focusing on "high-ranking" actors.[3] Although further analysis is required to disaggregate the relative importance of the potential factors behind weak implementation, frequency data indicating the extent of compliance achieved through passive implementation suggest that codifying guideline recommendations at the national level is generally a low priority.

The policy risks associated with incomplete and selective implementation of the guidelines are likely to vary according to a wide range of policy-related and institutional factors - including pan-governmental buy-in to the underlying objectives of Article 5.3 and effective monitoring and enforcement - and are, therefore, difficult to anticipate in the absence of in-depth case study analysis. However, a number of general inferences can be drawn from studies on tobacco industry political activity. First, the number of residual opportunities for policy influence is likely to deepen policy risks. Residual opportunities are not exclusive of one another. Recent research on the policy conflict relating to the proposed introduction of standardised packaging in the UK illustrates that tobacco companies' seek to exploit all available opportunities for influencing health policy.[4] This heterogeneous quality of political action strongly suggests that weak controls on industry interactions, conflicts of interests, and policy subsidies have a cumulative and mutually reinforcing effect on the industry's capacity to build consensus within government and legislatures against policy change. The continuing susceptibility of elected representatives to industry influence[5] is a case in point. In the context of weak implementation of conflict-of-interest provisions,[6-10] this permits tobacco manufacturers to relationship-build with elected representatives through hospitality and other expenditures,[11] in addition to applying direct political pressure using political constituencies comprising other actors in the tobacco supply chain[5]. Second, the fact that partial implementation limits the universe of possibilities for tobacco companies does not necessarily imply reduced influence. In 2000, for example, industry actors' ability to access the Prime Minister's office

in the UK, worked to weaken health policy even where access to other departments was denied.[12] Third, the fact that opportunities for policy influence are interdependent and have the potential to create additional channels of influence suggests that the type of opportunities left open by partial implementation is also important. These additional channels can expedite relatively subtle changes of emphasis in industry political activity. Partnerships between government and the industry on tobacco tax policy and the illicit trade in tobacco products, for example, can facilitate a range of venue, function, and agent based opportunities for policy influence by facilitating reliance on industry data, closer co-operation between industry actors and government officials, and increased access to policy actors.[13-19] They can also facilitate paradigmatic changes in political action. Access to officials involved in brokering trade policy, for example, can shape international trade and investment agreements, which, in addition to creating new, and potentially powerful, venues for policy influence by expanding tobacco companies' access to investor-state dispute settlement procedures,[20] can also enable tactical shifts in how the industry lobby.[21]

This last example highlights opportunities for policy influence facilitated by gaps in the guidelines, which do not explicitly address trade and investment agreements. Another important gap in the guidelines concerns parties' increasing use of mandatory stakeholder consultations and impact assessments, characteristic of the cost-benefit approach to US administrative law. Stakeholder consultation creates a horizontal venue-based opportunity for policy influence, which circumvents restrictions on government-industry interactions. Further, by permitting third parties funded by major tobacco companies to represent themselves as independent actors and by taking a permissive approach to the types of evidence that can be relied upon by participants which allows respondents to draw on reports funded by the major tobacco companies[22-24] consultations facilitate agent and functional-based opportunities. Finally, the recommendations do not directly cover outsider political strategies.[25-27] Transparency provisions in the guidelines may help to monitor such strategies, but these are overlooked by the majority of parties.

Policy Recommendations

The findings underline the importance of parties taking an active approach to implementing all the Guideline recommendations, taking a whole-of-government approach to implementation,[28] and ensuring that measures explicitly apply to third parties working on behalf of the industry. Implementation should, where relevant, be formally codified in administrative measures or legislation, which integrate the full range of proposals outlined in discrete recommendations. Specific consideration should arguably be given to imposing obligations on tobacco industry actors in accordance with Recommendations 5.2 and 5.3 to submit information concerning their political activities, which should enhance effective industry monitoring and allow health officials and civil society actors to accurately track the industry's response to restrictions on its political activity. Parties may also give consideration to introducing public health policy footprints, which mandate disclosure of public and elected officials' contacts with stakeholders and supporting materials provided by lobbyists in the course of their work.[29] Ideally, this should be a live document, which

would help civil society actors scrutinise policymaking in real time.[29] Finally, there is a clear case for revisiting the guidelines. Industry political activity is mutable and capable of adapting to altered politico-institutional conditions. Emerging research indicates that the guidelines need to be developed to take account of innovations in political activity that centre on Better Regulation practices[22, 23, 30-32] and trade and investment agreements.[20, 33] Introducing general duties (in conjunction with specific measures) may partly address this phenomenon, particularly where they apply to policy actors across government.[34]

There are several pathways to achieving these changes. Parties may consider the value of establishing inter-ministerial bodies aimed at facilitating a whole-of-government approach to implementing the guidelines.[35, 36] Civil society actors and academics should also inform public officials of the policy risks attendant on isolated efforts to prohibit or manage specific forms of political activity. Finally, where there is an absence of political will to implement Article 5.3, public health advocates may also explore the possibility of litigation. As one of several similar documents adopted at sessions of the Conference of the Parties (COP), the governing body of the FCTC, there is a measure of agreement that the guidelines constitute a subsequent agreement under Article 31 of Vienna Convention on the Law of Treaties 1969[37] and, therefore, should be taken into account by parties in interpreting their obligations under Article 5.3. The preamble to the guidelines, which states that parties are “encouraged” to implement them and that their aim is to “assist Parties in meeting their legal obligations” under the Convention, emphasises the non-binding status of the guidelines. However, the Treaty’s structure (a primary agreement outlining general principles particularised by detailed guidelines for implementation) and other comments in the guidelines, which encourage Parties to implement measures beyond those outlined, arguably indicates that effective implementation of Article 5.3 not only requires Parties to adopt its recommendations in full, but that this represents the minimum necessary step to giving effect to the Article.[38]

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