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ENFORCEMENT OF AND COMPLIANCE WITH TOBACCO CONTROL LEGISLATION

A GUIDE FOR THE WHO AFRICAN REGION



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FOREWORD

This guide to the enforcement of, and compliance with, domestic tobacco control legislation represents an important next step in efforts to implement tobacco control legislation in WHO's Member States. Effective implementation is urgent because tobacco kills up to half of its users translating into about 6 million people each year. Unless urgent action is taken, the annual death toll could rise to more than 8 million by 2030.

Ongoing global and domestic efforts to implement the WHO Framework Convention on Tobacco Control (WHO FCTC) and promote evidence-based tobacco control have triggered the enactment of domestic tobacco control legislation in many countries around the world. The adoption of national laws is only the first step of domestication; the next challenge is enforcing these laws and ensuring that those subject to them comply. Member States participating in many workshops requested WHO Regional Office for Africa to prepare and disseminate technical materials on enforcement of and compliance with tobacco control legislation. This guide is our response to enforcement needs by providing a useful informative tool for all those involved in promoting enforcement of, and compliance with, tobacco control legislation.

The guide also addresses key concepts, theories and practices underpinning tobacco control enforcement and compliance. It emphasizes the importance of developing strong tobacco control legislation that includes key components to support an effective enforcement programme, including various aspects of enforcement programme operations such as the detection of violations and penalties for non-compliance. It similarly emphasizes the importance of proactive compliance promotion and monitoring mechanisms for preventing or minimizing violations of tobacco control laws. It addresses the various mechanisms and structures required to institutionalize an effective and sustainable enforcement programme. Three country case studies have been prepared to enhance a practical understanding of the processes, challenges and lessons learned in the enforcement of domestic tobacco control legislation.

This guide is intended to assist all those working to adopt and enforce domestic tobacco control laws. These include legislators, public health officials, and inspectors, local and municipal authorities, police, customs and other enforcement officers, judicial officials and educators, tobacco control experts as well as the media and civil society.

Dr Abdikamal Alisalad
Acting Director, Noncommunicable Disease Cluster
WHO Regional Office for Africa

DISCLAIMER

Nothing in this guide should be construed to represent the official views of the World Health Organization, particularly concerning the interpretation and application of the WHO FCTC, or is it meant to influence or prejudices the interpretation of the Convention by the Parties.

EXECUTIVE SUMMARY

PART I: PRINCIPLES AND PRACTICES

CHAPTER 1: AN INTRODUCTION TO ENFORCEMENT AND COMPLIANCE

Tobacco kills up to half of its users. Tobacco kills nearly 6 million people each year. Unless urgent action is taken, the annual death toll could rise to more than eight million by 2030. Nearly 80% of the world's one billion smokers live in low- and middle-income countries. As part of efforts to combat this growing problem, many countries in the WHO Africa Region are enacting and implementing domestic legislation for tobacco control. The WHO FCTC calls on Parties to implement effective legislative, executive, administrative and other measures at the national, regional and international levels in order to reduce tobacco consumption, nicotine addiction and exposure to tobacco smoke. While adoption of effective tobacco legislation is an essential ingredient of tobacco control, subsequent enforcement and compliance must be thorough for the law to be successful. This guide has been prepared to assist Member States in the WHO African Region to implement appropriate enforcement and compliance strategies for tobacco control legislation including the adoption of a compliance and enforcement plan. While the ultimate goal of tobacco control is the protection of public health, an intermediate goal is to secure full compliance with the laws for controlling tobacco. Compliance occurs when legal requirements are met and the desired changes are attained. Tobacco control has generally followed public health-based command-and-control forms of enforcement, where the government prescribes the desired changes through detailed legal requirements and promotes and enforces compliance with these requirements. Other methods such as taxation, litigation and tobacco product regulation are also being used to enforce tobacco control legal requirements.

CHAPTER 2: WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL: ENFORCEMENT AND COMPLIANCE

Enforcement of and compliance with tobacco control legislation under the WHO FCTC is informed by: the Convention itself, the guidelines adopted by the Conference of Parties and other relevant decisions of the Conference of Parties. Under article 5.1, each Party is required to develop, **implement**, periodically update and review comprehensive multi-sectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the Protocols to which it is a Party. Article 5.2 provides that Parties are required to adopt and **implement effective** legislative, executive, administrative and/or other measures for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke. Furthermore, article 2 encourages Parties to **implement** measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law. Finally, under article 19, the Convention encourages States Parties to utilize their existing civil and criminal law to address issues of compliance and enforcement. However, the most comprehensive guidance on enforcement of and compliance with the requirements of the WHO FCTC is derived from the guidelines adopted under the Convention. These Guidelines significantly inform the options and pathways for Member States efforts in the enforcement of and compliance with the Convention.

CHAPTER 3: STRONG TOBACCO CONTROL LEGISLATION: THE BEDROCK OF A SUCCESSFUL ENFORCEMENT PROGRAMME

Cultivating a climate of compliance necessitates the drafting of tobacco control laws and requirements that are enforceable. These laws must establish the necessary power and authority and their requirements must be clear and practical. Law drafters and implementers must consider the full extent of constitutional requirements for law enforcement. Tobacco control enforcement frameworks need to include law enforcement frameworks provided by a country's constitution or other laws and fill any enforcement gaps in ways that are constitutionally and legally permissible. Most importantly, tobacco control legislation must clearly specify who will be responsible for its enforcement, including the application of penalties and sanctions. This enables the vesting of institutional enforcement responsibility and accountability in government. The legislation needs to specify the enforcement roles and responsibilities of other government ministries, departments or agencies and the different levels of government. These laws are most effective when they provide the power and authority for their own enforcement. The reputation of a tobacco control enforcement programme is diminished if violators in the regulated community can successfully challenge the authority and legitimacy of the enforcement programme or of the agency acting to enforce the law.

Within the framework of the tobacco control and other laws applicable to tobacco control enforcement, it is important to review a country's civil and criminal law enforcement and coordination mechanisms and their effectiveness, challenges and opportunities. Tobacco control law must complement and reinforce the enforcement mechanisms of related laws on drug and food safety, occupational health, consumer protection, alcohol, toxic hazards, water and sanitation as well as medical devices, among others. This is essential to supporting the enforcement regime for tobacco control legislation. Studies of tobacco control programmes around the world indicate that a gradual and phased approach to enforcing stringent requirements has been most successful. Health and tobacco control enforcement programme officials need therefore to rely on evidence based and proven methods in order to demonstrate that the goals of the legislation can be achieved. Moreover, officials need to provide a range of alternative options that can be used to achieve compliance. Early consultations with concerned groups help foster a climate for future enforcement.

In light of the above, tobacco control legislation may need to direct greater enforcement efforts at key members of the regulated community whose compliance can achieve the greatest enforcement and public health impact. In most cases this is the tobacco industry. Analysing each regulated community early in the process helps enforcement officials understand compliance capabilities better by determining the community's willingness to comply with the law. It also helps officials tailor and deploy the most appropriate and effective compliance strategies for specific sections of the regulated community. Consultations involving tobacco control program officials, enforcement agencies as well parts of the regulated community can go a long way towards reducing the potential for resistance to enforcement and compliance.

CHAPTER 4: ENFORCEMENT PROGRAMME OPERATIONS AND RESPONSES

Compliance promotion is needed along with repression. Compliance promotion consists of informing the public and the regulated communities about the laws and of what is allowed and what is prohibited under the law. They must also learn what actions they will have to take to comply with the law. Compliance monitoring is at the heart of effective tobacco control enforcement and compliance. It helps determine whether a regulated community has complied with the legislation. The main tools for compliance monitoring include: inspections conducted by enforcement officers, self-monitoring, self-recordkeeping and self-reporting by the regulated community.

Inspectors must be highly trained and possess comprehensive skills. Tobacco inspections may either be routine, sporadic without prior notice, or taken in response to reports of violations. Inspectors must follow legally-specified procedures in order to comply with relevant domestic laws and to enable full admissibility of inspection information in the appropriate courts of law. A standardized operational framework must be created for this. Self-enforcement and compliance by regulated communities is widely recognized under tobacco control legislation. Legislation usually provides for the regulated community to monitor its own compliance through self-enforcement measures. Self-enforcement can be effective when coupled with compliance education as well as with mechanisms for obtaining reliable information and for reporting violations. There need to be real prospects for legal action in cases of non-compliance, and these are the purview of the formal enforcement programme.

Formal enforcement response mechanisms for tobacco control legislation are legally binding and their application and use must comply with specified legal procedures according to the legal system of each country. The legal basis for judicial enforcement action varies from country to country and is based on the laws of the jurisdiction in which the claims are brought. Formal civil and criminal enforcement mechanisms must be established in tobacco control legislation or in other, related laws. Criminal judicial enforcement becomes imperative when a regulated community knowingly and willingly violates a tobacco control law under the prevailing laws of the specific jurisdiction. The activities of the formal enforcement programme must be consistent and sustained in order to maintain a climate of deterrence and full compliance. Response mechanisms for enforcement of tobacco control legislation aim to impose sanctions for non-compliance; remove threats to public health as well as to social, economic and environmental well-being; ensure that violators of the legislation become compliant; deprive regulated communities of any benefits, including any unjust enrichment, derived from non-compliance with tobacco control requirements; and require the performance of specific actions in furtherance of these requirements.

CHAPTER 5: SUSTAINING ENFORCEMENT RESPONSES

Tobacco control is a multifaceted, multisectoral effort that cuts across many sectors in government. The WHO FCTC recognizes that the implementation of tobacco control, including enforcement, will be carried out by a multiplicity of sectors across government and will include non-governmental actors as well. Depending on the particular characteristics of each jurisdiction, responsibility for the enforcement of provisions of the tobacco control law may devolve upon

several governmental agencies. It is extremely important to have an enforcement strategy that clearly identifies the various enforcement actors and delineates their tasks in the enforcement of the legislation. The rights of persons must be balanced against the determination of the government to act swiftly and fairly to protect public health. Enforcement responses should be transparent, equitable and fair. Enforcement officials need to develop an enforcement response policy to create standards for all enforcement actions related to tobacco control legislation. Enforcement frameworks for tobacco control legislation can also exist at the state, provincial, municipal or other local governmental levels. The following have enforcement and compliance responsibilities:

- (a) **Legislative bodies** can greatly influence the pace and nature of enforcement of tobacco control legislation by defining public health and enforcement goals, specifying the powers of the authorities, amending legislation and determining the level of resources required for tobacco control.
- (b) **Judicial institutions** have the responsibility of interpreting tobacco control laws that come before them. Through case decisions and judicial review, courts define the legal rights and powers that can determine the ultimate effectiveness of tobacco control enforcement programme.
- (c) **Ministries of health**, one of their agencies or other national institutions for tobacco control have a central role in coordinating the adoption and enforcement of legislation. These can be vested with administrative mechanisms to enforce tobacco control requirements against violations of the law or to apply authority already vested in them for this enforcement.
- (d) **Police** may also possess significant resources to detect and correct violations and help to ensure that the tobacco control-regulated community returns to compliance.
- (e) Each **ministry or agency** retains responsibility for the enforcement of particular elements of tobacco control legislation that fall within their functional mandates. To avoid inter-agency conflicts, a mechanism for ongoing cooperation between the agencies is required.
- (f) In many countries around the world, **NGOs** have become leading watchdogs and providers of substantial resources for implementation. They are allies of the government, facilitating governmental enforcement and compliance activities while promoting education and awareness that help bridge the transition from the enactment of the law to its enforcement.

Evaluation of enforcement activities helps everyone responsible for enforcing the laws carry out their roles consistently, using established mechanisms and procedures. Evaluation reports help enforcement programmes review and learn from successes or failures in the application of the various enforcement tools. Evaluation measures how well enforcement of a specific tobacco control law is performing. An important measure of the success or failure of an enforcement programme is the amount of tobacco consumed by a population. On its basis risk groups can be identified and further interventions can be undertaken to reduce the prevalence of tobacco consumption. However, it would be misleading to rely entirely on public health results to measure the effectiveness of the legislation, so other measures must be added, including the level of compliance achieved by the whole range of the regulated community, the quality of inspections, the frequency and number of inspections, the number of major violators in the regulated community and the quality and quantity of reporting received under the legislation.

It is likewise important to monitor the number of responses and the amount of time taken to complete such enforcement responses fully, measured against set enforcement time goals. It should be kept in mind, as remarked at the beginning of this document, that a comprehensive tobacco control enforcement regime may not be achieved at the outset of legislative development. It may be necessary to adopt an incremental approach to establishing enforcement mechanisms for tobacco control, focusing enforcement resources on the most significant violators of the tobacco control law.

PART II: CASE STUDIES ON TOBACCO CONTROL LEGISLATION ENFORCEMENT

CHAPTER 6: KENYA

Kenya is a Party to the WHO FCTC having signed and ratified it in 2004. As the second state globally to sign and ratify at the same time, it indicated a political commitment to implement its objective to control the growing, manufacture, sale, and use of tobacco. Generally, Kenya has complied with the WHO FCTC. It has domesticated the convention and Kenya has one of the strongest tobacco control laws, the Tobacco Control Act 2007. Its enforcement has seen increased levels of awareness on tobacco and its effect amongst the Kenya population and this has changed people's attitude and perception towards it. There is significant reduction in tobacco use, and most of the regulated community such as individual persons and the business community know their legal obligation not to violate the law because they are cognizant of the consequences. There is a marked decrease in advertisement, promotion and sponsorship of tobacco due to prohibition, the prosecution and imposition of sanction, penalties that include heavy fines, seizure and destruction of tobacco products that violate the law. Further, there is restricted tobacco use in public place and work places.

However, there is need to define the law to align with the convention, its guidelines for implementation and the approval of the regulation enhanced. The government at various levels needs to factor in adequate resources (human and infrastructure) toward tobacco control. Human resource is one of the single important components determining performance of the public health system and infrastructure is fundamental to the provision of public health services. Further, the law, regulation and/ or the policies need to establish a clear coordinating structure to give direction and utilize resource efficiently and effectively. The law enforcement agencies and officers should enhance implementation/ enforcement that are geared towards full compliance.

CHAPTER 7: SEYCHELLES

Before 2009, legislation on tobacco control was limited to a ban on smoking for children, a ban on sales of tobacco products to children and a well enforced policy since several decades that ruled that tobacco products should not be advertised in the national mass media, and that smoking was not allowed in all schools, health facilities, Government buildings and public transports. In 2000, the Minister of Health appointed a multi-sectorial National Tobacco Control Committee with the mandate to develop comprehensive tobacco legislation. The National Tobacco Control Committee was later expanded into a "National Tobacco Control Consortium" of all interested parties, and it then included representatives from more than fifty governments,

non-governmental and other private organizations in Seychelles. This “whole of society” participatory approach ensured broad support and the Bill submitted to the Parliament was approved unanimously with no substantive change in 2009. Hence the Seychelles National Tobacco Control Act entered into force in 2009. It is comprehensive tobacco control legislation and it addresses most of the major obligations under the WHO FCTC. Main provisions include, *inter alia*:

- (a) a total ban on smoking in all enclosed public places, all enclosed workplaces and on all public transports, as well as in all outdoor premises of all education and health institutions (“enclosed” being defined as any area under a roof);
- (b) a total ban on all forms of direct and indirect tobacco advertising, sponsorship and promotion;
- (c) mandatory rotating pictorial health warnings covering at least 50% of the main areas of tobacco packages;
- (d) various measures against tobacco smuggling;
- (e) the establishment of a National Tobacco Control Board to develop, guide and monitor tobacco control in Seychelles;
- (f) Penalties are defined for all offenses.

The Attorney General’s Office of Seychelles has responsibility to prosecute and recover damages resulting from non-compliance to the Tobacco Control Act. The Ministry of Health is the main enforcing agency of the Seychelles Tobacco Control Act and the Minister of Health has power to issue and amend regulations related to the Tobacco Control Act. The Ministry of Health shares enforcement power with designated authorized public health officers, who can make orders for non-compliance as well as issue spot fines. Authority under the Tobacco Control Act can also be delegated to officers of the police department, the licensing authority and the customs department. The chair and the executive secretary of the National Tobacco Control Board are major actors to mobilize the regulated community in ensuring enforcement of and compliance with the Act. All provisions in the Tobacco Control Act 2009 involve penalties for offenders. Enforcement of tobacco control legislation is facilitated by activation and involvement of the community at the root levels. Surveys of enforcement of the tobacco control legislation have been conducted at regular intervals by the Ministry of Health. A recent survey conducted in October-November 2014 also shows overall good compliance, with a few exceptions.

However, Seychelles also faces challenges in enforcing tobacco control legislation. Enforcement of the ban of smoking in enclosed places is not yet optimal. Another issue arose with the implementation of mandatory health warnings on tobacco packets. The designated set of warnings included a limited number of health warnings. While the local cigarettes manufacturers swiftly complied with the prescribed health warnings before the deadline, importers had difficulties to comply as some of importers tended to apply rules that prevailed in Mauritius which had similar health warnings as in Seychelles but also additional ones. The National Tobacco Control Board is currently reviewing this issue.

To conclude, the swift ratification of the WHO FCTC, rapid enactment of a comprehensive tobacco legislation, and effective implementation of the main regulatory measures demonstrate high commitment of Seychelles to strong and sound public health action for the prevention of non-communicable diseases. The prevalence of smoking has decreased regularly and markedly over time, as assessed in serial independent population surveys in 1989, 1994, 2004 and 2013. Yet, while substantial successes in tobacco control have been recorded during the 30 past years in Seychelles, there is also a need to continuously develop and strengthen the enforcement of tobacco control measures to sustain current successes and to address new challenges for tobacco control such as e-cigarettes and other nicotine delivery systems in Seychelles.

CHAPTER 8: SOUTH AFRICA

South Africa follows a system of cooperative government, with three tiers of government: national, provincial and local. The overall framework for tobacco control in South Africa is set out at the national level, although local municipalities play a significant role in its implementation. South Africa's constitution protects the right to a healthy environment, as well as the right to life. There is no constitutionally-enshrined right to smoke. The country's national tobacco legislation clearly prioritizes public health considerations over the autonomy of the individual.

South Africa is a signatory to the WHO FCTC. The country's first major piece of tobacco control legislation – the Tobacco Products Control Act was enacted in 1993, and has been subject to three subsequent amendments. Six sets of regulations have been published in terms of this legislation. The law as it stands today complies with most of the best recommendations of the WHO FCTC. Notably, there is a ban on all advertising and promotion of tobacco products – direct or indirect – except for certain prescribed notices at the point-of-sale. Smoking is also banned in all indoor public places. Nationally, the tobacco portfolio rests with the Health Promotion Directorate within the National Department of Health, which is responsible for the development and drafting of legislation and regulations. However, responsibility for the enforcement of tobacco control laws which affect the general public rests primarily with the health sections of the various city municipalities, specifically their Environmental Health Practitioners (EHPs). This is often done in partnership with various other law enforcement agencies, as well as interested non-governmental organizations (NGOs).

EHPs have competency to inspect premises in order to check compliance with tobacco control laws, and to issue fines in certain circumstances in which there is non-compliance with various aspects of the legislation. Dockets may also be opened with the police, which require a formal police investigation and prosecution. Much of the enforcement is carried out in response to complaints from members of the public, which are encouraged and facilitated both by NGOs and various municipalities. Although more rare, EHPs do occasionally carry out proactive inspections of certain premises in order to check compliance. In certain circumstances there are other enforcement mechanisms in place. For example, some regulations are enforced at the stage at which building plans are submitted for approval with the relevant local authorities. Tobacco products which are brought into the country – and which therefore must comply with South Africa's tobacco control laws and regulations – are also generally inspected as they arrive at the ports.

The Health Promotion Directorate within the national department of health is responsible for education and communication relating to health issues. The directorate is involved in disseminating information relating to such issues, and raising community awareness. Within the local authorities, EHPs are also responsible for educating the public as to the health dangers posed by tobacco, as well as the relevant laws and regulations. However, in practice it is largely up to the various advocacy groups to make use of earned or unpaid publicity to promote tobacco issues. Evidence suggests that tobacco control laws in South Africa are to a large degree self-enforcing. This is indicative of a shift in the mind-set of not only the general public, but also those in control of public places such as restaurants and shopping malls. Certain establishments are even imposing restrictions on smoking beyond those required by law.

The attitude among the South African public has also contributed to high levels of compliance within public places. Non-smokers are aware of their right to clean air, and are increasingly demanding that it be respected. Enforcement operations are largely driven by complaints from the public, which aids authorities in directing their resources where needed, and streamlines the process of ensuring there is compliance where there has been a failure to abide by the laws and regulations. There is also a tendency for the public first to approach those in charge before lodging a complaint. Engaging with those responsible in a constructive manner tends to be met with cooperation.

Challenges to enforcement include unfamiliarity of police and prosecutors with the tobacco control laws and regulations as a major challenge to enforcement, as well as a degree of unwillingness to investigate or prosecute cases of noncompliance. There are also attempts by industry to circumvent legislation, often by adopting a wide interpretation of the laws. This can be exacerbated by ambiguous or inaccurate drafting of legislation. Problems in drafting might also be symptomatic of a larger problem, namely a general lack of capacity. State legal teams are stretched, and there is a lack of expertise available to draft such legislation. Industry might also occasionally institute its own litigation in order to challenge certain laws directly. South Africa's successes in enforcing tobacco control laws may be attributed to a number of different factors, but there are certain aspects which stand out and which may be instructive for other countries attempting the same. First, in the example of South Africa, one sees the value of active citizenry and advocacy groups. Authorities are often confronted with a lack of resources, which restricts their capacity to enforce the laws and regulations to the extent that they might wish. However, this challenge has been vitiated by the prominent role that the general public and advocacy groups are playing in facilitating enforcement.

Compliance promotion has also been facilitated by a strong media. Overall, there has been a “de-normalization” of tobacco use, which has been assisted by the media. An increased awareness, and strong anti-tobacco advocacy generally, is likely responsible for the shift in mind-set that has led to self-regulation. The South African example also shows the effectiveness of a ‘soft’ approach to enforcement. In responding to complaints on non-compliance, actors appear to approach alleged violators in a constructive and non-confrontational manner. The response generally appears to be positive, with most found to be willing to cooperate once engaged. This is again indicative of a shifting attitude. Such an approach is also likely to be not only more effective, but also more efficient

CHAPTER 9: CONCLUSION

Enforcement and compliance measures ensure that both the short-term and long-term public health and other objectives of tobacco control legislation are achieved. As this guide and country case studies have demonstrated, a multi-pronged approach to enforcement and compliance is required from preparations and adoption of legislation to its full and effective implementation.

PART I: PRINCIPLES AND PRACTICES

CHAPTER 1: AN INTRODUCTION TO ENFORCEMENT AND COMPLIANCE

Background

Tobacco kills up to half of its users. Tobacco kills nearly 6 million people each year.¹ More than five million of those deaths are the result of direct tobacco use while more than 600 000 are the result of non-smokers being exposed to second-hand smoke. Unless urgent action is taken, the annual death toll could rise to more than eight million by 2030. Nearly 80% of the world's one billion smokers live in low- and middle-income countries. Globally 12% of all deaths among adults aged 30 years and over were attributed to tobacco.² To reverse this epidemic, many countries are tackling tobacco use through comprehensive and multisectoral interventions. These include regulatory measures concerning institutions and mechanisms for controlling tobacco use, public education, tobacco product advertising, promotion and sponsorship, taxes, packaging and labelling, product regulation, smuggling, second-hand smoke exposure, smoking cessation, liability concerns and exchange of information. Enactment and implementation of domestic legislation for tobacco control has been pivotal to achieving these measures.

The global movement to fight tobacco use has been energized by the negotiation, adoption and entry into force of the World Health Organization's Framework Convention on Tobacco Control (WHO FCTC). The WHO FCTC is an international treaty "intended to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke".³ The Treaty has been widely embraced, and many Parties have begun the process of implementing the obligations in the Treaty. The WHO FCTC calls upon Parties to address issues as diverse as: banning tobacco advertising, promotion and sponsorship; packaging and labelling; regulation and disclosure of contents of tobacco products and tobacco smoke; illicit trade in tobacco products; price and tax measures; sales to and by young persons; government support for alternative livelihoods to tobacco manufacturing and farming; treatment of tobacco dependence; second-hand smoking and smoke-free environments; surveillance, research and exchange of information; and scientific, technical and legal cooperation.

The WHO FCTC requires parties to adopt and implement effective legislative, executive, administrative and other measures, and to cooperate with other Parties in developing appropriate policies for preventing and reducing tobacco consumption, nicotine dependence and exposure to tobacco smoke.⁴ The Convention also requires Parties to consider taking legislative action or promoting their existing laws to deal with criminal and civil liability, including compensation,

¹ Mathers CD, Loncar D (2006) Projections of Global Mortality and Burden of Disease from 2002 to 2030. *PLoS Med* 3(11): e442. doi:10.1371/journal.pmed.0030442; Murray CJL, Lopez AD. Assessing the burden of disease that can be attributed to specific risk factors. In: Ad Hoc Committee on Health Research Relating to Future Intervention Options. Investing in Health Research and Development. Geneva, the World Health Organization, 1996

² World Health Organization, WHO global report: mortality attributable to tobacco, WHO Geneva, 2012.

³ WHO FCTC, Article 3

⁴ WHO FCTC, Article 5(2)(b)

where appropriate. Article 15 of the WHO FCTC also requires Parties to enact or strengthen legislation with appropriate penalties and remedies against illicit trade in tobacco products, including counterfeit and contraband cigarettes, and it also provides for the confiscation and destruction of all counterfeit and contraband cigarettes along with their manufacturing equipment. Under this article, the Protocol to Eliminate Illicit Trade in Tobacco Products was adopted by Parties to the Convention to counteract illicit trade in tobacco products under international law. Under Article 16 of the WHO FCTC, Parties are required to implement penalties against sellers and distributors who violate prohibitions concerning the sale of tobacco products to minors. The adopted guidelines⁵ of the WHO FCTC encourages Parties to the Convention to adopt strong enforcement mechanisms to implement the specific requirements of the Convention.

Along with the impetus provided by the WHO FCTC, citizens in all countries consider laws a critical and essential ingredient of government efforts to control tobacco and protect health. The government has a vital role in ensuring compliance with such laws. Tobacco control legislation addresses the legal requirements that must be met by, inter alia, the tobacco industry,⁶ businesses, individuals and governments. These requirements are the cornerstone of protecting public health and achieving the objectives of comprehensive, evidence-based tobacco control measures. It is often very challenging to ensure that the regulated groups comply fully with or implement the requirements. Without compliance, tobacco control requirements will fail to achieve their desired results. Enforcement and compliance usually requires efforts to encourage (e.g. affirmatively requiring tobacco manufacturers to place large health warnings on cigarette packages) and discourage (e.g. prohibitive fines for breach of tobacco control requirements) the behaviour of regulated communities. This guide builds on existing legal technical assistance being provided by the WHO Regional Office for Africa in the area of enforcement and compliance.

The role of this Guide

This guide has been prepared to help WHO Member States implement appropriate enforcement and compliance measures for domestic tobacco control legislation, so as to achieve effective tobacco control. The possible users of this guide include legislators, public-health officials, including inspectors, local and municipal authorities, police, customs and other enforcement officers, judicial officials, tobacco control experts and practitioners, educators as well as the media and civil society.

The guide provides the following:

- (a) a legal and policy framework for establishing enforcement programmes and compliance strategies;
- (b) basic principles common to tobacco control legislative enforcement programmes;
- (c) options for common features of a legislative enforcement programme;

⁵ [Link to the guidelines.](#)

⁶ The WHO FCTC, Article (e), defines the tobacco industry as tobacco manufacturers, wholesale distributors and importers of tobacco products.

- (d) examples of some existing tobacco control enforcement programmes; and
- (e) resources for additional information on enforcement of tobacco control legislation.

What are compliance and enforcement?

In the context of tobacco control legislation, compliance refers to "the fulfilment by a regulated community of its obligations under a tobacco control law, thereby fully implementing tobacco control legal requirements".⁷ The ultimate goal of tobacco control is the protection of public health by securing full compliance with established laws and regulations. Compliance occurs when legal requirements are met and the desired changes are attained. For example, that large graphic health warnings are placed on tobacco packets or packages; a ban is established on advertisement, promotion and sponsorship; or a ban on smoking in public places is enacted. The design of legal requirements generally and enforcement provisions in particular are major predictors of a successful tobacco control enforcement programme. However, if the legislative requirements, including enforcement, are clearly designed, then compliance will achieve the desired public-health and other objectives of the tobacco control legislation. If the tobacco control legislative and enforcement requirements are poorly designed, achieving compliance or public health and other desired objectives can be difficult.

Enforcement refers to the set of actions that governments or others take to achieve compliance among the regulated community to correct, halt and prevent actions/inactions that would endanger the public.⁸ The various activities aimed at achieving compliance are interrelated and usually commence with the enactment of tobacco control legislation. However, there are additional enforcement activities that are common to most governmental tobacco control enforcement programmes. These activities include: the development of a compliance strategy, technical assistance and training and information management systems. They enhance compliance by supporting core enforcement activities such as inspections, investigations and legal action. Enforcement usually includes the following:

- (a) inspections that are usually carried out by the enforcement authorities to determine the level of compliance by the regulated community and to detect related violations of legal requirements;
- (b) communications with members of the regulated community who are not in compliance, in order to implement approaches that ensure that the tobacco control requirements are fully met;
- (c) legal action, where necessary, to enforce compliance and to impose penalties and other actions for violating the tobacco control legislation and for posing a threat to public health;
- (d) compliance promotion such as educational programmes, technical assistance and public awareness programmes to encourage compliance; and
- (e) enforcement by nongovernmental organizations (NGOs), which may also become involved by detecting non-compliance, reporting on enforcement actions and conducting educational

⁷ This definition reflects the WHO Western Pacific Region manual Enforcement of public health legislation, which defines compliance as the act of complying by ceasing to act in a way that is prohibited or acting in a way that is required. It also reflects Article 5 of the WHO FCTC on the obligation to implement tobacco control laws and policies.

⁸ This reflects the objective of the WHO FCTC as provided under Article 3 of the Convention.

campaigns. Where the legal basis exists, NGOs may take legal action for noncompliance against the regulated community or even take such action to compel the government to enforce certain tobacco control legislation requirements.

Why is enforcement and compliance important for tobacco control?

An efficient enforcement programme has a number of advantages, foremost of which is improved public health when there is compliance with tobacco control requirements. Public health is protected only if tobacco control requirements achieve results. For example the All Ireland Bar Study examined the impact of smoke-free workplace legislation in Ireland and found that among non-smoking workers, nicotine concentrations in the saliva declined by 80%; that work-related exposure to second-hand smoke and exposure to it outside work dropped significantly; and that after the legislation was introduced there was a significant drop in the proportion of bar staff experiencing respiratory symptoms. A 2013 and 2014 Seychelles Ministry of Health survey after concerted enforcement of the legislation showed reduced prevalence of tobacco use in the country.⁹ Similarly, in the United States of America, a study on the impact of the Massachusetts Smoke-free Workplace Law of 2004, which banned smoking completely in all workplaces, including restaurants and bars,¹⁰ demonstrated that the law achieved good compliance rates and effectively improved indoor air quality.

Secondly, compliance with tobacco control legislative requirements enhances the legitimacy and credibility of tobacco control and the legal infrastructure upon which the enforcement regime stands. To succeed, tobacco control laws and the government agencies that enforce them must be taken seriously. When enforcement is in place, individuals and the general public tend to regard tobacco control requirements and the institutions that enforce them as strong and effective.

Thirdly, an effective enforcement programme helps ensure fairness for those who willingly comply with tobacco control requirements. Enforcement ensures that facilities or groups that violate tobacco control requirements do not gain an unfair advantage over those who voluntarily choose to comply. A consistent and effective enforcement programme ensures that the regulated community is treated equally and consistently in complying with tobacco control requirements.

Finally, compliance with tobacco control requirements provides economic, social and environmental benefits to individuals and society.¹¹ For example, smoke-free laws add value to hospitality establishments. Restaurants in smoke-free cities have, on average, a 16% higher market value at resale than comparable restaurants located in smoke-filled cities.¹² Smoke-free workplaces also promote a healthy environment.¹³

⁹ See Seychelles case study pages of this Guide

¹⁰ Connolly GN et al. Evaluation of the Massachusetts Smoke-free Workplace Law (1 April 2005). In: Tobacco Control. Reports on Industry Activity from Outside UCSF. At: <http://repositories.cdlib.org/tc/reports/Harvard>

¹¹ Reflecting Article 3 of the WHO FCTC

¹² Alamar B, Glantz SA. "Smoke-Free Ordinances Increase Restaurant Profit and Value." Contemporary Economic Policy, 22(4), October 2004, 520-525; See Glantz S, Charlesworth A. Tourism and hotel revenues before and after passage of smoke-free restaurant ordinances. Journal of the American Medical Association 281(20): 1911-1918, 1999.

¹³ See Connolly GN et al. "Evaluation of the Massachusetts Smoke-free Workplace Law" (1 April 2005). Tobacco Control. Reports on Industry Activity from Outside UCSF. Paper, Cambridge, Harvard University. At: <http://repositories.cdlib.org/tc/reports/Harvard>

Some basic determinants of compliance and enforcement

Tobacco control enforcement aims to change the regulated community's behaviour to ensure compliance with tobacco control legislation. A number of determinants affect enforcement and compliance, and this varies from country to country according to the regulatory mechanisms in place. The two major elements of a tobacco control enforcement programme are: promoting education along with monitoring tobacco use; and legal actions to bring violators into compliance. Therefore, a number of specific factors affect compliance.

First, the degree to which enforcement can deter potential violators is based on the severity of sanctions. Enforcement helps deter violators by imposing penalties for failure to comply with a tobacco control legal requirement. There are key factors that are pivotal to the effectiveness of deterrence. The regulated community must perceive and be fully aware that there are increased chances of detection for violations; that responses to violations will be predictable and swift; and that appropriate sanctions will be imposed. Severe sanctions are necessary for violations that are difficult to detect. A less severe sanction may be sufficient if violations are easily detected and the enforcement response is relatively quick. Enforcement actions will need to be undertaken in ways that ensure that the regulated community perceives the consequences of noncompliance and this creates deterrence.

Second, a regulated community's behavioural change may also be motivated by economic considerations. Where enforcement officials can demonstrate that compliance can prevent future liability, save money or profits and help avoid penalties, the regulated community may be more willing to comply. However, the high cost of compliance may create enforcement obstacles. Nevertheless, economic incentives to violate the law must be removed through the imposition of monetary penalties for these violations. The monetary penalties imposed would need to offset any economic gains the regulated community stands to make as a result of their noncompliance.¹⁴

Third, the institution's reputation within the domestic setting is significant. Countries have varied and evolving social norms and practices regarding compliance and enforcement. This is partly due to the reputation that domestic laws and enforcement institutions enjoy in each country. In countries with a history of non-enforcement of and non-compliance with the law in general, or non-compliance with health or consumer protection laws in particular, non-compliance with tobacco control legislation and its enforcement programme's ineffectiveness are likely. However, these negative societal attitudes, which may undermine compliance, can be offset by good educational and awareness-raising campaigns on the tobacco control legislation.

Fourth, some factions within the regulated community may be more inclined to comply with legislation so as to reinforce community or social responsibility and expectations for the protection of public health. Compliance and enforcement will be difficult in countries where breaches of legislative requirements or threats to public health, and particularly tobacco use or exposure to it are not met with social disapproval because there is a lack of awareness of health and legislative requirements.

¹⁴ Nathan R. Model Legislation for Tobacco Control: A Policy Development and Legislative Drafting Manual, International Union for Health Promotion and Education, 2004, 83-87.

Finally, the regulated community's awareness of its related technical capability to comply with specific tobacco control requirements is key to enforcement success. The regulated community must have a clear and unequivocal understanding that they are subject to certain requirements, understand the various procedures in place to ensure compliance and be able to ensure the application of the necessary technologies where necessary. For example, tobacco product packaging and labelling, tobacco product regulation and bans on cross-border advertisement or internet advertising are areas that may require some technological preparedness to ensure compliance with tobacco control legislation. Nevertheless, tobacco control requirements can usually be met without much technological contribution to its enforcement. Importantly, costs should not be a deterrent to implementing and enforcing legislation, although in some cases a time frame between enactment of a law and initiation of enforcement measures is needed to enable the regulated community to make the necessary changes for compliance. The time frame allowed should be only that which is technically necessary for the changes to be made and awareness to increase, and not a deterrent or delay to the entry into force of the legislation or regulation.

Compliance and enforcement models and tobacco control legislation

There is now wide recognition of the elements of evidence-based comprehensive tobacco control legislation. However, the scope and means of enforcement of each element may vary. Public health regulatory approaches have predominantly been the command-and-control forms of enforcement.¹⁵ Tobacco control is no exception and largely reflects governmental regulation through command-and-control mechanisms. Voluntary and market based compliance approaches that encourage and assist change have generally been discouraged in tobacco control law-making and implementation.¹⁶ To understand an effective enforcement programme's characteristics, one must first grasp the interface between the various enforcement approaches and tobacco control laws and policies.

In the first approach, the command-and-control approach to enforcement, the government prescribes the desired changes through detailed legal requirements and promotes and enforces compliance with these requirements. This approach also designates the agency or agencies within the government that would be responsible for enforcement. As tobacco control laws become more comprehensive, various enforcement agencies come into play. Command-and-control approaches prescribe technological, informational, product use and other standards. In fact, much comprehensive tobacco control legislation around the world adopts the command-and-control approach to enforcement. Hence, the regulated community must comply with elements of comprehensive tobacco control such as bans on tobacco product advertising, promotion and sponsorship; bans on smoking in public places; along with tobacco product packaging and labelling requirements that are prescribed by legislation.

The second approach, market-based economic incentives, must achieve desired changes among those members of the regulated community. Legislation can use this approach on its own or use it to complement a command-and-control approach to tobacco control. Taxation, pricing and

¹⁵ See Gostin LO. Public Health Law: Power, Duty, Restraint. University of California Press, 2000.

¹⁶ Tobacco companies have abused voluntary agreements to avoid strict legal requirements. See Samet J et al. Mexico and the tobacco industry: doing the wrong thing for the right reason?, British Medical Journal, 2006, 332:353-354 (11 February).

licensing in tobacco control are examples of this approach. Taxation is a market-based intervention that can help to reduce tobacco consumption among tobacco users, especially the poor and the young.¹⁷ However, market-based approaches such as trade-offs and offsetting of harm, which is common in the environmental regulatory context, are inappropriate for tobacco control. The impropriety of market-based incentives for tobacco control is based on the fact that such approaches can ignore the public health reality that tobacco products are inherently harmful and deadly.

The third type of approach, the liability approach, is also very effective in enforcing tobacco control legislation. Article 19 of the WHO FCTC states that Parties are encouraged to consider using legislation to deal with civil and criminal liability for tobacco control. Increasingly, tobacco control legislation includes provisions that enable victims to bring claims against tobacco companies. This also allows health-service providers to bring claims for costs incurred in providing medical care to sick tobacco users and request punitive or exemplary damages as legal remedies for dealing with issues of liability.¹⁸

The fourth approach, the risk or harm reduction approach is increasingly becoming important in tobacco control and compliance management. This approach establishes priorities for change focusing on the potential for harm reduction. Tobacco product regulation requirements are a typical example of risk-based approaches to enforcement. Following this approach, the WHO FCTC obligates countries to undertake a number of measures,¹⁹ such as requiring manufacturers and importers of tobacco products to disclose to government authorities information about product contents and emissions.

Finally, voluntary approaches to enforcement encourage and assist, but do not require, change. Unlike voluntary self-regulation that is discouraged in tobacco control, a regulated community's voluntary enforcement activities, such as compliance education and technical assistance by and for its members—or in some instances the general public—may enhance compliance. For example, smoke-free environment regulations are largely enforced, partly through social pressure and expectations but also by comprehensive preparedness of the community. Although inspections and other enforcement mechanisms exist, they would not fully promote compliance without social pressure and community expectations. However, voluntary enforcement activities must not include global tobacco-industry-sponsored "tobacco control" programmes, which have been proven to subvert implementation of tobacco control laws and other policies.²⁰

¹⁷ Curbing the Epidemic: Governments and the Economics of Tobacco Control. Washington, The World Bank, 1999. 39–43. (<http://www1.worldbank.org/tobacco/reports.htm>)

¹⁸ See British Columbia's Tobacco Damages and Health Care Costs Recovery Act, [SBC 2000], Chapter 30, Copyright (c) Queen's Printer, Victoria, British Columbia, Canada. (http://www.qp.gov.bc.ca/statreg/stat/T/00030_01.htm)

¹⁹ See the WHO Framework Convention on Tobacco Control, Articles 9 and 10.

²⁰ Blanke DD, da Costa e Silva V, eds. Tobacco control legislation: an introductory guide. Geneva, the World Health Organization, 2004, 133-142.

CHAPTER 2: THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL: ENFORCEMENT AND COMPLIANCE

In the context of the WHO FCTC, enforcement of and compliance with tobacco control legislation is informed under three strands: the Convention itself, the guidelines adopted by the Conference of Parties and other relevant decisions of the Conference of Parties. Each Party is required to “...develop, implement, periodically update and review comprehensive multi-sectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the protocols to which it is a Party.”²¹ Parties are required to “adopt and implement effective legislative, executive, administrative and/or other measures ... for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.”²² The Convention also provides that the WHO FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health, and that Parties are determined to give priority to their right to protect public health.²³ Furthermore, “...Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law”.²⁴ Moreover, strong political commitment is necessary to develop and support, at the national, regional and international levels, comprehensive multi-sectoral measures and coordinated responses...²⁵ The Convention also encourages States Parties to utilize their existing civil and criminal law to address issues of compliance and enforcement.²⁶ To sum, up the approaches to promoting compliance with the Convention through domestic implementation fall under the following themes: (a) First, the Convention promotes the adoption and implementation of legal mechanisms for tobacco control. This includes the adoption of legal, administrative, executive and other measures.²⁷ Similarly, the Guidelines adopted under the WHO FCTC stress the importance of adoption of Regulations to enforce the Convention’s provisions. Furthermore, Parties are encouraged to take legislative action to promote existing laws to deal with criminal and civil liability including compensation. They are also encouraged to provide assistance in legal proceedings to promote compliance with and enforce the requirements of the Convention.²⁸ (b) Second, the convention significantly requires States Parties to use bans and strict controls to promote compliance with and enforce tobacco control legal requirements.²⁹ Bans are provided in relation to smoking in public places,³⁰ on packaging and labelling³¹ and to control tobacco advertising, promotion and sponsorship.³² (c) Third, the Convention emphasizes the importance of strengthening institutional mechanisms. It requires Parties to establish or reinforce coordinating mechanisms for tobacco control. The guidelines adopted under the Convention make detailed provisions on the importance of designating competent authorities for enforcement. (d) Fourth, the Convention

²¹ WHO FCTC, Article, 5.1.

²² WHO FCTC, Article, 5.2.

²³ WHO FCTC, Preamble.

²⁴ WHO FCTC, Article 2.

²⁵ WHO FCTC, Article 4.2.

²⁶ WHO FCTC, Article 19.

²⁷ WHO FCTC, Article.5.2.

²⁸ WHO FCTC, Article 19.

²⁹ These bans are often referred to as “command and control” enforcement mechanisms.

³⁰ WHO FCTC, Article 8

³¹ WHO FCTC, Article 11

³² WHO FCTC, Article 13.

encourages Parties to use economic tools for enforcement. Under Article 6, Parties are encouraged to use taxation to reduce demand for tobacco products. Licensing is also another mechanism to deter sale of tobacco products to and by minors. (e) Fifth, the Convention emphasizes the importance of information based tools to promote compliance with tobacco control requirements. For example, in implementing research, surveillance and exchange of information, Parties are required to maintain a database of laws, regulations and their enforcement.³³ Parties are also required to exchange information including on implementation of the Convention.³⁴ (f) Sixth, the Convention also encourages legal action such as inspections, investigations and remedies. For example, in the context of illicit trade in tobacco products, Parties are required to implement measures that include inspections, investigations and remedies in compliance with the Convention.³⁵ (g) Seventh, the Convention promotes collaborative approaches focusing on cooperation in its implementation. It requires Parties to develop, implement, periodically update and review comprehensive multi-sectoral national tobacco control strategies, plans and programmes.³⁶ The Convention also encourages international cooperation in its implementation.³⁷ However, the Convention prohibits collaboration with the tobacco industry and its affiliates in the in the development of public health policy relevant to tobacco control.³⁸ (h) Finally, the Guidelines for implementation of the Convention provide for evaluation of implementation measures under the WHO FCTC. The most comprehensive guidance on enforcement and compliance of the requirements of the WHO FCTC is derived from the guidelines adopted under the Convention. The Guidelines for the implementation of articles 8, 9 and 10,11 and 13 significantly provide guidance on enforcement and compliance of the specified requirements of the Convention. The following part therefore considers guidance on enforcement and compliance under the specific provisions.

1. Guidelines for implementation of Article 8 of the WHO FCTC

The guidelines provide that effective smoke-free legislation should impose legal responsibilities for compliance on business facilities but also individual smokers. The law should provide for penalties for violations. The law should provide responsibility on the owner, manager or other person in charge of the premises and clarify actions he/she is required to take. The duties on the owner include posting signs on prohibition of smoking in the facility, removal of ashtrays, supervision of compliance with the rules and taking reasonable steps to discourage individuals from smoking on the premises.

The legislation should specify fines or other monetary penalties for violations. The law can also for administrative sanctions such as suspension of business licenses. Criminal penalties can also be considered for inclusion. The legislation should also identify the authority or authorities responsible for enforcement and should include a system for monitoring compliance and prosecuting violators. Compliance inspections are key and can be integrated into existing inspection mechanisms for business licencing, health and safety, environmental health and even hospitality standards. The use of enforcement plan and training of inspection staff is also

³³ WHO FCTC, Article 20.4.a.

³⁴ WHO FCTC, Article 21.

³⁵ WHO FCTC, Article 15(4)(a)

³⁶ WHO FCTC, Article 4.2.

³⁷ WHO FCTC, Article 4.3.

³⁸ WHO FCTC, Article 5.3.

important. Funding for enforcement enables effective enforcement operations. Finally, enforcement of smoke-free laws must be strategic comprising soft enforcement immediately after entry into force to high profile prosecutions to deter breaking of the law. This needs to be combined with mobilizing of the community as this will promote self-enforcement and compliance. To conclude, the guidelines on article 8 also emphasize the monitoring and evaluation of smoke-free requirements including the enforcement and compliance measures.

2. Guidelines for the implementation of articles 9 and 10 of the WHO FCTC

Article 9 of the WHO FCTC provides for testing and measuring of the contents and emission of tobacco products and their regulation. Whereas article 10 deals with the disclosure of information on such contents and emissions to governmental authorities and the public. The two requirements have a consolidated set of guidelines that make provisions on their enforcement and compliance. The guidelines provide that effective legislative, executive and administrative or other measures should impose legal responsibilities for compliance on manufacturers and importers of tobacco products and should provide penalties for violations. It should identify the authority or authorities for its enforcement and should include a system both for monitoring compliance and prosecuting violators.

Parties should implement the infrastructure for compliance monitoring and enforcement activities including a budget. It is pertinent to inform stakeholders of the requirements of the law before its entry into force. Setting deadlines for compliance as well as inspections of manufacturing and importing facilities is required. Samples can be collected and tested for the presence of restricted ingredients. Audits at manufacturing facilities should be conducted following disclosure to governmental authorities. Quick and decisive response to non-compliance should be institutionalized and enforcement actions publicized to deter violations. Finally, sanctions for non-compliance should include criminal sanctions, monetary amounts, corrective actions, suspension, limitation or cancellation of business and import licenses, seizure, forfeiture and destruction supervised under national law. Penalties should specify a range of fines or other penalties based on the severity of the violation.

3. Guidelines for implementation of Article 11 of the WHO FCTC

In drafting legislation on tobacco product packaging and labelling, Parties should consider issues such as who will be responsible for the administration, compliance and enforcement approaches and the levels of government involved. Parties should specify the authority responsible for overseeing the implementation of tobacco product packaging and labelling measures and this should be the authority responsible for leading the implementation of tobacco control measures. In case another authority is identified, input from the relevant health authority is fundamental. Packaging and labelling requirements should apply to all tobacco products sold within the jurisdiction. The costs of placing health warnings and messages and information on constituents and emissions on tobacco product packaging should be borne by the tobacco industry.

Furthermore, Parties are encouraged to ensure that the implementation of packaging and labelling requirements under article 11 does not diminish the legal obligation of the tobacco industry to warn consumers about the health hazards of tobacco use and exposure to tobacco

smoke. The legal measures should contain clear and detailed specifications to minimize deviations and inconsistencies to ensure effective compliance with requirements. Parties should develop a source document containing samples of health warnings and messages and other information to appear on packaging. Parties should also require all entities that sell tobacco to bear legal responsibility for compliance with packaging and labelling measures. Parties should specify a range of fines and other penalties commensurate with the severity of violations. This may include the creation and enforcement of offences and the suspension, limitation or cancellation of licences.

Parties should grant enforcement authorities the powers such as order of violators to recall non-compliant tobacco products, recovery of expenses of the recall, imposition of sanctions deemed appropriate including seizure and destruction of non-compliant tobacco products. Parties should also publicize the names of violators and nature of their offences. A timeline for phasing of non-compliant tobacco products and deadline for the full entry into force of packaging and labelling requirements should be specified. Regular review of the drafted enforcement and compliance related legal measures taking account of experiences including from other jurisdictions, lessons learned and industry practices can help identify loopholes and improve enforcement and compliance. Parties should implement the infrastructure for compliance monitoring and enforcement activities including a budget. As a strategy, Parties should inform stakeholders of the requirements of the law before its entry into force including different strategies for tobacco manufacturers, importers and retailers. To ensure compliance with packaging and labelling requirements, Parties should consider regular on spot inspections of tobacco products at facilities including points of sale. New or existing inspection mechanisms can be used for this purpose. Quick and decisive response to non-compliance should be institutionalized and enforcement actions publicized to deter violations. Finally, Parties should consider encouraging the public to report violations to promote compliance with the law. For this purpose, it is important to establish an enforcement contact point for reporting alleged cases of non-compliance that should be investigated and resolved in a timely and thorough manner. To conclude, Parties should consider implementing monitoring and evaluating their packaging and labelling measures to assess their impact, identify where improvements are required and produce evidence in implementing packaging and labelling measures.

4. Guidelines for implementation of Article 13 of the WHO FCTC

The Guidelines for implementation of article 13 of the WHO FCTC provide guidance on the domestic enforcement of laws on tobacco advertising, promotion and sponsorship. The guidelines state that Parties should implement effective, proportionate and dissuasive penalties including fines, corrective advertising remedies and suspension or cancellation of licenses. To ensure effective deterrence, penalties should be graded commensurate with the nature and seriousness of the offences that should also outweigh potential economic benefits to be derived from the advertising, promotion and sponsorship. Repeat offences should incur a high penalty for a manufacturer or entity. Sanctions should include the obligation to remedy the infringement such as by removal of the advertising, promotion and sponsorship, publication of court decisions at the expense of parties designated by the Court and funding of corrective or counter advertising. Sanctions should be applied to the conduct of both entities and individuals including

managers, directors, officers, legal representatives of corporate entities when those individuals are responsible for conduct of corporate entities.

Furthermore, licensing of tobacco manufacturers, wholesale distributors, importers and retailers can be effective in controlling advertising, promotion and sponsorship. Compliance with tobacco advertising, promotion and sponsorship should be a major criterion for the grant, renewal, withdrawal, revocation, suspension and cancellation of license tobacco business entities as well as others such as broadcasters. With deterrent sanctions, enforcement authorities can utilize non-adversarial contacts, meetings, warnings, administrative decisions and periodic penalty payments to effect compliance.

Finally, Parties should designate a competent independent authority to monitor and enforce laws and entrust it with necessary powers and resources. The authority should have power to investigate complaints, seize unlawful advertising or promotion, and pronounce on complaints and initiate appropriate legal proceedings. Civil society and citizens should participate in the monitoring and effective enforcement of the ban. Civil law options should be used to deter tobacco advertising, promotion and sponsorship. Domestic law should enable an interested person including NGOs to initiate legal action against illegal tobacco advertising, promotion and sponsorship. The enforcement programme should consider including a toll-free telephone hotline or an internet web site or a similar forum to encourage the public to report violations. In sum, the guidelines recommend that Parties should introduce and apply effective, proportionate and dissuasive penalties. They should designate a competent, independent authority to monitor and enforce the law and entrust it with the necessary powers and resources. Civil society should be participate in the monitoring and enforcement of the law and have access to justice.

5. Conclusion

The WHO Framework Convention on Tobacco Control and its guidelines provide importance guidance to Parties in implementing specific requirements of the Convention in their jurisdictions. Key messages from the guidelines include the need for effective drafting of enforcement and compliance requirements in legislation for tobacco control, designation of a responsible authority/authorities to spearhead the enforcement and compliance programme, ensuring a sound infrastructure including a budget line and other sources of funding from the regulated community to finance the enforcement programme, the need to ensure legal responsibility of the regulated community for non-compliance, the need to provide a range of enforcement powers to authorities as well as a range of penalties and sanctions for non-compliance, adoption of an enforcement strategy, the importance of inspections and investigations to effect compliance, the need for regular review and evaluation of legal measures and mobilization of the public and civil society to promote compliance with the law.

CHAPTER 3: STRONG TOBACCO CONTROL LEGISLATION: THE BEDROCK OF A SUCCESSFUL ENFORCEMENT PROGRAMME

1. Designing enforceable tobacco control laws

Introduction

The drafting of enforceable tobacco control laws and requirements is critical to fostering a climate of compliance. The laws must establish the necessary power and authority and their requirements must be clear and practical. Enforcement strategies without adequate legal enforcement powers and authorities are ineffective. Furthermore, unclear, imprecise, ambiguous, inconsistent or contradictory tobacco control requirements may also hinder tobacco control enforcement. Therefore, considering enforcement and compliance issues during the drafting of legislation and throughout the process of legislative development ensures effective enforcement frameworks for inclusion in the legislation. Tobacco control advocates usually push for strong tobacco control legal provisions and also need to focus on implementing strong enforcement frameworks.³⁹ The following are some proposals for improving the enforceability of tobacco control legislation:

Constitutional and related legal frameworks

Enforcement mechanisms for domestic legislation, including tobacco control laws, usually derive their legal legitimacy from the national constitution or similar legal instrument. Constitutional law is the supreme and fundamental law of any country. Constitutions determine the structure of government, the distribution of power among the sub-units of government, limitations on the powers of governmental units and the fundamental rights and freedoms of the citizenry. Overall, constitutions play an important part in law enforcement, particularly tobacco control.

Constitutions determine the extent and division of responsibility for public health protection among the federal, state, provincial and municipal levels of government. Responsibility for public health legislation usually includes responsibility for its enforcement. Besides apportioning public health responsibility to the various levels of government, constitutions also designate the agencies of government having the primary mandate for law enforcement in each country.⁴⁰ In this regard, the courts or the state law offices or the attorney general's offices derive their mandate for all governmental law enforcement directly from the constitution. Therefore, drafters and those responsible for implementation of tobacco control legislation must consider the full extent of the constitutional requirements and their limitations concerning law enforcement. In this way, tobacco control enforcement frameworks will take maximum advantage of the overall law enforcement frameworks prescribed by a country's constitution or constitutional principles and fill any enforcement gaps in ways that are constitutionally and legally permissible.

³⁹ See Jacobson PD, Wasserman J. The implementation and enforcement of tobacco control laws: policy implications for activists and the industry, *Journal of Health Politics, Policy and Law*. 1999 Jun, 24(3):567-98.

⁴⁰ For example, the Constitution of Uganda empowers several agencies to enforce all laws in Uganda. For example, under Article 126 the administration of justice, including judicial power, shall be exercised by the courts; Article 12 establishes a police force whose duty is to preserve law and order; Article 120 establishes the Office of the Director of Public Prosecutions and mandates it to institute criminal proceedings against any person or authority in any court; Article 77 empowers the Attorney General to represent the government in the courts or in any other legal proceedings.

Institutional mechanisms

Tobacco control legislation must clearly and unambiguously establish the institutional mechanisms for its enforcement. The law must specify who will be responsible for its implementation and enforcement, including the application of penalties and sanctions.

This enables the vesting of institutional responsibility and accountability in government and the citizenry for enforcement. This in turn facilitates the achievement of compliance with tobacco control legislation by the regulated community. It may also be desirable for the legislation to specify the enforcement roles and responsibilities of the various government ministries, departments or agencies and the different levels of government: federal or central, provincial, district or municipal governmental authorities. A number of tobacco control laws have also facilitated enforcement or quasi-enforcement roles for private actors such as tobacco control NGOs.⁴¹ This has enabled NGOs to pursue legal action to enforce tobacco control legislation. WHO FCTC requires each party, acting in accordance with its capabilities, "to establish or reinforce and finance a national coordinating mechanism or local point for tobacco control".⁴² This mechanism is either a centralized office within the Health Ministry or a similar agency working with other enforcement arms of government.⁴³ In Mauritius, the Ministry of Health and Quality of Life has the mandate and an institutional unit to enforce the Public Health Act including the tobacco control Regulations. In Seychelles, The Ministry of Health is the main enforcing agency of the Seychelles Tobacco Control Act and the Ministry works with office of the Attorney General as well as other relevant enforcement agencies to implement the Act. For example, in Ireland the Office of Tobacco Control in the Department of Health and Children is vested with a mandate to assist the Minister for Health and Children with the implementation of policies and objectives concerning tobacco control, including smoke-free workplace legislation.⁴⁴

In other cases, responsibility has been devolved to several agencies working on enforcement and compliance programmes by gazetting such enforcement agencies under the law to enforce tobacco control legislation. Such enforcement units include the police, public health inspectors, environmental inspectors, customs officers and standards officers. In Singapore, the Tobacco Regulation Unit under the Ministry of Health is responsible for monitoring laws so that any loopholes are quickly detected and closed.⁴⁵ Authority to manage the enforcement programme may also be vested in a multisectoral coordinating mechanism such as in Thailand and Australia.

Enforcement powers /authorities

Tobacco control laws are most effective when they provide the power and authority essential for their own enforcement. Without sufficient authority or powers, an enforcement programme can be seriously undermined in its mandate and capabilities to create compliance with existing tobacco control legislation. The reputation of a tobacco control enforcement programme can be curtailed if violators in the regulated community can successfully challenge the authority and

⁴¹ See the roles NGOs have played in the enforcement of tobacco control laws in Jordan, India and South Africa, in the enforcement case studies of India and Jordan, page

⁴² WHO Framework Convention on Tobacco Control, Article 5(2)(a)

⁴³ See WHO, Building blocks for tobacco control, a handbook. WHO 2004 at pages 77-88

⁴⁴ See Sections 9-10, Public Health (Tobacco) Act, 2007.

⁴⁵ Tan ASL et al. Overview of legislation and tobacco control in Singapore. The International Journal of Tuberculosis and Lung Disease, 2000, Nov.,4 (11):1002-8

legitimacy of the enforcement programme or agency acting to enforce the law. Powers/authorities that have been considered pivotal and effective in a successful enforcement programme for tobacco control laws include the following:

- (a) Authority to issue regulations, licenses and/or guidance to implement the law. In many jurisdictions, tobacco control legislation (particularly statutes) provides the vision, scope and authority for tobacco control. Statutes may also include broad legal requirements. Detailed requirements for enforcement may be included in the regulations. Regulations establish detailed rules that must be met by the regulated community. They provide the criteria and procedures for achieving certain standards of compliance. For example, a number of tobacco control laws have required the enactment of regulations on matters such as the types of packaging and warning labels to be used on tobacco products, smoke-free public places and product regulation among others.

Furthermore, enforcement agencies may be vested with the authority to prepare written guidance and policies in order to interpret and implement tobacco control requirements and answer questions from the regulated community on the interpretation and implementation of the regulations.

- (b) Power to inspect regulated communities and gain access to records, tobacco products or facilities that manufacture tobacco products.
- (c) Power to store or retain tobacco and tobacco products.
- (d) Power to institute requirements that meet the compliance needs of sections of the regulated community.
- (e) Power to require the regulated community to monitor its own compliance, keep records on compliance and enforcement matters, report required information to the tobacco control enforcement programme or agency and ensure that the information is accessible to enforcement officials and others as stipulated under the law.
- (f) Power to take any legal or other appropriate action against any non-complying regulated community such as the tobacco product manufacturers and to impose monetary penalties, punitive damages and other legal sanctions for violation of the law.
- (g) Power to impose criminal deterrence on the regulated community such as imprisonment or monetary penalties for violation of the tobacco control legislation.
- (h) Power to prevent or correct activities of the regulated community that undermine tobacco control requirements and public health.

The role of other public health laws

Health laws must not be unduly incompatible. In many countries, public health laws have been the predominant form of legislation addressing public health threats. In terms of enforcement, a tobacco control law must seek to strengthen, complement and reinforce existing legal requirements and the enforcement mechanisms of related laws on drug and food safety, occupational health, consumer protection, alcohol, toxic hazards, water and sanitation as well as medical devices, among others. For example, it is common for tobacco control legislation to provide enforcement powers to public health inspectors whose mandate of work also derives

from other health legislation such as public health acts.⁴⁶ It is important to note that in some cases, public health acts in developing countries have not effectively addressed emerging communicable diseases such as those relating to tobacco control.⁴⁷ Part of the problem has been the weak enforcement mechanisms of some public health laws. In such cases, public health acts may need to be amended and strengthened in order to ensure compatibility with tobacco control law and its enforcement mechanisms where possible.

The role of other relevant domestic laws

The professional reputation of enforcement agencies and programmes helps to strengthen compliance with legislation. Laws intended to prevent corruption and fraud while encouraging access to information and streamlined legal procedures for conducting legal actions to counter violations, all help to buttress enforcement programmes for tobacco control. Article 5(3) of the WHO FCTC provides that in setting and implementing public health policies with respect to tobacco control, parties shall act to protect these policies from commercial and other vested interests in the tobacco industry in accordance with national law. WHO and other actors have already exposed the tobacco industry's attempts to subvert strong tobacco control measures and legislation around the world.⁴⁸ Tobacco control legislation does not usually address wider procedural issues such as fraud, corruption and the use of evidence in legal proceedings. Therefore knowledge about, and practical application of, other laws that deal with such concerns are essential to support the enforcement regime for tobacco control legislation. Where a tobacco control law comprehensively provides for such issues, the need to invoke other laws may vary.⁴⁹ Furthermore, consumer protection laws may already exist in a particular jurisdiction. Such laws are relevant to tobacco control.

For example, in New Zealand the Fair Trading Act provides that "no person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics or suitability for a purpose, of goods".⁵⁰ Claims by the tobacco industry refuting the overwhelming conclusion that passive smoke kills could not be challenged using tobacco-specific legislation.⁵¹ Therefore, enforcement of the Fair Trading Act, a consumer protection law, became a key to the success of enforcing tobacco control requirements as well.⁵² This example shows that good enforcement of other laws, such as laws relating to tax evasion and consumer protection, can positively support enforcement of tobacco control legislation.

⁴⁶ See the role of state and municipal sanitary inspectors in the enforcement of Brazilian tobacco control legislation, see Brazil enforcement case study, see page of this Guide. In Norway, the Norwegian Labour Inspection Authority, municipal medical officers along with the food and liquor inspectors undertake inspections to enforce tobacco control legislation, See Norway enforcement case study, page..... of this guide

⁴⁷ See New Zealand Ministry of Health, Public health legislation: promoting public health, preventing ill health and managing communicable diseases, 3.4-3.6, identifying enforcement problems related to current and future health threats and the antiquated mechanisms established by public health laws.

⁴⁸ See Tobacco company strategies to undermine tobacco control activities at the World Health Organization: report of the Committee of Experts on Tobacco Industry Documents. Geneva, World Health Organization, 2000.

⁴⁹ For example, Sections 52 and 53 of the Public Health (Tobacco Act) of Ireland adopts requirements for the use of evidence in proceedings for violation of the act and for dealing with forgery of documents respectively.

⁵⁰ Section 10 of the Fair Trading Act: New Zealand Government 1986

⁵¹ Thomson G , Wilson N. Implementation Failures in the use of two New Zealand laws to control the tobacco industry: 1989–2005. Australia and New Zealand Health Policy 2005, 2:32

⁵² Ibid

2. Developing enforceable legislative requirements

A number of approaches have been noted and applied in many countries around the world to strengthen the enforceability of tobacco control legislation.

Striking a balance between a stringent but feasible legislation

More stringent tobacco control requirements are most effective in achieving the goals of tobacco control. However, requirements that are too stringent and are enforced without a phase-in period may be onerous for compliance purposes and delay the overall enforcement timelines of the legislation.⁵³ Proponents of tobacco control legislation will need to balance the desire to create the most stringent and ambitious legal requirements with the likelihood of compliance by the regulated community. A number of tobacco control programmes around the world indicate that a gradual and phased approach to enforcing stringent requirements has been the most successful.⁵⁴ Phased implementation and enforcement of tobacco control requirements ensure that the regulated community will have adequate time to prepare and comply with the law.

Fostering a climate conducive to enforcement and compliance

There is a wealth of evidence on the effectiveness of various tobacco control interventions and the best options for implementing them.⁵⁵ A number of actions can stimulate compliance by the regulated community. Health and tobacco control enforcement programme officials need to rely on evidence-based and proven methods in order to demonstrate that the goals of the legislation can be achieved.⁵⁶ Secondly, officials need to provide a range of alternative options that can be used to achieve compliance. Early consultations with concerned groups also help cultivate the climate for future enforcement. For example, in Singapore focus group discussions were held with principals and teachers to collect feedback on ways to enforce a new law prohibiting minors from smoking in public. Their feedback was taken into consideration when the final bill was passed in Singapore.⁵⁷ In this way, a positive environment for compliance by the regulated community and others was created.

In South Africa, prior to the enactment of the Tobacco Products Control Amendment Act,⁵⁸ the parliament convened parliamentary hearings including 70 groups.⁵⁹ While the tobacco industry and its affiliates opposed the bill during the hearing, the South African tobacco control

⁵³ Laws come into operation in different jurisdictions through different means such as approval by parliament, publication in the Gazette, etc., depending on a country's legal system. However, tobacco control legislation may also appoint a different commencement date to enable all concerned actors, i.e., the enforcement authorities, the regulated community and the general public, to ensure their readiness for compliance with the legislation.

⁵⁴ Examples include smoking bans in Ireland and Norway. See case studies of Kenya, Seychelles and South Africa.

⁵⁵ Curbing the epidemic: governments and the economics of tobacco control. Washington, World Bank 1999, 39-43, See also Guindon GE, Tobin S, Yach D. Trends and Affordability of cigarette prices: ample room for tax increases and related health gains. Tobacco Control 11:35-39

⁵⁶ Curbing the epidemic: governments and the economics of tobacco control. Washington, World Bank 1999, 39-43, See also Guindon GE, Tobin S, Yach D. Trends and Affordability of cigarette prices: ample room for tax increases and related health gains. Tobacco Control 11:35-39.

⁵⁷ Tan ASL et al., Overview of legislation and tobacco control in Singapore. The International Journal of Tuberculosis and Lung Disease, 2000 Nov, Vol. 4 (11), p. 1002

⁵⁸ Tobacco Products Control Amendment Act, 1999:12

⁵⁹ See: The Tobacco Epidemic can be reversed: Tobacco Control in South Africa before the 1990s, Applied Fiscal Research Centre, School of Economics, University of Cape Town, Cape Town 2002. At: <http://archive.idrc.ca/ritc/SA-finalreport.pdf>

legislation was enacted and has been effectively implemented.⁶⁰ The South African example also shows that despite the importance of cultivating a climate for compliance with tobacco control legislation, tobacco companies and their affiliates will often oppose both the law and preparations for its enforcement.

Effective legislative drafting that strengthens enforcement

The drafting of general enforcement and compliance requirements must be clear and well defined. Specifically, it should be clearly stated which parts of the regulated community are targeted and subject to tobacco control requirements, what exceptions there may be to such requirements, if any, and what specific timelines and/or deadlines exist for achieving compliance and imposing penalties and sanctions. The law must provide room for strengthening, adapting and amending the enforcement mechanisms through parliamentary or administrative.

Ministerial amendments led by the Ministry of Health. The law must also clearly provide for civil and criminal action (usually in varying degrees ranging from informal to formal legal action) in case of breaches. The WHO FCTC encourages parties to utilize their domestic legislation to deal with criminal and civil liability, including compensation to promote tobacco control.⁶¹ In this way, an enforcement regime will be dynamic and responsive to the changing enforcement and compliance needs of tobacco control legislation.

Targeting the regulated communities

The size of a regulated community can influence a programme's ability to enforce compliance requirements successfully. The larger the regulated community, the greater the effort required to enforce legal requirements successfully. Tobacco control legislation may need strategically to direct greater enforcement efforts at key members of the regulated community whose compliance can achieve the greatest enforcement and public health impact. It is well known that the tobacco industry is the most important regulated community for tobacco control enforcement, but this may vary in some countries.⁶² Targeting the tobacco industry, while also targeting other members of the regulated community such as retail sellers of tobacco products, the hospitality industry and advertising agencies, is very effective.⁶³

Moreover, prior analysis of the ability of the regulated community to comply with specific aspects of tobacco control legislation is an important step in the enforcement process. The necessity of balancing the specificity of compliance requirements with the need for flexibility cannot be underestimated. A number of economic, technological, educational and other factors may determine the ease of compliance for a regulated community. For example, education helps raise awareness among those in the regulated community of the obligations, duties and rights under a tobacco control law. Education also helps to educate the public about the expected changes and show them how they may or may not be affected by the law and its enforcement. It may be useful to analyse the possible enforcement barriers by undertaking relevant enforcement

⁶⁰ See Van Walbeek C. Tobacco control in South Africa, promotion and education. *International Union for Health Promotion and Education* 2005, Suppl 4:25-8, 57

⁶¹ WHO Framework Convention on Tobacco Control, art. 19

⁶² WHO Framework Convention, Article 1(e), defines the tobacco industry as tobacco manufacturers, wholesale distributors and importers of tobacco products.

⁶³ DiFranza JR et al. What is the potential cost-effectiveness of enforcing a prohibition on the sale of tobacco to minors? *Preventive Medicine*, Volume 32, Number 2, February 2001, 168-174(7)

related studies. These studies could review prior domestic enforcement activities in order to anticipate better any future obstacles/concerns. For example, studies on the cost and benefits of compliance dispel the myth that compliance with tobacco control requirements is costly for small regulated communities such as retailers.⁶⁴ Studies may also survey the technological and educational needs of the regulated community and offer effective solutions to address these needs.

Participation of the regulated community

Involving the regulated community in shaping enforcement programmes can help create support while reducing resistance and conflict. This also helps ensure that general compliance requirements are more practical and enforceable, while achieving the desired public health impact and publicizing requirements before actual enforcement commences. It is possible for sections of the regulated community to be involved at some stage of enforcement planning and implementation by enabling them to comment on certain aspects of enforcement actions. However, specific legal procedures must limit the involvement of the regulated community in order to prevent the possibility of delay or undue influence on enforcement planning and operations. It is important that enforcement programme officials guard against what is commonly known as "regulatory capture" of enforcement programmes and mechanisms by the regulated community.

Regulatory capture in the context of tobacco control describes situations where enforcement programme officials may identify with the interests of the regulated community such as the tobacco companies in the course of carrying out their enforcement and compliance activities. It is important to note that groups with an economic interest in the sale and use of tobacco are likely to oppose the implementation of tobacco control legislation in general. Such groups may include tobacco companies, broadcasters, publishers and advertising agencies dependent on advertising fees as well as the operators of businesses often opposed to smoke-free legislation such as hospitality industry groups.⁶⁵ Tobacco industry campaigns to undermine health legislation have been well documented.⁶⁶ The WHO FCTC requires state parties to protect the setting and implementation of public health policies from the commercial and vested interests of the tobacco industry in accordance with national law.⁶⁷ However, in the strict sense of strategic enforcement and, when necessary, the involvement of relevant members of the regulated community early in the enforcement process can help advance the enforcement strategies for tobacco control legislation. Informing the different stakeholders on enforcement of specific aspects of the legislation is useful. In the case of smoke-free laws, hospitality businesses and the public may be involved in some aspects of enforcement planning.

⁶⁴ See also Rigotti NA et al. The effect of enforcing tobacco-sales laws on adolescents' access to tobacco and smoking behaviour. *New England Journal of Medicine*, 1997, 337(15), 1044–51

⁶⁵ See Blanke D et al, Tobacco control legislation, an introductory guide. WHO, 2004, 53

⁶⁶ Voice of truth: I- II. Multinational tobacco industry activity in the Middle East: a review of internal documents. Geneva, the World Health Organization, 2002. At: www.who.int/tfi/tfi.htm

⁶⁷ WHO Framework Convention on Tobacco Control, art 5, para 3

Participation of enforcement officials, coordination with other public health enforcement programmes

Those involved in drafting tobacco control legislation may not be involved in enforcement of the legislation and vice-versa. The enforcement programme officials may not always possess the legal and public health expertise and experience available at the legislative drafting stage. Therefore, mechanisms need to be established to ensure that enforcement officials are involved as early as possible in the drafting or planning of enforcement regulations. In the enforcement process, joint committees comprised of public health, legal and enforcement programme officials need to be created to deal with major aspects of enforcement. Such committees can also include enforcement officials at the national, state, provincial, local and municipal levels.

Furthermore, enforcement requirements of other health laws should be taken into account when designing enforcement requirements and programmes. Substantive and procedural health and enforcement requirements under similar health laws can affect compliance with tobacco control legislation, especially when the same enforcement mechanisms or programmes are used under both laws. In many countries in Africa, it is common to use existing public health inspectors and other enforcement personnel to enforce tobacco control legislation. In the province of New Brunswick, Canada, the Smoke-free Places Act is jointly enforced by public health inspectors, liquor license inspectors, and occupational health inspectors.⁶⁸ Therefore, coordinating with such enforcement officials early in the process enables a smooth beginning to the enforcement regime.

3. Focus on the regulated community and enforcement priority setting

Introduction

Within the framework of the tobacco control and other laws applicable to tobacco control enforcement, it is important to review a country's civil and criminal law enforcement and coordination mechanisms and their effectiveness, challenges and opportunities. This will also comprise the review of other enforcement frameworks such as public health, environmental and local government laws. This also entails the mapping of enforcement agencies across the country. A functional and effective multi-sectoral enforcement team should be established and coordinated to implement effective tobacco control enforcement. These are key precursors to an effective tobacco control enforcement programme.

Identification of the regulated community

The WHO FCTC, along with tobacco control laws around the world, identifies members of the tobacco control-regulated community. Tobacco control enforcement requirements apply to diverse groups, individuals, businesses, companies and even governmental agencies. These include the tobacco companies, manufacturers and importers of tobacco products, managers of work and other public places, governmental agencies, sellers and distributors of tobacco, advertisement agencies and advertisement media as well as individual tobacco users among others. With many developing countries facing budgetary constraints, targeted and strategic enforcement and compliance efforts are essential. This must include the detection of and

⁶⁸ The National Strategy: Moving Forward, The 2005 progress report on tobacco control, prepared by the Tobacco Control Liaison Committee of the Federal Provincial Territorial Advisory Committee on Population Health and Health Security, in collaboration with nongovernmental organizations and published under the authority of the Minister of Health, Canada 2005, 18

response to violations. The promotion of compliance and other enforcement programmes can effectively maximize limited resources to achieve the best possible enforcement goals. Key decisions should also be made regarding the division of resources for inspections, compliance promotion or prosecution for breaches, the frequency of deployment of routine enforcement tools such as inspections, education and technical assistance as well as when other responses such as fines and prosecutions of breaches can be pursued cost effectively.

Profiling the regulated community

Analysing each regulated community early in the process helps enforcement officials to understand compliance capabilities better as well to determine as the community's willingness to comply with the law. Profiling regulated communities also helps tailor and deploy the most appropriate and effective compliance strategies for specific sections of the regulated community. In the process, both the regulated community and enforcement officials will understand their respective obligations and enhance their familiarity with the compliance programme. For example, profiling manufacturers and importers of tobacco products, work environments and public places is an effective way to ensure an appropriate compliance strategy for packaging and labelling and smoke-free legislation respectively. The enforcement programme officials may need to collect information that promotes compliance. Such information may include the names and types of the regulated communities, their geographical presence, types of businesses or facilities and licenses required for their operation, other applicable regulations, specific elements of tobacco control legislation targeted for enforcement in that facility, etc. Other information may also include compliance schedules and status, compliance checks, number and degree of violations and the results of the various enforcement activities.

Enforcement authorities can obtain information from the regulated community through a number of means. Firstly, the regulated community can be required to provide information to the enforcement agency directly or through site visits by enforcement officials. The information must be periodically updated in order to improve compliance planning. The authorities will need to decide on the frequency of updating such information and the type of information needed for enforcement and compliance purposes. Secondly, many sections of the regulated community already have a degree of regulation under pre-existing laws or related institutions. For example, under licensing or other laws the liquor and food licensing authorities or local government authorities may already possess useful information on restaurants and bars. Similarly, the ministries of agriculture and finance may have important information for enforcement purposes on taxation and company information that may include business names, addresses, taxable assets and tax returns, size, head offices and chief officers and branches. Such data can shed light on the features of specific regulated communities and their previous compliance history. Existing tobacco control information relevant for enforcement can also be obtained from WHO, health ministries and other sources.⁶⁹ Moreover, other governmental agencies or ministries such as finance, trade, justice and labour may have vital information on other regulated communities such as tobacco companies, major tobacco exporters and importers and the types of tobacco products, tax collection and revenues generated.

⁶⁹ See WHO Tobacco Free Initiative's Global Information System on Tobacco Control (GISTOC) and other surveillance information at: http://www.who.int/tobacco/global_data/regional_databases/en/index.html such as the PATIOS database at PAHO accessible at <http://www.paho.org/tobacco/PatiosHome.asp>

Thirdly, requiring the major identified sections of the regulated community to register their facilities or businesses for compliance purposes with the enforcement programme can also help to provide useful information. The enforcement authority must develop and implement a database that will contain all compliance related information. Responsibility for data management should be devolved to a specific unit or persons within the enforcement programme. Through this database, the enforcement authority and all those involved in enforcement can access patterns of noncompliance by specific regulated communities such as tobacco companies. This helps in determining actions necessary to enforce compliance with the tobacco control requirements that apply to those specific groups in the regulated community. In undertaking these activities, laws enabling access to information and laws that prevent falsification of information must be considered, reviewed and applied to support the daily information management activities. To conclude, tobacco control surveillance mechanisms can play an important role in profiling regulated communities to support enforcement actions under the law.

Enforcement priority-setting

To implement an effective tobacco control enforcement programme, enforcement authorities need to establish priorities. The following considerations are key in establishing priorities: the need to protect health through the reduction of tobacco use and exposure to tobacco smoke; the need to strengthen the administrative and information gathering capability of the tobacco control enforcement programme; the importance of maintaining a constant and ongoing enforcement presence, particularly among key regulated communities; and the importance of financial and technical resources for enforcement.

As is common in many countries public health, including tobacco control priority setting, law making and its enforcement, are largely a function of national governmental authorities. It is also widely acknowledged that sub-national and local governmental authorities set their own legislative and enforcement priorities in relation to tobacco control. However, where priority setting will occur depends to a large extent on the structure of the tobacco control enforcement programme in each country and this varies from jurisdiction to jurisdiction. National priority setting helps to ensure compatibility at the sub-national, national and international levels within each country. The role of sub-national governments and enforcement authorities in tobacco control enforcement priorities is crucial. To complement enforcement operations of national enforcement authorities, local authorities may be best positioned to understand the factors and other dynamics for the success of enforcement and compliance activities at the local level.

Finally, it is always essential to communicate enforcement priorities to all enforcement authorities and personnel, the regulated community and the general public. Whether enforcement priorities need to be continuously reviewed and changed depends in large part on whether the existing enforcement priorities are achieving the enforcement goals or not.

CHAPTER 4: ENFORCEMENT PROGRAMMES OPERATIONS AND RESPONSES

1. Compliance promotion and tobacco control laws

Introduction

The traditional command-and-control regulation that is prevalent in domestic enforcement mechanisms of tobacco control legislation has its limitations. Therefore, compliance promotion complements the detection and prosecution of non-compliance by using other mechanisms to encourage compliance with tobacco control legislation. Compliance promotion consists of informing the public and the regulated communities of the laws and of their responsibilities under them. It is an essential means of motivating, and thereby indirectly encouraging, the achievement of compliance with tobacco control law. The implementation of tobacco control laws by the regulated community does require in part some physical, practical and even technological changes, including changes in the way tobacco products are dealt with. The whole regulated community, i.e., tobacco companies, businesses, governments and individuals, needs to know what is allowed and what is not allowed under the tobacco control law. They also have to know what positive steps and actions they will have to take in order to comply with the law. In this way, compliance promotion ensures that some of the obstacles to successful enforcement can be overcome. Compliance promotion helps publicize tobacco control legal requirements as well as promote its enforcement tools.

Reliance on promotion alone is ineffective. Enforcement creates the necessary conditions for the regulated community to utilize resources availed through promotional activities. Therefore, enforcement coupled with compliance promotion is more effective than either enforcement or promotion alone. This is especially true in tobacco control, where there is a large and diverse regulated community. Explaining the law and its implications begins when a law or regulation is being drafted or developed, and continues through its passage, enactment and beyond. Because of the diverse nature and large size of the tobacco control-regulated community, compliance promotion efforts become necessary throughout the life of the law, many years after the law attains legal force.

The people best equipped to undertake compliance promotion are those responsible for the development of the law and its implementation and who have knowledge of the law. These include tobacco control programme staff, sponsors of the law, public health officials and relevant public health NGOs. They are knowledgeable and able to explain the content and implications of the various tobacco control requirements to each group of the regulated community.

In some cases it may be possible to include both tobacco control programme officials and enforcement officials. A number of approaches have been used to promote compliance with tobacco control legislation. These include providing technical and legal assistance along with education and information to the regulated community; mobilizing public support for enforcement and compliance; developing media and other advocacy based on successful enforcement success stories; and strengthening compliance and enforcement capabilities of the enforcement programme as well as that of the regulated community.

Education and awareness-raising

Education and information constitute a sound foundation for self-enforcement and voluntary compliance by the regulated community. They can help tackle ignorance of enforcement and compliance requirements and promote overall compliance with the law by the regulated community, as well as gather public and social support for the law. Providing information on tobacco control requirements and guidance on how to meet them enhances the capabilities of the regulated community to comply. An enforcement programme must collect and retain technical, legal and other essential information necessary to facilitate its work. Copies of tobacco control legislation, best practice guides, results of economic and outcome evaluation studies and other surveillance information relevant to enforcement and compliance will need to be disseminated. Furthermore, disseminating information on enforcement actions such as court actions under the law, including injunctions, convictions and seizures, builds awareness among the regulated community. Publicizing successful prosecutions and convictions in connection with the tobacco control legislation will deter potential violations of the law by the regulated community. In this regard, caution must be exercised because it has been common for the tobacco industry to undermine tobacco control enforcement programmes by using retail associations to undertake retailer education programmes.⁷⁰

The WHO FCTC requires countries to adopt legislative, executive, administrative or other measures that promote public awareness and access to information about the addictiveness of tobacco, the health risks of tobacco use and exposure to smoke, the benefits of cessation and the actions of the tobacco industry.⁷¹ Even though this is a general provision, the convention recognizes the importance of public education in the implementation of tobacco control policies including legislation. Tobacco control legislation in some Member States of the WHO African Region make provisions for compliance promotion such as the requirements relating to no smoking signs, awareness raising among the regulated community and training. For example, in Seychelles, the National Tobacco Control Board are major actors to mobilize owners and managers of restaurants, work places and other public places regarding enforcement (including the ban on smoking in enclosed premises, need for no-smoking signs where smoking is banned; assess mandatory labels on tobacco products) and provides training on enforcement of the Act to the enforcing officers and to the related government departments. Further afield, under the Canadian Non-Smokers' Health Act an employer is required to inform employees as well as the public of the prohibition of smoking in any work space and of the location of designated smoking rooms/areas under the control of the employer. However, it must be noted that education alone may not be as effective as education and awareness-raising combined with enforcement.⁷² However, in a United States study, it was found that education alone had a limited effect on reducing illegal sales of tobacco products to minors.⁷³ However, when merchant education is combined with actual enforcement of the law, sales to minors can be dramatically

⁷⁰ See Nixon ML, Glantz SA. Tobacco industry political activity and tobacco control policy-making in Texas: 1980-2002 (May 1, 2002). Center for Tobacco Control Research and Education. Tobacco Control Policy Making: United States. Paper TX2002. At: <http://repositories.cdlib.org/ctcre/tcpmus/TX2002>

⁷¹ The WHO Framework Convention on Tobacco Control, Article 12

⁷² Staff M. et al, Can non-prosecutory enforcement of public health legislation reduce smoking among high school students, Australia and New Zealand Journal of Public Health, 1998, 22(3 Suppl):332-5

⁷³ See Feighery E, Altman DG, Shaffer G. The effects of combining education and enforcement to reduce tobacco sales to minors, a study of four Northern California communities, Journal of the American Medical Association, 1991, 266:3168-3171

reduced.⁷⁴ Simply put, education must be combined with effective judicial enforcement to achieve the set enforcement goals.

Technical assistance to facilitate enforcement and compliance

In the first instance the health ministry or the national coordinating mechanism of the tobacco control enforcement programme needs to develop a technical assistance plan. This plan must clarify the types and limits of technical assistance that can be provided to the different enforcement actors and categories within the regulated community, what expertise is required and the circumstances under which technical assistance can be provided to facilitate enforcement and by whom, as more than one actor may be involved in this endeavour. Within this framework, the authorities can provide technical assistance to the regulated communities, the NGOs, the general public and even governmental units. The national focal point for tobacco control and the enforcement programme staff needs to provide assistance to the regulated community on the broad areas of tobacco control measures includes supporting on the public health, economic and legal aspects of tobacco control, which in turn facilitates enforcement. Technical assistance may also be provided to the different agencies of government involved in the enforcement of tobacco control measures.

Technical assistance includes communicating technical tobacco control information such as technical reports and other informational materials on enforcement and compliance, training tools and materials, seminars and conferences and resulting reports. Communication of technical information to the regulated community includes the following:

- (a) Who is subject to the provisions of the tobacco control legislation, what are the tobacco control provisions?
- (b) Why are the tobacco control requirements necessary?
- (c) What changes must be made by the regulated communities to comply with each of the provisions of the law
- (d) How can these changes be effected and what are the consequences of non-compliance?
- (e) What mechanisms are available to clarify questions and resolve interpretational disputes relating to legislation or implementation regulations?
- (f) What mechanisms are available to ensure that any new entities that are part of the regulated community and that commenced operations after the enforcement strategy was put into effect are aware and informed of the compliance and enforcement details?

The WHO FCTC recognizes the importance of technical assistance in the realization of the requirements of the convention. Parties are required to cooperate to strengthen their capacity to fulfil the obligations arising from the convention. Such cooperation shall promote the transfer of technical, scientific and legal expertise and technology in order to establish and strengthen national tobacco control strategies, plans and programmes. Domestic tobacco control legislation in a number of countries provides for technical assistance to support implementation of tobacco control laws. Technical assistance may be provided by government agencies or international and national NGOS working on tobacco control. The Tobacco Control Programme at the WHO

⁷⁴ Cummings KM et al. Evaluation of an enforcement programme to reduce tobacco sales to minors, American Journal of Public Health, 1998 June, Vol. 88. (6), pp. 932-936 at 935

African Regional Office provides technical assistance in enforcement and compliance including in enforcement training and the development of national enforcement and compliance plans for tobacco control legislation. In the United States of America, the Technical Assistance Legal Centre (TALC) was established by the State of California Department of Health Services to provide technical legal assistance to local tobacco control programmes, attorneys and county Counsels on tobacco control programmes in the state.⁷⁵ BREATH, an American Lung Association NGO programme, was created to support California's implementation of smoke-free bars and restaurants by local agencies. BREATH has helped to inform and educate business owners and patrons about the law; collect and evaluate economic impact data; provide legal interpretations and enforcement models; develop local media to counter tobacco industry campaigns; and train local tobacco control advocates.⁷⁶

Mobilizing public support

The role of the public in promoting compliance with tobacco legislation has proven to be effective. Public support helps create a social climate of compliance with the law. Moreover, the public can be involved in the enforcement process by serving as watchdogs to report incidents of non-compliance. A toll-free telephone number can be set up and the public invited to utilize the number to report violations, anonymously or not. If the domestic legislation provides the appropriate powers, the public can be empowered to bring public suits against tobacco companies and others for non-compliance. Public support helps advocate for greater funding and political support for the enforcement programmes. Where there is general lack of awareness about the harm caused by tobacco use and exposure to tobacco smoke, raising awareness and mobilizing public support cultivates the norm of a smoke-free society. Enforcement programmes help build public support by disseminating information regarding tobacco control, legislation, the necessity and benefits of complying with the law, enforcement and compliance activities, achievements and successes along with a plethora of ways by which the general public could provide and mobilize support for the enforcement programme. Enforcement programme officials can also work with civil society and the media to mobilize support for enforcement of and compliance with the tobacco control legislation. Successful mobilization of public support for effective enforcement also requires sufficient funding of the enforcement authorities.

For example, in Ireland and South Africa the tobacco control programmes have mobilized public support for compliance by establishing hotlines to report violations. In Ireland, the hotline aimed to support the building and maintenance of compliance with smoke-free workplace legislation under the Public Health (Tobacco) Acts of 2002 and 2004. In 2005 a total of 1353 calls were made to the hotline.⁷⁷ The proportion of complaints increased after the legislation's implementation, perhaps reflecting increased public understanding of the legislation.

⁷⁵ See California Department of Health Services/Tobacco Control Section, Legal technical assistance on tobacco control policy, April 2002. At: <http://www.dhs.ca.gov/tobacco/documents/pubs/TALCbook.pdf>

⁷⁶ Weber MD et al. Long term compliance with California's Smoke-Free Workplace Law among bars and restaurants in Los Angeles. *Tobacco Control* 2003, 12:269-273:270

⁷⁷ See Ireland, Office of Tobacco Control, 2005 Office of Tobacco Control, Annual Report, 15. At: <http://www.otc.ie/uploads/Publications%20-%20AR%202005%20English%20Web.pdf>

Disseminating success stories and changing attitudes: the role of the media

Publicizing success stories of compliance by regulated communities can create a general climate in support of compliance. Publicity and positive media coverage about successful compliance and enforcement actions motivate the general public to support tobacco control and its legislative enforcement measures. However, to ensure that the media coverage is fair and well informed relevant health sectors within each jurisdiction should provide the media with the best available evidence on the benefits of such legislation and consequences including the penalties for its breach.⁷⁸ In Brazil, the National Agency of Sanitary Surveillance (ANVISA) often invites the media to join its inspections in a high profile facility and to publicize the inspection.⁷⁹ In 2005 Ireland's Office of Tobacco Control ran a national television and radio advertising campaign based on the theme "smoke-free is working, let's keep it that way".⁸⁰ The public information campaign helped raise awareness of the smoke-free workplace legislation, build support and communicate the high levels of compliance to the general public.

2. Compliance monitoring

Compliance monitoring refers to the collection and analysis of information regarding the compliance status. Compliance monitoring is at the heart of an effective tobacco control enforcement and compliance programme. Compliance monitoring helps:

- (a) determine whether a regulated community has complied with legislation;
- (b) detect and correct violations of the tobacco control law;
- (c) provide evidence to support enforcement actions;
- (d) ascertain the compliance status of specific groups in the regulated community;
- (e) establish a constant field presence in the regulated community;
- (f) as a deterrent to non-compliance;
- (g) fulfil statutory mandates to achieve compliance with tobacco control laws;
- (h) support and enhance the overall enforcement programme and evaluate the enforcement scheme for the tobacco control law.

The main tools for compliance monitoring include: inspections conducted by enforcement officers, self-monitoring, self-recordkeeping and self-reporting by the regulated community, NGO and public complaints and monitoring.

Some specific compliance monitoring activities for enforcing tobacco control legislation include: performing compliance inspections, surveillance and investigations; collecting and collating information and developing enforcement strategies; collecting, analysing, evaluating and managing information for enforcement purposes; reviewing and evaluating self-reported documents, reports and records; responding to violations, including complaints and referrals from the general public, owners of public places, governmental and nongovernmental authorities and officials; preparing reports and updating databases with compliance findings and inspection

⁷⁸ Thompson G, Wilson N. BMC Public Health, 14 March 2006, 1–9

⁷⁹ See Brazil, Case Study on Enforcement of Tobacco Control Legislation at page

⁸⁰ See Ireland, Office of Tobacco Control, 2005 Office of Tobacco Control, Annual Report: 15. At: <http://www.otc.ie/uploads/Publications%20-%20AR%202005%20English%20Web.pdf>

results. These reports should be publicized and distributed especially to the public, public health officials and policy makers to provide feedback to the regulated community.

3. Inspections

Introduction

Inspections are at the core of a tobacco control enforcement programme. Tobacco control legislation around the world commonly provides for inspections to enforce tobacco control laws. For example, under Namibia's Tobacco Products Control Act, in order to verify compliance with the Act an inspector is entitled at any reasonable time to enter and inspect any workplace.⁸¹

Furthermore, under the United Kingdom's Tobacco Advertising and Promotion Act of 2002,⁸² in order to enforce the prohibition of tobacco advertising an authorized officer has the right to enter premises to carry out inspections and examinations; to require the production of any book, document, data, record or product and inspect it and take copies of or extracts from it; to take possession of any data, record or product that is on the premises and retain it for as long as s/he considers necessary for that purpose.⁸³ The type of inspectors commonly deployed for tobacco control inspections varies from country to country. They range from government inspectors, police and environmental health officers, public health officers and inspectors, trading standards officers, revenue/tax officers and in some cases specially trained tobacco control enforcement officers. The wide-ranging elements of tobacco control inspections require inspectors to be highly trained with comprehensive skills. Responsibilities include: the collection and preservation of information or samples; understanding the domestic and other laws governing searches, seizures and collection of evidence; understanding criminal procedures and rights of the regulated community; dealing with a regulated community; the identification of tobacco control violations; analysis of reports; ability to testify in court and competent use of the enforcement information management system. Inspectors must also acquire detailed knowledge about the penalties and the circumstances of their imposition. These skills are important for enabling inspectors to monitor compliance of tobacco control legislation effectively.

Key compliance monitoring responsibilities of inspectors include: verifying legal requirements targeted at the specific regulated communities; demanding compliance by violators; deterring non-compliance through enforcement presence and action; proposing the initiation of investigations; providing compliance and other evidentiary information for future enforcement actions; recording and communicating findings to the enforcement programme and to regulated communities or the public; implementing inspection priorities and plans under the law; and applying warnings, sanctions or penalties as appropriate. Inspectors are also responsible for the planning of inspections, data collection concerning the regulated communities, recording and reporting their inspections to ascertain whether the regulated community has complied with a tobacco control requirement or not. Inspection requires establishing the necessary infrastructure, including human, financial and logistical resources. The tobacco control legislation or related laws and regulations should provide for streamlined and standardized procedures for inspections.

⁸¹ Tobacco Products Control Act, No 1 of 2010, sections 30 -32.

⁸² Tobacco Advertising and Promotion Act 2002, 2002 Chapter 36, HMSO. At: <http://www.opsi.gov.uk/ACTS/acts2002/20020036.htm#13>

⁸³ Section 14, *ibid*.

This will enable a uniform approach to inspections of similar regulated communities. In some cases, inspections regarding youth access laws may be carried out through NGOs or other third parties. "Sting operations" have enabled authorized teenagers to buy cigarettes in order to assess compliance with youth access laws.⁸⁴

Inspections play a crucial role in the enforcement of tobacco control legislation including: prescribing smoke-free public places, packaging and labelling, control of tobacco advertisement, regulation of tobacco products, determining tax and anti-smuggling measures. Facilities that are commonly inspected for tobacco control purposes include: manufacturing or trading premises of tobacco products, including retailers and distributors; public facilities such as offices, bars or restaurants; places producing packaging or advertisements for tobacco products wherever they may be; and print and electronic media among others.

The ministries of health or the focal points for tobacco control, along with other responsible governmental agencies, have the responsibility for designing the frequency and nature of such inspections. Tobacco control inspections may be triggered by several things. Firstly, they may occur as regular, routine inspections. These are preferable because they contribute to an early detection of violations and also help prevent future gross violations of tobacco control requirements. Secondly, it may also be necessary for programme and enforcement officials to conduct sporadic inspections without prior notice. This helps to create a climate of compliance among the regulated community. Thirdly, inspections may occur as a response to reports of violations from the general public, the media or NGOs. Inspections help return violators to compliance and prevent further violations of the tobacco control laws that endanger public health. The objectives of inspections for tobacco control are generally: to ascertain public health threats due to tobacco use and exposure to tobacco smoke; to notify the regulated community of violations of the tobacco control legal requirements; to collect information to determine the compliance status of a regulated community; to gather evidentiary information for use in future compliance and enforcement activities or legal actions; to ascertain and review self-enforcement activities, self-reporting and other related activities by the regulated community.

In Ireland, under the Public Health (Tobacco) Act of 2002, authorized officers are empowered to enter any premises to inspect records; remove any records or documents; carry out examinations, tests and checks of premises, tobacco products and any equipment, machinery or plant on the premises; take samples of tobacco product; secure and take possession of and remove tobacco products for analysis and determine if the law has been violated.⁸⁵ Pursuant to this legal requirement, by the end of 2005 Environmental Health Officers had conducted a total of 35 042 inspections/compliance checks nationally.⁸⁶ Data has shown that national compliance levels have remained high throughout 2005. With respect to the smoke-free workplace provision, 95% of the premises inspected were found to be compliant. Some key tobacco control inspection checklists include the following:

⁸⁴ Jacobson PD, Wasserman J. Tobacco control laws: implementation and enforcement. Santa Monica, California: RAND, 1997. See also Jacobson PD, Wasserman J, Anderson JR. Historical overview of tobacco legislation and regulation. *Journal of Social Issues* 1997,53:75-95.

⁸⁵ See Section 48 of the Public Health (Tobacco) Act of 2002

⁸⁶ See Ireland, Office of Tobacco Control, 2005 Annual Report: 13. At: <http://www.otc.ie/uploads/Publications%20-%20AR%202005%20English%20Web.pdf>

Collecting information from inspections

Tobacco control inspectors have an important role to play in collecting information to ascertain the compliance status of regulated communities or compile evidence that a violation has occurred. Since inspection information must be utilized to support further enforcement activities, including litigation, inspectors must follow legally-specified procedures in order to comply with relevant domestic laws and to enable full admissibility of inspection information in courts of law in the specific jurisdiction. Following legal procedures in compliance with the law ensures that compliance inspections are uniform throughout the jurisdiction and that the regulated community is treated fairly and evenly. Failure to follow legal procedures in inspections and to act within the law can result in the possibility of a challenge to inspection reports or a rejection of inspection evidence in a case subjected to the courts of law. Any legal challenges by the regulated community and rejection of such evidence jeopardizes enforcement actions and entails monetary, logistical and other expenses to the enforcement programme. To obtain legally admissible inspection information, the enforcement authorities must prepare standard terms of reference for all inspections in order to ensure that procedural and other legal anomalies are prevented during the collection of inspection-related information.

An inspection plan

An inspection plan provides an important framework for carrying out inspections of the regulated facilities. It provides the specific procedures and checklists for a successful inspection and must be based on compliance procedures established by the legislation, its implementing regulations and operational guide or other applicable legislation.

Inspection reports

It is better for every inspection to be recorded. Records may include notes taken by the inspector and documents relevant for the inspection report. Inspection reports may include the rationale for inspection, observations, responses from persons in the specific regulated community, the inspection participants, a declaration that relevant inspection procedures have been satisfied and the types of information and their possible evidentiary value. The collection and recording of inspection information should be standardized. Moreover, a mechanism should exist to share inspection reports among the various governmental agencies that may be the designated authorized officers responsible for inspections relating to the range of provisions of the legislation such as smoke-free public places, taxes, advertisements and packaging and labelling.

Inspection capacity building

Tobacco control inspections require technical competencies in tobacco control, law enforcement and compliance. In this regard it is the responsibility of the tobacco control enforcement programme, including the ministry of health and other ministries or government agencies as appropriate, to provide appropriate inspection training for tobacco control inspectors. Since inspectors have the responsibility of enforcement of provisions of tobacco control legislation, inspectors must not only have legal skills but also public health knowledge, especially tobacco control, managerial and communication skills. They also must be extremely familiar with the details of the enforcement legislation as well as their authority to impose sanctions. While not all inspectors possess tobacco control expertise, tailored training on tobacco control enforcement can enhance the effectiveness of inspections for tobacco control enforcement and compliance programmes and the legislation it works to enforce. Such training should include the basics of

tobacco control knowledge that formed the rationale for the legislation so that inspectors gain a good understanding of the health and other implications of tobacco use and the importance of compliance with the legislation. Furthermore, inspection capacity building requires the provision by the government of the necessary financial and logistical resources to facilitate inspections.

Equipment to collect data and evidence such as sound recorders, cameras and videos, testing and analytical equipment for cigarettes and air quality are all instrumental in promoting effective inspections and enforcement activities. In order to build inspection capacity in Ireland, for example, the Office of Tobacco Control(OTC) organizes seminars for Environmental Health Inspectors (EHOs) who are the authorized inspectors for the Public Health (Tobacco) Act of 2002 and the Public Health (Tobacco) (Amendment) Act of 2004. In 2005, the OTC organized a seminar for EHO.⁸⁷ The seminar took stock of the enforcement aspect of the inspection programme and reviewed case law, facilitated the exchange of information and experience gained through the developing case law, and provided training on presenting evidence under cross-examination on what is a new area of law. The seminar provided positive feedback on inspections.⁸⁸

4. Self-compliance and enforcement

Self-enforcement and compliance by regulated communities is widely recognized under tobacco control legislation. Legislation usually provides for the regulated community, for example tobacco manufacturers, importers and managers of public places, to monitor their own compliance and undertake measures of self-enforcement. Measures of self-compliance and enforcement include self-monitoring, the retention of records for enforcement purposes and reporting of information. These measures are essential in obtaining information that can facilitate compliance and enforcement activities by the enforcement authorities. It is also less costly for the enforcement authorities, as costs of self-enforcement and compliance activities are borne by the regulated community. Public and social educational campaigns can add to the success of self-enforcement as social pressure compels the regulated community to comply with the legislation. This is particularly successful when coupled with compliance education and awareness campaigns, and when a mechanism for reporting violations such as a hotline is in place.

Self-reporting

A number of tobacco control laws around the world include provisions for self-reporting by the tobacco control-regulated community. For example in Singapore, under Regulation 14 of the Smoking (Control of Advertisements and Sale of Tobacco) (licensing of importers, Wholesalers & Retailers) Regulations, manufacturers, importers and distributors of tobacco products are required to send test results to the enforcement authorities on the tar and nicotine content of tobacco products manufactured, imported or distributed in Singapore. A person who fails to comply is fined or imprisoned or both. In Sweden, manufacturers and importers of cigarettes are required to report the ingredients of said tobacco products, including the quantities and health effects of such ingredients, annually to the National Institute of Public Health.⁸⁹ Moreover,

⁸⁷ See Ireland, Office of Tobacco Control, 2005 Annual Report: 15. At: <http://www.otc.ie/uploads/Publications%20-%20AR%202005%20English%20Web.pdf>

⁸⁸ Ibid

⁸⁹ See The Swedish Tobacco Act, 1993 as amended in 1994, 1997, 2002, 2004 and 2005, Section 16. At: <http://www.tobaksfakta.org/Default.aspx?id=4100>

anyone operating a commercial enterprise at which tobacco products are sold to consumers is required to notify the municipality in which such sales take place by the date of commencement of sales.⁹⁰

Self-monitoring

Tobacco control laws now require self-monitoring to achieve compliance with tobacco control legislation. Many countries around the world have adopted national and local laws to ban smoking in public places. Many governmental authorities view such laws as self-enforcing, the implication being that such laws require little monitoring or enforcement.

These laws often vest managers of public places such as pubs, restaurants, schools and hospitals with the responsibility of ensuring that these facilities achieve full compliance with the laws. For example, under the South African Tobacco Products Control Amendment Act it is the responsibility of any person in control of premises which any vending machines are kept to ensure that no person under the age of sixteen years makes use of any such machine.⁹¹ Under Article 38 of Chad's Law on Tobacco Control, those responsible for the facilities where the following acts, making a place for smoking available to smokers, knowingly act in any way whatsoever to favour the violation of this prohibition and neglecting to post the required notices shall pay a fine of over 20 000 CFA including the closure of their facilities.⁹² Senegal's Tobacco Control Law of 2014 requires operators or persons in charge of places in which smoking is prohibited, to take all measures to see to it that the law is obeyed, including the prominent posting of clear signs for enforcement as defined by ministerial order and non-compliance leads to a fine of 150 000 to 300 000 FCFA.⁹³ Similarly, Singapore's Smoking (Prohibition in Certain Places) (Amendment) Act of 1994 provides that any aggrieved person can report a smoker to a manager or operator of a public place.⁹⁴ The manager is then required to take all reasonable steps to investigate the complaint and take action against the offender.⁹⁵ Any failure or neglect by the manager or operator of the public place is punishable by a hefty fine.⁹⁶ The Swedish Tobacco Act endows employers with the responsibility to ensure that employees are not involuntarily exposed to tobacco smoke at the workplace or in other areas in which employees perform duties related to their work.⁹⁷ A study assessing workplace compliance with a no smoking ordinance in Massachusetts found out that a self-enforcement approach to implementing a smoke-free public place law achieved high levels of awareness of the law and intermediate levels of compliance in the city's businesses.⁹⁸

Record keeping

Another important tool of self-enforcement is record keeping. The regulated community is required to retain records of activities, operations and actions required under tobacco control legislation. For example, under Regulation 14 (1) (b) and (2) of the Smoking (Control of

⁹⁰ Ibid. section 12c.

⁹¹ Section 7, Tobacco Products Control Amendment Act, 2000 (Act No. 12 of 1999).

⁹² Law No. 010/PR/210 on Tobacco Control, Article 38

⁹³ Law No.2014-14 Concerning the Manufacture, Packaging, Labelling, Sale and Use of Tobacco, Article 26.

⁹⁴ Section 6(3), Smoking (prohibition in certain places) Act, (Chapter 310), Laws of Singapore. At: <http://statutes.agc.gov.sg/>

⁹⁵ Section 6(4), *ibid*

⁹⁶ *Ibid*

⁹⁷ Section 8, Swedish Tobacco Act, adopted 1994, as amended on 1 July 1994 and 1996

⁹⁸ Rigotti N A, Stoto MA, Schelling TC. Do businesses comply with a no-smoking law? Assessing the self-enforcement approach. *Preventive Medicine* 23, March 1994, 2:223-9.

Advertisements and Sale of Tobacco) (Licensing of Importers, Wholesalers and Retailers) Regulations of Singapore, manufacturers, importers and distributors of tobacco products are to furnish information about the import, sale or supply of any tobacco products and of the operations being carried out with respect to tobacco products manufactured in Singapore when this is required by the enforcement authorities. A person who fails to comply is fined or imprisoned or both.

The success of self-enforcement depends on the ability of the regulated community to present or compile accurate compliance information. The regulated community may submit or retain misleading and incorrect information as well as faulty record keeping. To enhance self-enforcement, laws regarding falsification of information must be applied to deal with cases of submission of fraudulent and misleading information. The regulated community will need to ensure that the relevant data management expertise is available to compile, collate and analyse compliance and enforcement-related information as required by the legislation and be prepared to submit this information to the appropriate authorities if and when asked. To minimize the reporting of unreliable information, tobacco control laws should prescribe uniform or streamlined standards on the compilation, reporting and retention of information.

Finally, laws concerning public disclosure of reports by the tobacco control-regulated community can enable the public and NGOs to provide comment on the accuracy of such information. NGO's have a pivotal role in maintaining vigilance to counter any falsified compliance information that may be reported by some regulated community. Public and NGO scrutiny under disclosure laws can contribute to effective enforcement through self-reporting, self-monitoring and the retention of records. However, NGOs, the public and others seeking disclosure of information must also be aware of non-disclosure laws in each country, as some jurisdictions may limit the types of information about the regulated community that may be publicly accessible.

5. Responding to violations: the mechanisms

Introduction

Tobacco control experiences around the world have demonstrated that compliance with tobacco control legislation is achieved if there is an effective enforcement regime. Tobacco companies and related companies, private businesses, public sectors and individuals may not willingly comply if there are no clear sanctions and penalties for non-compliance. Through enforcement, the government halts any violations of the law. Compliance with the law is promoted because any violation by the regulated community attracts enforcement action. This in turn creates a climate of compliance within the regulated community because of fear of governmental and non-governmental enforcement action. Governmental enforcement action is also facilitated by other factors that contribute to the creation of a climate of compliance. Tobacco control NGOs and the general public around the world have played important roles in detecting violations of tobacco control requirements by tobacco companies and other members of the tobacco control-regulated community. Moreover, mass awareness and education that creates a social norm of compliance and deterrence also supports governmental enforcement action. Successful enforcement of tobacco control legislation requires full cooperation across governmental organs and agencies that have a shared mandate in all or parts of tobacco control legislation and its enforcement.

Legislation usually provides for a transitional period to enable all actors involved to prepare for compliance and enforcement. Enforcement activities must be commenced soon after a tobacco control law enters into force. In some cases, during this start-up period more efforts are focused on education and technical assistance before the full application of the penalty regime comes into force to deal with non-compliance with the law. The enforcement programme activities must be consistent and sustained in order to maintain a climate of deterrence and full compliance with tobacco control requirements. Response mechanisms for enforcement of tobacco control legislation aim to accomplish the following: to impose sanctions for non-compliance, to correct the threats to public health as well as social, economic and environmental well-being, to ensure that violators of legislation become compliant, to deprive regulated communities of any benefits, including any unjust enrichment due to non-compliance with tobacco requirements, and to require the performance of specific actions in furtherance of tobacco control requirements.

(a) Enforcement powers and authorities

The effectiveness of enforcement mechanisms for tobacco control legislation will depend in part on the types of enforcement power and authority available to the enforcement agencies. Typical enforcement powers can be sanction-based, provide remedial relief or be general enforcement powers. Enforcement powers are usually provided by tobacco control legislation or, in some cases, other laws. The WHO FCTC requires parties to adopt and implement comprehensive tobacco control legislation.⁹⁹ The implication of this requirement is that countries must also provide, as much as possible, comprehensive enforcement mechanisms for tobacco control legislation within the legislation itself. Enforcement powers are pivotal in providing the legal powers and enhancing the credibility of the enforcement programme. Typical powers/authorities for enforcement of tobacco control legislation include the following:

Sanction-based powers and authorities

- (a) Power and authority to impose monetary penalties such as instant fines
- (b) Power and authority to apply for punitive damages and fines
- (c) Power and authority to seize property such as tobacco products.¹⁰⁰
- (d) Power and authority to apply for damages and health care recovery costs
- (e) Power and authority to institute a civil claim or prosecute in the courts of law
- (f) Power and authority to institute administrative proceedings before an administrative tribunal
- (g) Power and authority to seek imprisonment for violation of a tobacco control requirement

⁹⁹ The WHO Framework Convention on Tobacco Control, article 5

¹⁰⁰ In the United Republic of Tanzania, an inspector is empowered to seize anything believed on reasonable grounds to have been used or to have given rise to an offence under the Tobacco Products (Regulation) Act of 2003. See The Tobacco Products (Regulation) Act of 2003, No.2 of 2003, The United Republic of Tanzania, Section 19(2)(d). At: <http://faolex.fao.org/docs/pdf/tan62291.pdf>.

Remedial relief-based powers

- (a) Power and authority to deny, suspend or revoke a licence¹⁰¹
- (b) Power and authority to issue warnings
- (c) Power and authority to impose a schedule for compliance, such as notices requiring compliance
- (d) Power and authority to close down a violating facility or operations, wholly or in part¹⁰²
- (e) Power and authority to enter and search premises¹⁰³
- (f) Power and authority to obtain enforcement assistance from other agencies of government
- (g) Power and authority to remove and impound or retain tobacco products
- (h) Power and authority to access, review and retain reports relating to tobacco control enforcement

General Powers

- (a) Powers and authority to require specified labelling and packaging on tobacco products
- (b) Powers and authority to require specified testing and measurement of tobacco products¹⁰⁴
- (c) Powers and authority to require specified product disclosure and reporting under the law for enforcement of tobacco control requirements
- (d) Powers and authority to require self-monitoring by the regulated community. These powers and authorities are not exhaustive and vary from country to country. However, they are commonly found in tobacco control legislation and can be incorporated into domestic tobacco control legislation in any jurisdiction around the world

There are a range of response mechanisms for enforcement of tobacco control legislation. These mechanisms can be grouped as informal and formal.

(b) Informal enforcement response mechanisms

Informal response mechanisms aim at transforming violators into compliers with the requirement of the law. Informal mechanisms can also evolve into full formal legal action in case the violator fails to return to compliance. While informal mechanisms may not directly constitute punitive or other sanctions, they can evolve and contribute to more stringent penalties if they are ignored. Informal response mechanisms comprise the following: phone calls, visits to the tobacco manufacturing facility or other tobacco businesses, violation notices and warning letters.

¹⁰¹ In Australia, under the Tobacco Amendment Act of 2000, the registrar may refuse to grant a tobacco license to an applicant if the registrar has reasonable grounds. For example, if the applicant does not sufficiently understand the obligations under the act or the applicant has committed offences relating to the sale or supply of tobacco products to minors.

¹⁰² In Ireland, the Office of Tobacco Control is required to maintain a register of all persons who carry on the business of selling tobacco products by retail trade. If a registered person is convicted of an offence under this act, the office may remove from the register the address of the premises and name of that person. See Section 37, Public Health (Tobacco) Act of 2002.

¹⁰³ For example, in India any police officer, officer of the State Food or Drug Administration or other officer holding rank equivalent to sub-inspector of police or higher may enter and search if he has any reason to suspect that a provision of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act of 2003 has been or is being contravened, See Section 12 of the Act.

¹⁰⁴ For example, under the Hong Kong Smoking (Public Health) Ordinance of 1999, for the purpose of the law the Government Chemist may from time to time analyse any cigarette to determine its tar and nicotine yields and may publish such test results. See Chapter 371, Section 16, Smoking (Public Health) Ordinance, 16 July 1999.

Warning letters

Tobacco control enforcement authorities can use warning letters or other documented communications when the violation of tobacco control legislation has occurred and/or persists. Warning letters inform the regulated community (tobacco companies, businesses, individuals etc) that they are violating tobacco control requirements and must change their behaviour or correct the state of affairs. If they don't, the letter warns them of further, more adverse legal action with resulting sanctions and other penalties. A warning letter must list the types of sanctions for ongoing non-compliance as well as guidance on what measures are needed in order to return to compliance. A warning letter must also entail a written or other type of response from the violating regulated community detailing corrective action already taken or describing what corrective action will be taken and delineate the time frame for implementing such corrective action. Indeed, if the violator fails to implement such corrective actions the law must provide for an automatic trigger for more formal legal action. Warning letters must specify the provision of the law that has been violated or is being violated. It must describe the civil or criminal offence associated with the violation. It must also state that if the violator fails to take the necessary action, the enforcement authorities will pursue further action against the violator. While warnings are usually written, in some jurisdictions, oral warnings can also be used.

Telephone calls and other oral communications

A telephone call or an oral (personal) visit by an enforcement official or other persons acting in that capacity is an easy way of communicating to a regulated community that it has violated a tobacco control requirement or that it is continuing to do so. The call will also demand that the violator cease further violation forthwith. An oral call will also demand that the violator provide a response detailing the corrective actions it has taken to comply. For example, Norway's smoke-free legislation requires the manager of a public place or public conveyance to notify any violator of a smoking ban orally and request any violator to cease activity. The manager must then take further corrective action in case of continuing violation or non-compliance.¹⁰⁵

Notices

Notices are of a higher legal status than ordinary warning letters. They bring attention to a regulated community about acts of violation and prescribe a specific period within which the regulated community must achieve full compliance. Notices usually include explicit warnings of further legal action if compliance with a tobacco control requirement has not been met within the specified period. They are usually made in writing.

Inspections of regulated facilities

Inspections enable enforcement officers to ascertain whether a regulated community is in compliance or not. Inspectors will alert regulated communities about violations and the corrective actions they should take. Moreover, through inspections enforcement officials can provide useful enforcement information in order to undertake preventive/corrective action to enhance compliance by the regulated community.

¹⁰⁵ See case study on the enforcement of smoke-free legislation in Norway in the Norway enforcement. Case study in Chapter X of this document. The smoke-free laws of Scotland, Ireland, Singapore and South Africa all contain similar requirements.

(c) Formal enforcement response mechanisms

Unlike informal enforcement mechanisms, which may not contain the full force of the law, formal enforcement response mechanisms for tobacco control legislation are legally binding and their application and use must comply with specified legal procedures according to the legal system of each country. Formal enforcement mechanisms must be established in tobacco control legislation or in other, related laws. The formal enforcement mechanisms in relation to tobacco control legislation are both civil and criminal.

Civil Enforcement Response

Civil actions may be administrative or judicial depending on the jurisdiction. Civil administrative actions are undertaken by administrative bodies such as a national institution or similar agency for tobacco control. In Sweden, for example, the Work Environment Authority as well municipal council agencies are empowered to take civil administrative action in enforcing the Swedish Tobacco Act.¹⁰⁶ In Ghana the Food and Drug Administration possesses civil administrative powers to require compliance with legislation that falls within its mandate, and this includes tobacco control legislation. On the other hand, judicial administrative proceedings are handled by Courts of law or related judicial organs within a country.

Civil administrative enforcement mechanisms

As mentioned earlier, civil administrative enforcement is typically implemented by an enforcement programme undertaken by entities such as the Ministry of Health or other national institutions for tobacco control. The law in some jurisdictions empowers these agencies to issue legal orders for compliance. For example, under the South African Tobacco Products Control Act the Director General of Health may direct the person who owns or is in control of a vending machine in writing to remove the machine from the premises.¹⁰⁷ Similarly, under Australian Capital Territory's Tobacco Amendment Act of 2000, an application may be made to the Administrative Appeals Tribunal for review of any of the following decisions of the registrar of tobacco licensing, such as refusal to grant a tobacco licence or to suspend or cancel a licence.¹⁰⁸ Administrative orders have similar contents to notices, and these orders are legally binding on the violator. Such orders usually cite the provision of the law that has been violated, describe the nature of the violation and include any evidence of violation. Like notices, they also require the violating regulated community to change behaviour and correct the violation within a specific period of time. If a regulated community previously issued an order continues to violate that order, further legal action can be pursued directly by the tobacco control programme officials or designated enforcement officials/agencies.

Civil administrative enforcement mechanisms usually empower administrative officials to pursue further legal action by issuing other administrative orders or court issued orders. It is important to note that there is a distinction between administrative and judicial action in relation to enforcement and compliance. Unlike judicial actions, in administrative actions legal enforcement is undertaken by an administrative mechanism embedded within the national coordinating

¹⁰⁶ See Swedish Tobacco Act 2005, Section 25. At: <http://www.tobaksfakta.org/Default.aspx?id=4100>

¹⁰⁷ See section 5(3) of Tobacco Products Control Act, No.83 of 1993.

¹⁰⁸ Tobacco Amendment Act of 2000, Australian Capital Territory, Australia. At: <http://www.legislation.act.gov.au/a/2000-16/20000701-3207/pdf/2000-16.pdf>

mechanism for tobacco control, focal points or other related administrative agencies with responsibility for implementing the tobacco control legislation and its enforcement strategy. Administrative enforcement entails the deployment of programme enforcement staff rather than the courts to implement actions against violators of the law. Because tobacco control programme and related enforcement staff may have tobacco control expertise, it may be a quicker means to complete enforcement actions by using administrative orders in order to return violators to compliance. However, when violators fail to honour administrative orders and sanctions, it is essential for all actors involved in implementation to resort to judicial action through the courts of law.

Civil judicial enforcement mechanisms

Civil judicial enforcement involves the use of mechanisms and formal legal actions, including the use of lawsuits in the courts of law, to enforce tobacco control requirements. Governmental and non-governmental actors have made civil claims to enforce tobacco control requirements in countries such as Bangladesh, India, Norway, Saudi Arabia, Sri Lanka and Uganda.¹⁰⁹ These include claims in tort or civil wrongs based on negligence, misrepresentation or fraud, product liability, conspiracy, nuisance, claims based on restitution or unjust enrichment as well as claims based on consumer protection from deceptive advertising and smuggling.¹¹⁰

It may also be preferable to pursue administrative actions before resorting to civil claims. This is because lawsuits in the courts of law are usually expensive, require lots of staff time and could be protracted, taking a long time in completing the enforcement action and achieving an enforcement goal. However, civil judicial actions are essential to dealing with the serious violations of the regulated community and ensure an end to massive violations of tobacco control requirements. In countries with common law legal systems, where the use of judicial precedents form an important part of enforcement, civil judicial enforcement helps to create such precedents, which in turn strengthen future judicial enforcement actions. Civil judicial enforcements require the application of a civil standard of proof. This standard of proof is proof "on the balance of probabilities", which is less stringent than the criminal standard of proof "beyond reasonable doubt" that is usually harder to prove in an enforcement case.

Criminal enforcement mechanisms

Criminal judicial enforcement becomes imperative when a regulated community knowingly and willingly violates a tobacco control law under the prevailing laws of the specific jurisdiction. The basis of criminal judicial enforcement includes criminal liability under laws prohibiting reckless or intentional endangerment of human life, laws prohibiting perjury or the giving of false statements under oath, laws prohibiting smuggling, and laws prohibiting the adulteration or contamination of products intended for human consumption.¹¹¹ Criminal actions seek criminal sanctions, which usually include imprisonment and/or monetary penalties. Tobacco control legislation in a number of countries contains provisions for criminal enforcement including the

¹⁰⁹ See Blanke D. Towards health with justice: litigation and public inquiries as tools for tobacco control. Geneva, the World Health Organization, 2002.

¹¹⁰ Ibid

¹¹¹ Blanke D. Towards health with justice: litigation and public inquiries as tools for tobacco control. Geneva, the World Health Organization, 2002.

imposition of criminal penalties such as imprisonment for breaches of the law.¹¹² It is important to note that criminal litigation is case intensive and may be complex.

However, it presents a strong deterrent to violators because it affects their personal liberty and presents a social stigma, making it an effective enforcement tool for tobacco control legislation. Criminal legal actions require intensive investigations. They also require proof that a wrongful act has been committed and that an individual or business (through its employees) was knowingly, intentionally, maliciously or recklessly responsible for the violation. Criminal judicial actions require prosecution expertise usually available from the ministries of justice or the state law or prosecution offices. The use of criminal judicial mechanisms for enforcement of tobacco control law depends on the criminal laws and procedures of each country and the availability of an enabling legal basis for its application, derived from tobacco control law or some other legal basis such as the national constitution, criminal and penal laws. The legal basis for applying criminal enforcement mechanisms obviously varies from situation to situation.

(d) Judicial enforcement mechanisms: common procedures

Judicial enforcement actions require an understanding of legal procedures, for example, those entitled to bring the case, against whom such suits are brought, where they can be brought, what legal basis for liability exists and what relief for enforcement can be brought. These circumstances also vary from country to country.

Plaintiffs

Plaintiffs are both natural and legal persons who have a standing in law and will bring an action to enforce a tobacco control requirement.

Firstly, individuals can sue seeking an injunction. However, due to the high costs of litigation for damages and possible insufficient claims for compensation, claims for compensatory damages based on individual actions may need to be carefully considered before commencing such enforcement actions. The advantage of individual actions is that they involve limited risks. Even if the case fails, this will not legally prevent other individuals from bringing similar cases in future.

Secondly, combined individuals can bring class actions or other consolidated judicial action for large recoveries or damages. The risk with this method is that it involves complexities that can cause delay and compromise the interests of individual class members.

Thirdly, governments have the responsibility to enact and enforce tobacco control legislation. Governments also ensure that sufficient resources are provided for enforcement activities. In this regard, governments are well placed to be potential plaintiffs in judicial actions to enforce tobacco control requirements.

¹¹² A number of tobacco control tax and anti-smuggling laws, including litigation, often seek criminal penalties for redress and to ensure compliance. See section 1399-II of New York Public Health Law. At: <http://public.leginfo.state.ny.us/menuetf.cgi>

Fourthly, NGOs have been active claimants in litigation for tobacco control. However, they may have limited resources or may not have the necessary legal standing to bring enforcement claims. NGOs in Uganda, Bangladesh and other countries have successfully instituted public interest litigation to enforce tobacco control laws. Finally, other private entities such as health insurance companies and private hospitals may also bring enforcement-related claims as plaintiffs.

Defendants

There are a number of potential defendants in a judicial action for tobacco control. Firstly, tobacco companies are the primary defendants in any tobacco litigation. The specific companies named as defendants will vary from country to country. This is because multinational tobacco companies may have other subsidiaries in different countries and jurisdictions. Depending on the legal basis, the named defendants may be the local subsidiary or the parent company usually legally resident in another jurisdiction or country. Secondly, sellers of tobacco, including distributors and retailers, may be appropriate defendants depending on the nature of the violations and enabling laws. However, the large number of retailers of tobacco products makes it complex to prove and calculate damages.

Thirdly, governments may be named as defendants for their failure to fulfil affirmative obligations to protect citizens or public health under the tobacco control legislation, the national constitution or the WHO FCTC and related international laws. Additionally, governments may be named as defendants due to their control of state owned tobacco companies. Therefore, governments are the primary guarantors and promulgators of a tobacco control law, and if they fail to play their due role in enforcement they may also be compelled by civil society and the public to enforce the tobacco control legislation.

Fourthly, employers and business owners such as the owners of restaurants, clubs and pubs can be potential defendants in judicial enforcement actions undertaken by employees or customers injured by exposure to second-hand smoke or other tobacco-related violations. Employee claims may be for recovery of damages and to enforce smoke-free or other tobacco control requirements. Other businesses such as advertising agencies as well as print and electronic media that violate advertisement prohibitions can also be potential defendants. Finally, individuals who violate tobacco control requirements may be potential defendants in a judicial action to enforce tobacco control requirements.

Potential legal basis for tobacco control judicial action

The legal basis for judicial enforcement action varies from country to country and is based on the laws of the jurisdiction in which the claims are brought. The causes of action and their legal efficacy for successful adjudication also depend on the legal system where the action is instituted. However, the plethora of tobacco litigation in the last decade or so has led to substantive and procedural avenues for future tobacco control litigation around the world. While the potential legal basis for tobacco control litigation is bound to evolve, the following has been considered as important legal theories to support tobacco control judicial actions.

Firstly, claims in tort or private civil wrongs include (a) negligence, such as failure to warn or negligent product design, misrepresentation or fraud, product liability, undertaking a special duty, conspiracy and nuisance; (b) contract claims that include express and implied warranties

that form a potential legal basis; and (c) claims in equity that comprise restitution and unjust enrichment that also constitute a potential legal basis.

Secondly, there are statutory claims as determined by the laws of respective jurisdiction. These may include claims based on consumer protection laws and laws against deceptive advertising, competition or anti-trust laws and laws that prohibit restraint of trade, smuggling laws, laws against business conspiracies or racketeering, laws prohibiting tobacco advertising or the sale of tobacco to youth and laws against public smoking. Thirdly, constitutional claims based on the governments obligation to protect public health, the right to health, safety, clean environment or right to life can be invoked in such actions.

Fourth, criminal liability exists under laws prohibiting reckless or intentional endangering of human life, laws prohibiting perjury or the giving of false statements under oath, smuggling laws, or laws prohibiting the adulteration or contamination of products intended for human consumption. Finally, the legal basis for liability may also be based on international law. This includes, primarily, the WHO FCTC but also more broadly the Charter of the United Nations, the Universal Declaration of Human Rights, the Constitution of WHO, the United Nations Convention on the Rights of the Child, the African Charter on Human and Peoples Rights and the African Charter on the Rights and Welfare of the Child.¹¹³

Types of relief

The types of relief sought in a judicial enforcement action will vary from jurisdiction to jurisdiction but largely depend on the judicial discretion of judges. Appropriate relief will also depend on the legal traditions of a country, the strength of the evidence supporting the case and the linkage between the causes of action alleged and the relief sought. It is important that relief sought should achieve the ultimate goal of tobacco control enforcement and the promotion and protection of public health. In this regard, some potential relief that can help enforce tobacco control legislation includes the following:

Injunctions

An injunctive relief that requires defendants to take or cease certain actions provides an important relief for tobacco control enforcement action. Injunctions could comprise: general prohibitions against future misconduct, restrictions on packaging, advertising, marketing, sponsorship or selling practices, changes in the design or formulation of contents of cigarettes or other tobacco products, packaging and labelling requirements, public disclosures and corrective public awareness and educational campaigns, termination of tobacco industry programmes, bans on public smoking, creation of cessation programmes, orders requiring the government to develop and implement tobacco control programmes including enforcement activities.

Declaratory relief

Declaratory relief is a formal judicial determination that the defendants are liable or have engaged in unlawful conduct. It can provide an impetus for the enforcement of tobacco control requirements that are adjudged to have been breached.

¹¹³ See African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999, Articles 14 and 15 make extensive provisions on health protection of children.

Equitable relief

Equitable relief comprises innovative remedies fashioned by the court to restore justice and redress any harm caused by defendants. It could require the defendants such as tobacco companies to undertake a number of actions to enforce tobacco control requirements.

Monetary remedies

Monetary remedies include compensatory damages, punitive (exemplary) damages, fines or civil penalties, lawyer's fees, etc. The monetary awards help to restore financial losses to individuals or reimburse governments or others for the costs of medical care. It can also be punitive and deterrent against violations of the law and ensure that behaviour will improve and that continuing violations will cease. Large punitive damages can also lead to increases in the prices of tobacco products, which ultimately reduce the rates at which youth become smokers, generally encourages smokers to quit and reduce the consumption of those who continue to smoke. The financial awards could also be utilized to fund tobacco control and compliance promotion for tobacco control legislation.

In the case of tobacco control, factors that may be applied to decide on the amount of a monetary penalty include following: (a) Firstly, there is the seriousness of the actual or potential harm to public health. This will provide for graduated penalties and will communicate a message of deterrence to the tobacco control-regulated community. The seriousness of the offence and any history of non-compliance, the public health impact and the need to protect the integrity of the enforcement programme are also factors. (b) Secondly, a monetary penalty must recover the economic benefit a violator has gained due to non-compliance and remove all economic advantage of non-compliance. (c) Thirdly, other factors such as the violator's ability to pay, the level of cooperation during the enforcement process by the violator and the level of self-monitoring and reporting by the regulated community are other factors that are important in assessing monetary damages.

Imprisonment

A number of legal systems allow for the possibility of jail terms for violating tobacco control laws. The deterrent value of imprisonment can cause the regulated community to change behaviour in favour of compliance. In a number of countries, the tobacco control laws specifically provide for the use of imprisonment for violation of tobacco control requirements.¹¹⁴

Other Sanctions

Other sanctions for violation of tobacco control laws include:

- (a) denial, suspension or revocation of licence for a facility;
- (b) imposition of a schedule for compliance, such as notices requiring compliance;
- (c) seizure of property such as counterfeit and contraband tobacco products or manufacturing equipment for such products;

¹¹⁴ See for example, Section 7(1) of Canada's Tobacco Control Act, SNL1993 CHAPTER T-4.1, that provides for both payment of a fine and imprisonment as penalties for breaches of the Act. At: <http://www.hoa.gov.nl.ca/hoa/statutes/T04-1.htm>. See also Article 19 of Iceland's Tobacco Control Act, 2002, No 6, 31st January, which provides for both fines and imprisonment for violation of the Act. At: http://ministryofhealth.is/media/Reglugerdir-enska/Tobacco_Control_Act_revised_2003.pdf. See also section 9 of South Africa's Tobacco Products Control Amendment Act of 1999, Act No 12,1999. At: <http://www.doh.gov.za/docs/legislation/acts/1999/act12.html>

- (d) closure of facilities or operations, wholly or in part, such as non-compliant public and workplaces, other businesses etc.;
- (e) removal, impounding and retention of tobacco products.

A number of countries have utilized judicial enforcement mechanisms to enforce their tobacco control laws. For example, in Ireland in 2005, a total of 38 prosecutions were initiated for both signage offences and for permitting smoking in an enclosed work place.¹¹⁵ The prosecutions targeted mainly licensed premises but also included taxi companies, a retail shop and a member of the public for violating the smoke-free law.

6. Sustaining enforcement responses

Protecting the rights of parties

While countries around the world have varying legal systems, laws and cultures, it is common in all these countries that the rights of persons must be balanced against the determination of the government to act swiftly and fairly to protect public health. There are various ways by which an enforcement response can be fashioned to be transparent, equitable and fair.

Firstly, the government or enforcement and programme officials should provide procedural guarantees for issuing notices to violators before the institution of formal enforcement action. This may enable the violator to contest the finding and or to correct the violation within a specified time limit. This enables the violator to avoid a more stringent response while ensuring that full compliance with tobacco control requirements is achieved. Warnings and other notices fall in this category. Secondly, the enforcement process needs to include the possibility for appeals by either the enforcement authorities or the regulated community. This can ensure that the relief sought by the enforcement authorities or the stringency of the relief is commensurate with the violation and achieves compliance and the required public health or enforcement goal of the tobacco control law.

Thirdly, it may be possible to put in place mechanisms for informal negotiations and settlements during the enforcement processes. This can help to achieve compliance without resort to formal enforcement response mechanisms. Alternative and creative settlement procedures that achieve the required tobacco control legal compliance objectives obviate costly court-related enforcement responses to achieve the same result. Negotiations cannot be ignored in the creative enforcement of laws. They enable the enforcement programme and regulated community to verify violations, facts and other information necessary for deciding on the appropriate enforcement tool.

Negotiation promotes compliance by taking account of and responding to the genuine challenges and limitations of enforcement actions faced by sections of the regulated community. It sends a positive signal to the regulated community that the enforcement authorities are willing to work together to achieve compliance with tobacco control requirements. However, any alternative dispute settlements such as negotiation can be most workable if enforcement authorities impose a stringent compliance schedule and maintain the threat of full legal action through litigation.

¹¹⁵ See Ireland, Office of Tobacco Control, 2005. Office of Tobacco Control, Annual Report, page 15. At: <http://www.otc.ie/uploads/Publications%20-%20AR%202005%20English%20Web.pdf>

Negotiations must be used carefully and sparingly with other regulated communities and should be avoided with the tobacco companies. Article 5(3) of the WHO FCTC requires parties to protect the enactment and implementation of public health policies related to tobacco control from the commercial and vested interests of the tobacco industry. Informal negotiations of this kind in the enforcement process should also be insulated from possible "regulatory capture" by vested interests of the tobacco control-regulated community.

Making an enforcement case

In any tobacco control enforcement actions, the claims of violation and other facts may be challenged by the regulated community. In such a situation, it is always essential first to prove that the violation of a tobacco control law has indeed occurred. Secondly, that the enforcement procedures and policies have been rightly followed in responding to the violations by the regulated community. Thirdly, it is essential to reiterate the public health and other objectives of the tobacco control requirement and the adverse consequences of violation of the requirements. Fourthly, should it be necessary, enforcement authorities should be able and willing to identify and provide guidance on the appropriate actions that must be taken by the regulated community to fulfill standards of return to compliance.

Include enforcement responses frameworks in the enforcement policy/strategy

A tobacco control law may not fully provide the framework for all enforcement response activities. In such a case, the enforcement programme officials may need to develop regulations, guidelines or other instruments that outline the circumstances for use of enforcement and compliance tools and powers. An enforcement response policy creates a standard for undertaking all enforcement actions related to the tobacco control legislation. Possible components of an enforcement policy framework for tobacco control legislation include the following:

- (a) The legal provisions of the legislation may state at what point a violation of a tobacco control requirement has occurred. However, this is not always obvious and hence it may be necessary to develop guidelines and standards to determine compliance or non-compliance with specific provisions or components of the law. The development of indicators of compliance with the tobacco control requirements will also be a useful tool for assessing compliance and non-compliance with the legal provisions and the specific tobacco control requirements.
- (b) If not already stated in the tobacco control or related law, it may be essential to specify the circumstances or tobacco control requirements the violation of which will engender either a civil or criminal response or both and should also specify the penalties and sanctions involved at various levels of non-compliance.
- (c) The policy may also outline the circumstances under which a penalty may be imposed on the violator. Deterrence is essential to a tobacco control compliance strategy because it sends a message to the regulated community that they must comply with the law. The policy may also specify whether a return to compliance by the violator can allow the enforcement authorities to waive penalties such as fines.
- (d) The policy may also consider the cost implications of each enforcement response and how this affects compliance. For example, if imposing penalties for a minor violation of a tobacco control law may only be achieved by devoting high and costly financial and technical resources to impose such penalties, this may not be a cost-effective approach to enforcement.

- (e) An enforcement policy may also provide directions regarding the varying types of sanctions or relief that can be imposed. As discussed earlier, there is a range of relief available for enforcement responses for tobacco control and these include injunctions, equitable relief, imprisonment, monetary penalties, etc.

CHAPTER 5: IMPLEMENTING AN EFFECTIVE ENFORCEMENT PROGRAMME

1. Enforcement responsibilities within government

Inter- and intragovernmental enforcement responsibilities: an introduction

In countries around the world, enforcement of the law is carried out by multiple bodies comprising governmental ministries and agencies, civil society and even the general public. However, governments retain the primary responsibility for enforcing tobacco control legislation, and indeed for the protection of the public health of its citizens. Tobacco control is a multifaceted, multisectoral endeavour that cuts across many sectors in government.

Article 5(1) of the WHO FCTC requires parties to the convention to develop, implement, update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with the convention and the protocols to which it is a party.

The convention recognizes that the implementation of tobacco control, including enforcement, will be carried out by a multiplicity of sectors across government and will include nongovernmental actors as well. Enforcement of tobacco control as a multisectoral activity will involve to varying degrees many institutions, ministries and other agencies of government. These institutions include the three arms of government: the executive, the legislature and the judiciary. However, governmental institutions with an enforcement role for tobacco control are those institutions that usually have a mandate alone or in concert with legislators: to initiate legislation generally, to initiate the development and implementation of tobacco control legislation, to determine resources for tobacco control, to institute legal action, to coordinate overall tobacco control activities in a country and to coordinate those with overall responsibility for all of the country's law enforcement.

Depending on the peculiarities of each jurisdiction, responsibility for enforcement of provisions of the tobacco control law may devolve upon several governmental agencies. For example, under the Swedish Tobacco Act¹¹⁶ responsibility for enforcement of the components of the legislation is shared between the National Board of Occupational Safety and Health, the National Institute of Public Health, the Consumer Ombudsman, the Work Environment Authority, the county administrative board, the National Board of Health and Welfare, the Municipal authorities and the courts.¹¹⁷ This shows the importance of having an enforcement strategy that clearly identifies the various enforcement actors and delineates their tasks in the enforcement of the legislation. In fact, studies have shown that enforcement authorities for tobacco control may be fragmented among those several agencies.¹¹⁸ However, it is important to note that fragmented governmental

¹¹⁶ See The Swedish Tobacco Act, 1993 as amended in 1994, 1997, 2002, 2004 and 2005, Section 16. At: <http://www.tobaksfakta.org/Default.aspx?id=4100>

¹¹⁷ Ibid. Sections 19-25.

¹¹⁸ Jacobson PD, Wasserman J. Tobacco Control Laws: Implementation and Enforcement. RAND, Santa Monica, CA, 1997, 57-58

mandates for tobacco control calls for central coordination by the tobacco control focal point or the ministry of health. This will enable the government to coordinate activities and strategies effectively to take legislative and enforcement avenues available within the non-health sectoral laws and enforcement programme under environmental, consumer protection or other laws.

An example in New Zealand shows the pitfalls of fragmented tobacco control mandates.¹¹⁹ While the commerce commission was willing to take tobacco companies to court on monopoly issues, it reasoned that the aspects of the Fair Trading Act with health implications were better dealt with by the Ministry of Health. Yet the Ministry of Health, while targeting smokers, was less able to focus on the tobacco industry as the major threat to public health. In New Zealand as is common in jurisdictions in Africa, there is pressure to focus on investing in the health sector budget in the treatment of disease than invest in non-health avenues such as legal action against tobacco companies.¹²⁰ Fragmentation in tobacco control is unavoidable and its negative impact can be offset by the institutionalization of a focal point for tobacco control and its enforcement programme.

National and sub-national governments

An important concern in a tobacco control enforcement programme is the division of enforcement tasks among different agencies of government and between the national governmental authorities and the sub-national or local governmental authorities. This is even more relevant in countries where both national and sub-national governmental authorities possess the legal competence to enact tobacco control laws and to enforce them as well. It also depends on the overall law enforcement frameworks and structures in a particular country. There are advantages and disadvantages to both national and sub-national enforcement frameworks.

National enforcement frameworks ensure that national tobacco control enforcement standards are maintained and applied throughout the country. Moreover, national enforcement frameworks provide for an enforcement programme that is consistent, uniform and fair throughout the country. A national enforcement framework also ensures that national resources such as expertise, funding and other assistance can be tapped to support enforcement programmes. Enforcement of some tobacco control requirements such as the regulation of tobacco products or ban of cross-border advertisement are examples of tobacco control requirements that are more effectively enforced within a national enforcement framework.

Despite the advantages of national level enforcement, a decentralized sub-national tobacco control enforcement framework exists in a number of countries around the world. Where national legislation has been difficult to adopt and implement, sub-national legislation has been the better option. Moreover, tobacco control requirements such as smoke-free legislation can be better enforced at the national levels. Enforcement frameworks for tobacco control legislation exist at the state, provincial/state, municipal or other local governmental levels. There are advantages of sub-national enforcement presence. First, assigning an enforcement role to sub-national governments is a sensible approach because subnational governments are closer to the tobacco control-regulated community (tobacco companies, tobacco sellers, employers and business

¹¹⁹ Thomson G, Wilson N. Implementation failures in the use of two New Zealand laws to control the tobacco industry: 1989-2005. *Australia and New Zealand Health Policy* 2005, 2:32

¹²⁰ *Ibid*

owners and the people.) Strong public support at the local level can motivate sub-national authorities to enforce the law within their areas of jurisdiction. Second, tobacco control enforcement programmes at the sub-national level are well placed to benefit from local knowledge of regulated groups such as tobacco sellers, owners of public places and their local practices, compliance challenges and prospects, and can therefore help to fashion enforcement frameworks to respond to specific local circumstances. Third, sub-national enforcement frameworks may be stringent at the local levels because enforcement officials have community presence, support and awareness of the community to strengthen compliance. Finally, in many countries, there are greater resources at the local level for tobacco control, including resources for enforcement of tobacco control laws.

Brazil, South Africa and Sweden are examples where there is a distribution of authority in the management of the enforcement programme. In Brazil, the tobacco control law empowers the municipal sanitary authorities to apply the sanctions provided in the law except in cases of exclusive or competing competence of certain regulatory or surveillance bodies.¹²¹ Similarly in South Africa, a local authority shall have the power, duty, and obligation to enforce any smoking (tobacco control) regulations within its area of jurisdiction, whether such regulations are local or national.¹²² In Sweden, the Swedish Tobacco Act of 1994 and related regulations are administered at the national level by the National Board of Occupational Safety and Health and the National Board of Health and Welfare. Direct supervision of the act at the local level is carried out by the Work Environmental Inspectorate and municipal authorities, while at the county level the relevant county administrative board is the supervising agency. Sub-national tobacco control enforcement programmes have also been successful in the United States of America, Canada and Australia.¹²³

Local and state level enforcement efforts have been inconsistent, yielding widely varying results. It is important that sub-national or local enforcement activities are aggressive. In the United States of America, early and aggressive enforcement by a special city enforcement unit helped the town of San Clemente in southern Orange County, California achieve almost 100% compliance with the ban.¹²⁴ On the other hand, delayed enforcement efforts and less-aggressive enforcement methods in the ban's first year contributed to the mediocre 50% compliance rate of the Los Angeles County, California stand-alone bars.¹²⁵ Despite these advantages, many tobacco control enforcement programmes are coordinated and deployed from the national governmental level.

The focal point/ministry responsible for tobacco control

Governmental ministries have a primary responsibility for initiating a specific legislative scheme and ensuring its enactment and implementation. In the case of tobacco control ministries of health, one of their agencies or other national institutions for tobacco control have a central role in coordinating the enactment or amendment of tobacco control legislation and its enforcement provisions. As mentioned above, national institutions for tobacco control may have enforcement powers and authorities at their disposal. They can be vested with administrative mechanisms to

¹²¹ Article 9, Paragraph 4, Law 10.167 of 27 December 2000

¹²² Section 2, sub-sections (6) and (7) of Tobacco Products Control Act, No 83 of 1993

¹²³ See Tobacco Control Legislation: An introductory Guide., Blanke D, da Costa e Silva V, eds., WHO Geneva, 2004 , 64-66

¹²⁴ Ibid

¹²⁵ Ibid

enforce tobacco control requirements against violations of the law or apply authority already vested in them for the enforcement of tobacco control legislation. They also have a role to play in promoting compliance, monitoring compliance and responding to violations of the tobacco control law. A national institution for tobacco control is also responsible for coordinating enforcement and compliance-related actions across other governmental agencies involved in law enforcement. The following are other governmental agencies frequently vested with responsibility for enforcement of tobacco control legislation:

Legislatures and law enforcement

Legislative bodies can greatly influence the pace and nature of enforcement of tobacco control legislation in most countries around the world. Parliaments and other law-making bodies are endowed with wide ranging powers relating to enforcement of and compliance with the laws of the land. Parliaments have the powers to define public health and enforcement goals, the powers of the authorities and the related mandates necessary to meet public health and law enforcement objectives. They also determine and apportion the level of resources required for public health and tobacco control implementation programmes. Furthermore, successful enforcement of tobacco control legislation requires ongoing amendments to the law and related subsidiary legislation. Legislatures play a pivotal role by enacting and promulgating amendments to tobacco control legislation. Within the limits of separation of powers, parliaments can also require law enforcement agencies and other arms of government to ensure that compliance is achieved with public health or tobacco control legislation in particular.

The judiciary and law enforcement

Judicial institutions have responsibility to make and also interpret tobacco control laws that come before them. Through case decisions and judicial review, courts define the legal rights and powers that can determine the ultimate effectiveness of tobacco control enforcement programme. Through judicial review, judges and courts may overrule, modify or advise on a given law, including on its enforcement. The role of courts in enforcement and compliance with varies from country to country. Courts in some countries can review the legalities of a law, including its enforcement provisions, while others may provide opinions that are persuasive. In addition, enforcement authorities may be challenged in the courts, and courts are crucial in deciding on such challenges.

A tobacco control enforcement framework must consider and assess the role of courts in its enforcement, e.g., whether enforcement frameworks can withstand legal challenges and how the law can be regularly reviewed to withstand judicial review and constitutional challenges. Courts do provide an important forum for undertaking enforcement and compliance action in respect to tobacco control law both in terms of prosecutions for violations of the law and for enforcing administrative and other orders against violators of a tobacco control law. Courts also possess the powers and discretion to determine relevant sanctions, penalties and relief in enforcing the laws and ensuring compliance with tobacco control legislation.

Police

Tobacco control legislation around the world has often relied on the existing law enforcement mechanisms in the country. The police are charged with law enforcement responsibilities and can play an important role in identifying violations of tobacco control laws. Police may also possess

significant resources to detect and correct violations and help to ensure that the tobacco control-regulated community returns to compliance. Tobacco control legislation in a number of countries endows the police forces with inspections and other enforcement roles relating to the tobacco control law. However, tobacco control legislation is a new and evolving area of law and police may not be familiar with tobacco control. Therefore, appropriate tobacco control training and education are essential to building the capacity of the police to enforce tobacco control legislation. Technical support from the health ministry and programme officials of the national institutions for tobacco control can strengthen the effectiveness of the police in enforcing tobacco control laws. Various levels of police may be involved in enforcing different components of the legislation. For example, the municipal/local police may be better placed to enforce smoke-free laws, while the national police may have more resources to enforce the anti-tobacco smuggling requirements of the law.

Other governmental ministries/agencies

An essential element of an enforcement programme for tobacco control legislation is the role of the national focal point for tobacco control. Tobacco control legislation often designates a focal point, usually based within the Ministry of Health or another governmental agency. The focal point will have the primary responsibility for managing the enforcement of tobacco control laws. However, a number of countries have established national committees for tobacco control.¹²⁶ The committees are comprised of ministries or agencies of government with responsibility in the area of tobacco control. Each ministry or agency also retains responsibility for the enforcement of particular elements of tobacco control legislation which fall within their functional mandates. This may include several ministries: finance for the enforcement of tobacco tax laws, justice for the general enforcement of the tobacco control laws, trade and customs for the enforcement of the anti-smuggling provisions of the law, communications for the enforcement of bans on tobacco advertising, education to implement tobacco control educational and awareness-raising programmes and agriculture for enforcing provisions relating to diversification away from tobacco to other economic alternatives.

For example in the United Kingdom, under the Tobacco Advertising and Promotion Act 2002,¹²⁷ the weights and measures authority is the enforcement authority with responsibility for enforcement of the law in England, Wales and Scotland.¹²⁸ There are also other governmental agencies such as environmental health and occupational health boards that may not be part of a multisectoral tobacco control committee but that enforce tobacco control requirements within their mandates. Such agencies add to the mix and help to strengthen the overall enforcement frameworks for tobacco control legislation. However, it is possible that conflicting mandates and even competition between agencies with a similar mandate in an area of tobacco control can undermine enforcement and compliance efforts. To avoid such inter-agency conflicts, a mechanism for ongoing cooperation between the agencies is required. This enhances the effectiveness of the enforcement strategy and programmes for the legislation and avoids any enforcement and compliance related loopholes that may arise due to lack of synergies between the activities of the various governmental agencies. Some mechanisms to increase synergy

¹²⁶ Roemer R. Legislative action to combat the world tobacco epidemic. 2nd ed. Geneva, WHO, 1993

¹²⁷ Tobacco Advertising and Promotion Act 2002, Chapter 36, HMSO. At: <http://www.opsi.gov.uk/ACTS/acts2002/20020036.htm#13>

¹²⁸ Section 13, *ibid.*

between agencies in addition to participation in the national committee for tobacco control could include:

- (a) Entering into inter-ministerial agreements to establish the mechanisms and procedures for dealing with issues relating to conflicting mandates and synergies in enforcement and compliance activities.
- (b) Developing a mechanism to integrate enforcement and compliance activities of concerned ministries under the national focal point for tobacco control
- (c) Carrying out joint enforcement activities such as enforcement promotion, training and other activities.
- (d) Developing review mechanisms for enforcement and compliance actions of concerned ministries by the national focal point for tobacco control and other concerned ministries.

Therefore, if these and other mechanisms of enhancing synergy can be developed, governmental agencies with a mandate in an area of tobacco control will be able to contribute proactively to enforcement and compliance actions in relation to the tobacco control legislation in question.

2. Civil society and enforcement of tobacco control legislation

Vital to successful enforcement of tobacco control legislation are the activities of civil society. In countries around the world, NGOs have become the leading watchdogs for the enforcement of enacted laws. NGOs can have substantial resources for implementation of tobacco control laws. NGOs can act as allies of the government and facilitate governmental enforcement and compliance activities. Depending on their expertise, NGOs also play a vital role in enforcement promotion and monitoring. They can, for example, provide education and training to enforcement officials, the general public and even members of the regulated community. In many countries, knowledge of a new law or of enforcement and compliance requirements may be low. Therefore, education and awareness driven by civil society can help bridge the transition from the enactment of the law to its enforcement.

For example, in South Africa tobacco control NGOs launched a public campaign to counter false claims made by the tobacco industry and help enforce bans on tobacco advertising, promotion and sponsorship. In Uganda, an NGO, the Environmental Action Network (TEAN) sued the Attorney General and then National Environmental Management Authority. The suit in the High Court of Uganda in 2001 resulted in the adoption and implementation of smoke-free regulations in Uganda.¹²⁹ In the State of Mississippi in the United States, an NGO named Partnership for a Healthy Mississippi (PHM) trained over 400 law enforcement personnel and 2000 retail employees to enforce tobacco access laws, cracking down on sales of tobacco products to minors.¹³⁰ Several segments of civil society that can be singled out to support enforcement efforts include tobacco control, cancer and heart NGOs, consumer and environmental NGOs, judicial officers' associations and local government associations such as those involving mayors and city officials.

¹²⁹ The Environmental Action Network LTD. (TEAN) vs. The Attorney General & National Environment Management Authority (NEMA), Misc. Applic. No. 39, High court of Uganda at Kampala (2001).

¹³⁰ Carter V et al. Nonprofit organizations versus government agencies to reduce tobacco use. *Journal of Public Health Policy*, 24 (2): 181-194

In conclusion, NGOs can help in different ways to promote tobacco control legislation and its implementation:¹³¹

- (a) by creating a climate of opinion in favour of tobacco control and the effective enforcement of tobacco control legislation, supporting governmental enforcement activities, identifying legislative priorities, including for reviews and amendments to the law to enhance effective enforcement;
- (b) increasing awareness that the tobacco companies, as members of the tobacco control-regulated community, have continued to act irresponsibly; and
- (c) providing a strong and powerful image for tobacco control, which in turn helps build the credibility of the tobacco control enforcement programme.

3. Evaluating enforcement and compliance programmes

The role of evaluation for enforcement and compliance

Evaluation of enforcement activities enables all agencies or officials responsible for enforcing the law to carry out their roles consistently using established mechanisms and procedures.

Evaluation reports help enforcement programmes review and respond to changing conditions and learn from successes or failures in the application of the various enforcement tools. The evaluation of the enforcement programme will need to be undertaken periodically and can play a number of roles:

First, it helps if enforcement programmes determine whether the deployed enforcement mechanisms for tobacco control legislation are effective. Hence, evaluation results provide the basis for either legislative amendments or changes to the enforcement policy for the legislation. In this way, enforcement loopholes can be identified and appropriate changes made to protect the integrity and effectiveness of the enforcement tools.

Second, evaluations help make the government and its enforcement officials and managers accountable for the enforcement of the tobacco control legislation or its overall success. An enforcement strategy usually contains mechanisms whereby enforcement objectives and the means to achieve those objectives are defined. Therefore, evaluation ensures that appropriate changes are put in place to strengthen enforcement performance. Accountability of government agencies with mandates to enforce all or some aspects of tobacco control is essential if the enforcement programme is to be successful.

Third, tobacco control legislation usually requires the enforcement programme to report the progress of its implementation to the parliament or the general public. Therefore, evaluation helps to provide accurate information on enforcement in order to report to the public and parliaments that have responsibility in allocating resources for tobacco control and its implementation. Finally, enforcement evaluation reports help raise awareness among the regulated community on the enforcement successes against violators of the law. It also outlines

¹³¹ See WHO, Building blocks for tobacco control, a handbook, WHO 2004 at page 219

the challenges to enforcement and what will be pursued to address such challenges. In this way, evaluation serves as a deterrent and contributes to compliance.

Measures of enforcement success

Evaluation will measure how well enforcement measures of a specific tobacco control law are performing in order to achieve the goals of the legislation. The evaluation requires the assessment of the processes by which the legislation is enforced and implemented, referred to as "process evaluation". It also involves an evaluation of the impact of legislation on key tobacco or public health-related goals, and this is referred to as "outcome evaluation". In relation to enforcement specifically, the enforcement programme strategy should set individual enforcement targets to be achieved within a certain period of time. Evaluation can then consider enforcement tools such as the number and quality of prosecutions, compliance promotion, compliance monitoring, inspections, enforcement training and technical assistance measured against the overall objectives of the tobacco control law. This approach is based on the establishment of clear and unambiguous goals for both the enforcement programme and the legislation it works to enforce. Against this background, some of the measures of success of the enforcement of tobacco control legislation include the following:

Public health results

Generally, the following are some of the indicators for evaluating the law relative to its goal of protecting health: (a) First, the amount of tobacco consumed in a population is an important measure of success or failure of an enforcement programme.¹³² (b) Second, the prevalence of tobacco use in the total population, among men and women, and among specific groups, can also help measure the tobacco problem in a given population. Risk groups can be identified and further interventions, including the review and strengthening of enforcement tools, undertaken and deployed to reduce the prevalence of tobacco consumption. (c) Third, exposure to tobacco smoke among adults and young people is an essential indicator for evaluating tobacco control legislation and its enforcement in its role protecting people from second-hand smoke in indoor workplaces, public transport, indoor public places and other places. (d) Fourth, information on tobacco-related mortality is an important indicator of the success of a legislative programme. (e) Finally, the status of general implementation elements of tobacco control such as research, cessation programmes and tax policies also provide useful indicators of whether public health results are being achieved through the enforcement activities.

Unfortunately, using public health results to measure success of enforcement has its shortcomings.

First, it may be difficult to determine if the stated public health results and outcomes are mainly due to the legislation and its enforcement or if there are other factors such as education and cessation efforts that encourage smokers to quit.

Second, there is always a time lapse between enforcement and compliance activity and the consequent improvement in public health. This hinders an accurate assessment of the effectiveness of enforcement and compliance activities relative to public health goals.

¹³² See WHO, Building blocks for tobacco control, a handbook. WHO 2004

Third, while the protection of public health is at the heart of tobacco control, these policies have social, economic, political and environmental dimensions. These factors can contribute to poor public health results and poor achievement of enforcement goals. It would thus be wholly inaccurate to rely entirely on public health results to measure the effectiveness of the legislation and its enforcement.

Rates of compliance in the regulated community

Compliance rates are an important measure of the success of enforcement. While the ultimate goal of tobacco control legislation is the protection of public health, high compliance rates are an effective measure of an enforcement programme's success. The legislation in question, regulation or enforcement strategy should clearly define the threshold of when compliance has been achieved. This should not pose difficulties if countries adopt comprehensive tobacco control laws that provide detailed rules and provisions on when compliance with tobacco control law has been fully achieved. However, compliance rates may not always be an effective measure of success because they depend on the application of enforcement tools such as inspections or the submission of reports by the regulated community. This means that the reports must both be accurate and that there are effective data management capabilities within the enforcement programme. Moreover, for compliance rates to be an effective measure of success, compliance must be achieved among the whole range of the regulated community, e.g., the tobacco companies, tobacco sellers, managers of public place, governmental agencies and the general public.

Compliance by the major violators in each country: tobacco companies

Tobacco companies have been identified as the most important regulated community in tobacco control and implementation of tobacco control policies. The WHO FCTC identifies the tobacco companies as the potential saboteurs of the implementation of the convention and of tobacco control policies generally.¹³³ In this regard, ensuring that tobacco companies comply with tobacco control legislation provides a good measure of the success of the enforcement programme, and above all the public health and other goals of the law. The provisions such as packaging and labelling, the ban on advertisements, promotion and sponsorships and the regulation of tobacco products are some of the tobacco control requirements for which compliance by the tobacco companies makes a big difference.

However, major violators may vary from country to country. It may be that in other jurisdictions the major violators are the tobacco sellers or the managers of public places. The rate of compliance by such violators provides useful information on the measures of successful enforcement. This method has some merits. It provides publicity that serves as deterrence for other members of the regulated community, as the major violators and their compliance with the law will be reported. Publication of such evaluations can motivate other sections of the regulated community to be compliant with tobacco control requirements. It also helps the enforcement programme to document compliance patterns among the various sections of the regulated community.

¹³³ The 19th preambular paragraph of the WHO FCTC recognizes “the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts and the need to be informed of activities of the tobacco industry that have a negative impact on tobacco control efforts”.

Compliance monitoring measures

An important indicator of measuring both the enforcement process and its outcomes is the quality and quantity of actions for compliance monitoring. These measures include the quality of inspections, the frequency and number of inspections, the number of major violators (in the regulated community) of the tobacco control law targeted by inspections and the quality and quantity of reporting received under the legislation. Quality assurance is attained when inspections are carried out according to established procedures that achieve high rates of compliance. Therefore, the number of inspections coupled with a high quality of inspection operations should lead to measurable effective enforcement. Targeted, high quality and quantities of inspections, coupled with high quality reporting under the tobacco control law can help detect even greater numbers of violations. This can enable the enforcement programme to review options to ensure compliance. However, in the strict sense of evaluation of enforcement success, well-organized inspection operations help detect more violations but also thereby show lower compliance rates.

Number of enforcement responses

Legal action, including litigation, is the ultimate choice of enforcement tool available for tobacco control in many jurisdictions. Various enforcement response measures are essential to the success of tobacco control. Legal action is an important indicator to the tobacco control community or general public that the government or NGOs are committed to taking appropriate action to enforce tobacco control laws. Unfortunately, litigation as an indicator can be a costly, time consuming endeavour. Its usefulness as an indicator will depend on the granting of timely relief by a judicial body in order quickly to ensure compliance by the regulated community.

Swiftness of enforcement responses

An effective indicator of an enforcement regime is the time taken by enforcement officials to respond to a violation of a tobacco control requirement and the time taken to return a violator to a state of compliance. Speedy enforcement responses ensure speedy compliance to legal requirements. It may be important to monitor the number of responses and the time taken to complete such enforcement responses fully, measured against set enforcement time goals. It may be possible to establish how long a specific compliance can be achieved after a state of non-compliance by a regulated community has triggered the application of appropriate enforcement responses. The time taken to comply with requirements such as a ban to cease smoking in a public place or the banning of tobacco advertisements in the media should be predictable. Litigation is normally a long process and may not always result in prompt compliance. Nevertheless, the use of measures of swift enforcement response help encourage enforcement officials to respond swiftly to violations, pursue violators of the law and devote efforts to a rapid attainment of compliance by the regulated community.

Legal and technical assistance

An important measure of the success of an enforcement programme is the range and quality of legal and technical assistance for enforcement of tobacco control legislation. As stated earlier, compliance promotion is crucial to successful enforcement and achieving compliance. Measures in this regard will take into account the number of actors, the regulated community, organs of government and relevant specific government agencies, sub-national governmental authorities, NGOs and the general public, all of whom will have received legal and technical support to

facilitate compliance and enforcement. This may also require ascertaining the degree of compliance achieved by the tobacco control-regulated community due to their receiving legal and technical assistance. It is important to note that legal and technical assistance may be received directly by the regulated community or indirectly through support given to other enforcement actors such as NGOs, other governmental agencies and the general public.

However, the challenge for evaluation associated with this measure of success is that effective enforcement and compliance may be achieved by other contributions such as sanctions, the numbers and quality of inspections or other compliance-monitoring measures.

Level of monetary and other penalties

Monetary penalties are an important indicator for evaluating the success or failure of an enforcement programme. Most often, compliance with tobacco control laws by the major regulated communities hinges on litigation and the resulting granting of relief/remedies by the courts of law. Therefore, the numbers, severity or value of penalties awarded due to enforcement responses including litigation is a useful indicator of the success of the enforcement programme. However, this indicator has its shortcomings because the awarding of monetary or other penalties occurs after a long period of legal proceedings such that other intervening factors may contribute to the attainment of compliance by the penalized regulated community.

4. Establishing the enforcement programme infrastructure

While tobacco control enforcement programmes may depend on the mandates of varying countries as well as on the division of enforcement responsibilities within the government and the range of enforcement powers granted by law, some common steps and issues in establishing an enforcement programme can be discerned from around the world.

Human resources/expertise

Tobacco control enforcement programmes require a mix of expertise, particularly in public health, legal, administrative, economic and other relevant scientific areas. Working together, experts can identify, prevent and respond to violations of tobacco control requirements. They can also coordinate enforcement responses with other authorized officers and institutions charged with enforcing the law. The division of roles between various programme actors is essential. Defining the roles of inspectors, technical and legal personnel can ensure better cooperation in handling enforcement operations.

The number and expertise of staff should also meet the enforcement goals under the programme's enforcement policy and plans. The time taken to accomplish an enforcement operation should be weighed against the costs involved. Policy makers must balance staffing needs in order to ensure a proper mix of personnel to support tobacco control enforcement operations such as compliance promotion and compliance monitoring as well as administrative and judicial actions. Training personnel is also an important aspect of addressing the root causes of enforcement challenges. Enforcement is a specialized area that requires both formal and on-the-job training. Staff training helps develop the inter-disciplinary public health, legal and other technical skills essential for successful tobacco control enforcement operations.

Funding

Funding is essential for tobacco control generally and even more so for enforcement operations. An enforcement programme needs to continue to advocate for funding. Apart from governmental funding, the enforcement programme could work to secure funding from other legitimate sources such as from fines imposed for non-compliance. The challenges due to lack of funding for implementation of tobacco control laws are common across most of the Member States of the WHO African Region.

Enforcement information management

Putting together information about the regulated community, violations, responses to violations and programme activities is important for effective enforcement of tobacco control legislation. Depending on the level of resources, enforcement information can be integrated into the overall tobacco control information systems or left on its own. Such information is used to develop priorities and strategies to utilize human and financial resources effectively, to promote and monitor compliance and to evaluate the enforcement programme and its objectives. Basic concerns relating to information management include: what kind of enforcement-related information should be obtained, who retains the responsibility for obtaining it, who is responsible for recording the information, how long is the information to be maintained in the files, what kinds of information analysis is needed and who performs them, is there any confidential information and what information is accessible by the general public? Responding to these questions is essential for ensuring that information management systems respond to changing and varied enforcement information requirements.

Comprehensive or incremental enforcement regimes

The WHO FCTC requires parties to adopt and implement comprehensive tobacco control. However, a comprehensive tobacco control enforcement regime may not be achieved at the outset of legislative development. It may be necessary to adopt an incremental approach to establishing enforcement mechanisms for tobacco control. It is important to note that, generally, domestic enforcement regimes evolve over time. There are a number of issues that the health ministry must consider when developing or strengthening enforcement regimes. Firstly, enforcement should be considered a priority by the tobacco control programme and the government as a whole. Political support at the highest levels across governments and within ministries or agencies with shared or residual mandates for enforcement of tobacco control legislation is important. For example, political support and priority for enforcement of the tobacco control law should be garnered within the health ministry but also from the justice, police, customs and other ministries who also have a responsibility for enforcing the legislation.

Secondly, many developing countries are faced with limited financial, human and technical resources for establishing comprehensive enforcement programmes within their tobacco control units. In this regard, focusing enforcement resources to target the most significant violators of the tobacco control law is important. Tobacco companies and other businesses are key targets for initial enforcement, in regard to tax increases, a ban on advertisement promotion and sponsorship, packaging and labelling requirements and smoke-free public and workplace laws. Focusing on key regulated communities to enforce major tobacco control requirements helps to create inertia and precedents for a comprehensive tobacco control enforcement programme.

Thirdly, tobacco control laws often provide for limited powers and authorities for authorized officers and others involved in enforcing the law. However, powers and authorities required to enforce tobacco control requirements need not be static. When the need for broader enforcement powers becomes necessary due to limitations in the application of the existing enforcement powers, such powers must be expanded over time through legislative amendments. In this way, enforcement powers will keep pace with emerging legal principles and industry tactics aimed at defeating enforcement and compliance measures. Fourthly, another issue is deciding how much the enforcement programme should focus on compliance promotion versus compliance monitoring, including judicial action. This depends more on the legal culture and the human, technical and financial resources available to pursue both compliance promotion and enforcement. Moreover, inspectors must be adequately trained, but tobacco control may be a new area for inspectors particularly in developing countries. Formal training is needed and learning by experience helps to accumulate practices to improve on future inspections. Development of self-reporting systems in tobacco control may also need to be gradually streamlined. Reporting systems need to support compliance inspections and feed directly into the enforcement information management system of the tobacco control programme. Furthermore, administrative or judicial responses for tobacco control have evolved over time as experience and precedents have accumulated and new enforcement tools become available. It may be useful to pre-test some enforcement responses, including fines, and tailor future penalties according to the severity of the violations.

Fifthly, a number of decisions relating to the structuring of an enforcement programme will need to be made. These include the role of the tobacco control focal point or ministry of health versus other governmental agencies with responsibility for enforcement; the role of national versus sub-national and local enforcement authorities; the mix of technical, legal, public health and other staff for running the enforcement programme. These key decisions on roles and responsibilities evolve over time depending inter alia on the legal mandate and availability of resources for tobacco control and the enforcement programme.

Finally, regarding evaluation of the enforcement programmes, this again evolves over time. However, the tobacco control enforcement information management system should provide useful resource for enforcement evaluation. Evaluation is at the core of a successful programme. However, substantial technical and financial resources are required to establish ongoing evaluation activities within the enforcement programme.

PART II: CASE STUDIES ON TOBACCO CONTROL LEGISLATION ENFORCEMENT

CHAPTER 6: COMPLIANCE AND ENFORCEMENT OF THE TOBACCO CONTROL IN KENYA: A CASE STUDY

1. Introduction

Kenya is a Party to the WHO Framework Convention on Tobacco Control (WHO FCTC) whose objective is to control the growing, manufacture, importation, sale, and use of tobacco and tobacco products. Kenya considers it as a noble cause to control tobacco and its products due to its health consequences, addictive nature, and mortal threats posed by tobacco consumption and exposure to smoke and the harmful effect of tobacco growing and handling. Globally, tobacco use is the single most preventable cause of deaths in the world today. Nationally, tobacco use is one of the most common factor for noncommunicable diseases (NCDs) that contribute to nearly 50% of all admission in public hospitals, 69 per every 1000 deaths of persons over 30 years of age are of people using tobacco, and about 5% of all non-communicable deaths in Kenya is tobacco related.

To comply with Convention, Kenya enacted and enforced its tobacco control legislation, the Tobacco Control Act 2007. Compliance in the context of the Convention is a state in which a Party, its institutions or persons act in accordance with established guidelines, specification while enforcement is the application of the law, regulation, or policy to achieve the specific objective e.g. prohibiting smoking in public places to guarantee smoke free environment. Compliance extends beyond adherence to the law and includes the understanding and awareness of the need and basis for controlling tobacco such as the health, social, economic and environmental consequences of tobacco.

Kenya has generally complied with the WHO FCTC that entered into force on 27th February, 2005 having been acceded, ratified, and accepted, or approved by the Parties. Kenya has signed, ratified, domesticated and enforced the Convention. Kenya's Tobacco Control Act 2007 is perhaps one of the strongest anti-tobacco laws in the region if not globally that meets the requirements of the Convention and the Constitution of Kenya 2010.

2. The national tobacco control law

The Tobacco Control Act 2007 was passed by parliament in 2007 to control tobacco and tobacco products. The law is divided in to seven (7) parts:

Part I – preliminary: This part contains among others the short title of the law, tobacco control Act 2007, interpretation/definition of key terms and the objective and purpose of the Act that is to control the growing, manufacture, sale, labelling, advertising, promotion and sponsorship of tobacco product, to provide for the tobacco control board, to regulate smoking in specified areas and for connected purposes. This part has complied with the convention and in particular article 1 and part II of the Convention.

Part II – administration: This part of the law provides for the power of the minister responsible for health, establishment of the tobacco control board that advises the minister in matters relating to tobacco control, and administration of tobacco control fund. This section has complied with the Convention considering articles 5.1 and 5.2 that requires member state to establish or reinforce and finance a national coordinating mechanism or focal point for control of tobacco and to set laws and policies.

Part III – information, education and communication: Is perhaps the cornerstone to controlling tobacco in Kenya. It provides that the government through key ministries and agencies shall promote public awareness about health consequence, addictive nature, and the mortal threats posed by tobacco consumption and exposure and that target communities throughout Kenya but ensuring community participation. The government shall train community own resource persons (CORPs) who in turn shall train/ sensitize the entire population. The Act provides that this program is inter graded in school syllabus and people encouraged to quit the growing of tobacco are provided with economically viable alternative.

Part IV – Tobacco products: The Act prohibits manufacture, sell, importation, distribution of any tobacco product that does not comply with the law or its regulation thereunder or that do not have adequate information in the package. It prohibit sell of tobacco products (cigarettes) that constitute about 90% of tobacco consumed in Kenya to be sold in single sticks, or to be delivered by mail unless between manufacturer and retailer to control easy access which is the very purpose of the convention thus compliance.

Part V – advertisement, promotion and sponsorship: The Tobacco Control Act 2007 prohibits promotion and advertisement of tobacco and tobacco products by any means. Advertisement and promotion as defined in the Act is in accordance with the Convention article 1 and guidelines for the implementation of Article 13 of the WHO FCTC. The ban on tobacco advertisement and sponsorship is key to compliance on promotion.

Part VI – involuntary exposure to second hand tobacco smoke: The Act provides the right to clean and health environment and the right to be protected from exposure to second hand smoking as envisaged in the convention, constitution and human rights and it is the duty of anyone responsible including government, parents and owners of public places to safeguard the health of non-smokers. It prohibits smoking in public places and public places is listed in the Acts though it not exhaustive but the good news is that the minister has powers to amend the list. The law requires the management of public places to display/post notices warning against smoking in public places. The provision for specially designated smoking areas in public places e.g. restaurant is a challenge to smoke free environment anticipated by the convention.

Part VII – enforcement: This part of the law has provided for who is the authorized officers, their powers and duties, time and place to visit, nature of offenses (cognizable), seizure, sampling, testing and analysis, destruction of products not complying to the provision of the law and general penalty among others. It's the part that operationalizes the Act and provides for procedures.

3. Enforcement structure and operations

Kenya has two (2) levels of governments that is the national and the county government that are 47 in number. The national and county levels are distinct and inter-dependent and conduct their mutual relation on the basis of consultation and cooperation (article 6 of the Kenya constitution, 2010). The government of Kenya coordinate and provides stewardship for the implementation of the Act, the Tobacco Control Act 2007 in collaboration with other stakeholders mainly the Ministry of Health. Tobacco control is coordinated by the division of non-communicable diseases, which is responsible for policy development, while division of occupational health implement enforcement measures. The department of health promotion and education handles communication and awareness issues. Tobacco control has a focal person/head of tobacco control unit. The tobacco control board whose mandate is to advice the minister in matters related to tobacco control and administer tobacco control fund, has chief public health as the secretary and membership from both government and non – government organization key among them is director of medical services, the attorney general, director of agriculture and a chairperson appointed by the minister among others. Key government ministries and agencies that include and not limited to trade, finance, revenue authority, bureau of standard and environment have a critical role and have been involved in tobacco control.

At the county level, save for some counties e.g. Nairobi which have established a tobacco control unit/focal person, tobacco control is coordinated by county director of public of health and it is concerned with the implementation of policies designed by the government (operation). The other actors in the structure are the civil society network (non-governmental organization) and they have played an important role in keeping tobacco control on the government agenda. As organizations operating at both levels of government, they are credited for lobbying, advocacy, public education, capacity building, and research among others. Health professions and their association and boards have been instrumental in advising the government and the public. The media, a powerful sector of the society has played key role in promoting public discussion on the issue of tobacco control in Kenya and a case in point is the recent launching of the anti-tobacco mass media campaign.

Inter-governmental coordinated forum remains the major forum through which government and key stakeholder in tobacco control meet and enforce the law. Others are inter-ministerial forums which provide opportunity for collaboration between ministry of health and the relevant ministries, agencies and civil society to plan and enforce tobacco control activities. At the national level the Ministry of Health has a coordination through which the various divisions' i.e. non-communicable diseases, occupation health, department of environmental health, and the board execute their role. Despite this and as noted in the WHO joint national capacity assessment on the implementation of effective control policies in Kenya, there is no clear mechanism for ensuring a smooth and coordinated implementation of tobacco control at different levels of governments.

4. Compliance promotion

Education, information and communication are areas with enhanced compliance promotion. Together with key stakeholders not limited to the Institute of Legislative Affairs (ILA), Kenya tobacco control alliance (KETCA), consumer information network among others, ministry of health has trained/sensitized the public on the consequence of tobacco use. With ILA and other stakeholders, the ministry has trained law enforcement officers countrywide comprising the public health officer, police, non-governmental organization among others on law enforcement. Empowered population and the application of the law on violation have led to change in behaviour. The global adult tobacco survey 2014 is indicative that over 52.4% of smokers have attempted to quit smoking in the past 12 months and 77.4% of current smokers planned to/are thinking about quitting tobacco use.

Enforcement of smoke free environment by those responsible has regulated tobacco use. It is indicative that majority of public places including government offices, hospital, supermarket, restaurants etc. are smoke-free/ restricting tobacco use. The government through line ministries and civil society have advocated for viable economic alternatives. Organizations such as Kenya anti-tobacco growing association have encouraged several farmers from tobacco growing zones in Kenya e.g. Migori and part of western Kenya to quit tobacco farming and they have switched to the growing of alternatives such as beans. The implementation of such orders as seizure and destruction of tobacco products that do not comply with the law, prosecution and punishment by fine or imprisonment have deterred specific or the general public toward tobacco use thus compliance promotion. Kenya seized and has destroyed shisha at the Eldoret international airport (Uasin-Gishu County). Nairobi County have investigated arrest and prosecuted a total of 86 people in 2012 and 96 in 2013 and sanction and punishment such as cash bail/fines or imprisonment were imposed on them.

5. Enforcement tools

At various level of government, there are several tools available to enforce tobacco control and they include:

Scientific evidence: several researches has been carried and continue to be carried e.g. tobacco versus health, global adult tobacco survey 2014 among other documentary on tobacco and the central findings are that tobacco use is harmful to health and environment. The various publications have enhanced compliance promotion where people have voluntarily changed/ stopped the use of tobacco because of facts provided by science.

The legislation: Kenya has a comprehensive tobacco control law that among others bans tobacco advertisement, promotion and sponsorship, prohibit exposure to second hand smoke and prohibit sell of tobacco products that violate the law. Further, the law provides for investigation, prosecution and punitive punishment of offender thus deterrents.

The regulation: Regulations to the Act are key as they operationalize the Act, set standards and provide clear interpretation of the law. The Tobacco Control Act 2007 regulations are before the national parliament for approval and it is an enforcement tool. It details health warnings,

packaging of tobacco product, provide for the relationship between authorized officers and tobacco industry, contains seizure forms, sampling forms, statutory notices among others therefore an important enforcement tool.

Policies: Policies are government general or specific statement or direction on a subject matter and for the purpose of this review tobacco control. The government is committed to control tobacco and has enforced specific measures e.g. taxation. Seizure, destruction of non-complying products, investigation, arrest, prosecution and punishment of offenders is another enforcement tool.

6. Kenyan mini-case study on smoke free environment

Kenya has been implementing several articles of the convention and key among them is article 8 and its guidelines for implementation and as contained in part VI of the tobacco control Act 2007.

Section 32 of the Act guarantee right to smoke free environment and it is the duty of every person to observe measures to safeguard the health of the non-smokers. It prohibit smoking in public places except in specially designated smoking areas and the list of public places and design of the specially designated area has been provided for under section 33 and 35 respectively. Further, the law require person responsible of public places to ensure no smoking takes place in such places and where designated smoking area do apply, to post/ display warnings against smoking in public places.

Kenya has enforced the law and smoke free environment is guaranteed in residential health facilities (patient rooms). Most public places have some restriction on the use of second hand smoke and that restriction is uncertain in some public facilities such as hotels and restaurants, public transport facilities/public service vehicle, outdoor or quasi-outdoor public places due to the law, ignorance on those with responsibility to safeguard the rights of the non-smokers or act of criminality. The global adult tobacco survey 2014 paints a sad picture that a significant population/people are still exposed to tobacco smoke. 17.6% people are exposed to tobacco smoke at workplace, 14.3 were exposed to tobacco smoke at home while 21.2 %, 86.1% and 30.2% of adults were exposed to tobacco smoke when visiting restaurant, bars or night clubs and visiting the universities respectively. The government through authorized officers has acted to enforce the law through information, education and communication, ban on tobacco advertisement and promotion and prohibition of tobacco use (smoking) in public places.

The definition of key terms relating to smoke free environment and the provision of specially designated areas has not ensured 100% smoke free environment. The government should provide in law through amendments, regulation and policies, clear definition of workplace as opposed to the current definition (public place), define second hand smoking that is not provided and redefine public place to include such places e.g. public roads and street. The definition of indoor or enclosed, and out-door or quasi- outdoor public places need to be defined and require such place to be 100% smoke free or smoking restricted area.

7. Kenya successes in Kenya's Tobacco Control Act 2007

Kenya has enforced the tobacco control 2007 thus compliance with WHO FCTC and success to count. They include:

- (a) The signing and ratification of the Convention, the passing into law of a strong anti-tobacco legislation, the Tobacco Control Act 2007, approval of tobacco control policy and an advanced stage in the development of tobacco control regulation the one major success in tobacco control.
- (b) It has Tobacco Control Action Plan 2010-2015 that promotes enforcement.
- (c) Kenya has enforced the law and tobacco control policy. It has:
 - (i) Increased taxes on tobacco and tobacco products.
 - (ii) It has enhanced information, education and communication through trainings, mass media, community sensitization forums among others that encourage awareness, informs, motivates or changes behaviour, for example, 77% of Kenya smokers are thinking of quitting smoking. Kenya is one place you rarely see smoking in public place.
 - (iii) Restricted tobacco marketing through ban on tobacco advertisement, promotion and sponsorship.
 - (iv) It has prohibited tobacco use in public place so that those still exposing non-smokers in public places are either ignorant or the criminals who have no respect for the law and who shall be dealt by the law.
 - (v) Kenya has investigated, prosecuted and secured a conviction on persons violating the law. The seizure and destruction of tobacco products that does not comply with the law and imposed fine on offenders is another success.

Partnership in fighting tobacco is one area Kenya view as a success. It has good working relationship with a number of international, national and local civil societies (non-governmental organization) supporting tobacco control through research, funds, lobbying etc. ministry of health in partnership with national agency for campaign against drugs (NACADA) has a quick line to enhance cessation. Warning labels on tobacco package: tobacco products packages are now mandatory bearing health warnings. Pictorial health warning is at advanced stage of development. The national tobacco control action plan 2010-2015 provide for the control of tobacco in Kenya. The government through line ministry and key stakeholders in tobacco control has implemented it to achieve the key objectives that are in line with the tobacco control Act 2007 e.g. the just released adult global tobacco survey in Kenya 2014.

8. Challenges in enforcing tobacco control

Several issues are challenges to effective law enforcement on tobacco control in Kenya and they include but not limited to:

- (a) Inadequate resources: resources are scarce and they are hardly enough to execute vast activities. There are few authorized officers in Kenya and the few are ill equipped to control tobacco considering that the governments and stakeholders budgets to tobacco control activities is limited relying heavily on civil society.

- (b) At various levels of governments there is no clear mechanism (structure) of ensuring effective coordination and implementation of tobacco control activities including enforcement. At the national level it is not really clear which division/department or officer is the ultimate respondent to matter relating to tobacco control.
- (c) Time and place to visit is another challenge to effective tobacco control. Authorized officers in the Act save for the police are civil servant whose work schedule is Monday to Friday and from 8am to 5pm but most of tobacco use especially in public places is after this hours and weekends when they are not on duty. Further, the provision seems to restrict visit for purpose of inspection residential premises.
- (d) Lack of regulations that are supposed to define and operationalize the Act have not been gazetted leaving parts of the law vague and ineffectively enforced.
- (e) Interference is another challenge. Tobacco industry interferes with the implementation of tobacco control activities through false, deception, for example by announcing the price of the products in the media when they are actually advertising/ promoting their product. Others include interference by lodging legal actions in Court. Political interference is another cause where people in government through their action or inaction interfere with the implementation of the tobacco control activities, for example a letter from one senior officer of Government contradicting the provision of the Tobacco Control Act 2007. Others are failure to act by the authorized officers and such acts as frequent transfers that interfere with enforcement actions.

9. Way forward/ overcoming challenges in tobacco control in Kenya.

The ministry of health should establish and execute a clear structure that ensure a smooth coordinated implementation of tobacco control activities at the different level of governments i.e. the government should create an official coordination mechanism that establish specific roles and duties. The established tobacco control should be adequately funded and there is in need to enhance human resource workforce and its technical capacity. The technical capacity should be tailored to address the specific interventions; information, education and communication, enforcement among others. The ministry of health in collaboration with the relevant agencies including the civil society should enhance a human and material resource to undertake an active surveillance of tobacco control activities. Monitoring and evaluation is critical to the establishing the effectiveness of enforcement and compliance. To prevent interference, the government should implement article 5.3, the Act and the regulation that prohibit non-official relationship between authorized officer and the industry and that bans an officer enforcing tobacco control legislations from engaging in tobacco related trade. The authorized officers should re-energize their efforts to enforce the law.

CHAPTER 7: SEYCHELLES

1. Constitutional context

Seychelles is an independent republic with a multi-party system. The President is both head of state and head of Government. Legislative power is vested in both the National Assembly and the Government. Laws adopted by the National Assembly needs the assent by the President. Regulations fall under the authority of the Minister of the particular ministry that submits an Act.

2. Tobacco control law

Before 2009, legislation on tobacco control was limited to a ban on smoking for children, a ban on sales of tobacco products to children and a well enforced policy since several decades that ruled that tobacco products should not be advertised in the national mass media, and that smoking was not allowed in all schools, health facilities, Government buildings and public transports. In 1996, the then Minister of health, Mr Ralph Adam, requested that the NCD section prepares comprehensive tobacco control legislation but an advanced draft could not make it to the National Assembly after his passing. Further efforts were deployed, particularly under the impulsion of the Unit of Cardiovascular Disease Prevention and Control in the Ministry of Health. Progress was initially slow as views still prevailed, at this time, that smoking was first a matter of individual responsibility and that tobacco control could be achieved through health education programs. Many awareness programs, including high profile activities for World No Tobacco Days, were organized every year since the late 1980s. Furthermore, bans on smoking in hospitality premises were viewed with caution by representatives of commerce and tourism, as tourism was (and still is) the main foreign exchange earner of the country.

In 2000, the Minister of Health appointed a multi-sectorial National Tobacco Control Committee with the mandate to develop comprehensive tobacco legislation. In addition to intense work by local experts on developing the new legislation during several years, the Committee also benefited from advice on tobacco control legislation from several legal experts from Tobacco Free Kids,¹³⁴ WHO and the World Bank. At a later stage, the National Tobacco Control Committee was expanded into a “National Tobacco Control Consortium” of all interested parties, and it then included representatives from more than fifty government, nongovernment and private organizations in Seychelles. This “whole of society” participatory approach ensured broad support and the Bill submitted to the Parliament was approved unanimously with no substantive change in 2009. Hence the Seychelles National Tobacco Control Act entered into force in 2009. It is comprehensive tobacco control legislation and it addresses most of the major obligations under the FCTC. Main provisions include, *inter alia*:

- (a) a total ban on smoking in all enclosed public places, all enclosed workplaces and on all public transports, as well as in all outdoor premises of all education and health institutions (“enclosed” being defined as any area under a roof);
- (b) a total ban on all forms of direct and indirect tobacco advertising, sponsorship and promotion;

¹³⁴ Nathan R. Model Legislation for Tobacco Control: A Policy Development and Legislative Drafting Manual. International Union for Health Promotion and Education, Paris, 2004.

- (c) mandatory rotating pictorial health warnings covering at least 50% of the main areas of tobacco packages;
- (d) various measures against tobacco smuggling;
- (e) establishment of a National Tobacco Control Board to develop, guide and monitor tobacco control in Seychelles.

Penalties are defined for all offenses. The Act and its related regulations can be downloaded at in the Ministry of Health web site and in other websites.¹³⁵ External reviews also assessed the performance of the Seychelles legislation.¹³⁶

3. Enforcement structure and operations

The Attorney General's Office of Seychelles has responsibility to prosecute and recover damages resulting from noncompliance to the Tobacco Control Act. The Ministry of Health is the main enforcing agency of the Seychelles Tobacco Control Act and the Minister of Health has power to issue and amend regulations related to the Tobacco Control Act. The Ministry of Health shares enforcement power with designated authorized public health officers, who can make orders for noncompliance as well as issue spot fines. Authority under the Tobacco Control Act can also be delegated to officers of the police department, the licensing authority and the customs department.

The Tobacco Control Act establishes a National Tobacco Control Board. This Board was set up by the Minister of health in 2010. It is chaired by the Public Health Commissioner and includes representatives of several governmental and nongovernmental sectors. Persons manufacturing, importing, exporting, or selling tobacco products cannot be eligible to the Board. The Board is responsible for advising and making recommendations to the Minister on tobacco control, including monitoring the use of tobacco products in the country; reviewing requirements in the Act and related regulations; designing and implementing a national programme for tobacco control; coordinating activities on tobacco control between government ministries, departments and other bodies or agencies; and preparing reports requested by the Conference of the Parties of the WHO FCTC.

4. Compliance promotion

The chair and the executive secretary of the National Tobacco Control Board are major actors to mobilize owners and managers of restaurants, work places and other public places regarding enforcement (including the ban on smoking in enclosed premises, need for no-smoking signs where smoking is banned; assess mandatory labels on tobacco products, etc.); provide training on enforcement of the Act to the enforcing officers and to the related government departments; produces materials and other information tools; collate statistics on tobacco use based on

¹³⁵ Ministry of Health, Seychelles, http://www.health.gov.sc/index.php?option=com_content&view=article&id=237&Itemid=183 (accessed 19 Nov 2014); Tobacco Control Laws. <http://www.tobaccocontrollaws.org/legislation/country/seychelles/laws> (accessed 19 Nov 2014).

¹³⁶ Lambert P, Donley K. Best practices in implementation of Article 8 of the WHO FCTC Case study: Seychelles. FCTC 2013. PDF report available on www.fctc.org; Report card on the WHO Framework Convention on Tobacco Control – Seychelles. http://www.afro.who.int/fr/downloads/doc_download/5925-seychelles-report-card-on-the-who-framework-convention-on-tobacco-control.html (accessed on 19 Nov 2014).

different surveys; and prepares reports on enforcement of tobacco control in Seychelles to the WHO and WHO FCTC Convention Secretariat. In addition to the National Tobacco Control Board, the Ministry of Health is the main actor involved in activities to raise awareness among the public including continued programs on national TV and radio and different activities in the community.

5. Enforcement tools

All provisions in the Tobacco Control Act 2009 involve penalties for offenders. A regulation issued by the Minister of health in early 2014 defines the eligibility criteria and the enforcement powers delegated to the officers authorised to inspect, spot fine and report offenders. Officers authorized to exercise power under the Tobacco Control Act include public health officers, licensing officers, custom officers, police officers, and other public officers. A list of designated enforcing officers is expected to be issued by the end of 2014. As the list of definite inspectors has not been issued yet, no offender under the Tobacco Control Act has been prosecuted so far.

In a small country like Seychelles, adequate enforcement of tobacco control legislation is facilitated by activation and involvement of the community at the root levels. Therefore, much emphasis has been placed on direct interaction with the public, e.g. by broadcasting regular education programs on the legislation on national TV or by sending flyers summarizing the main provisions of the legislation to owners or managers of hospitality premises or other key stake holders. Also, whenever informed of an offense (e.g. someone was seen smoking inside a restaurant X), the Board immediately sends a warning letter signed by the chair of the Board. Surveys of enforcement of the tobacco control legislation have been conducted at regular intervals by the Ministry of Health. For these surveys, officers act as ordinary anonymous patrons and they assess compliance with the ban on smoking in the enclosed premises of restaurants, cafés, discotheques, and night clubs at peak business hours. A first survey in 2011 showed good compliance with the ban on smoking in enclosed premises.¹³⁷ A recent survey conducted in October-November 2014 also shows overall good compliance, with a few exceptions. For the survey in 2014 (currently under analysis), a report showing results for all visited named premises will be sent to all hospitality owners. It is expected that making all hospitality owners aware of the results in all premises in the country will provide an incentive to improve compliance with the legislation for those owners who did not comply well. As soon as the list of inspecting officers is issued, expectedly no later than early 2015, the designated officers will submit spot fines to offenders, with a particular focus on places where compliance has been repeatedly observed to be inadequate.

6. Enforcement of specific elements of tobacco control and enforcement successes

Seychelles has been organizing numerous high profile activities every year for World No Tobacco Days and many education programs on tobacco control were broadcast on national radio and TV every year since the late 1980s. High commitment of government toward tobacco control was repeatedly conveyed through strong statements on the need for tobacco control issued by Minister of health broadcast on national radio, TV and newspapers every year since the

¹³⁷ Viswanathan B, Plumettaz C, Shamlaye C, Gedeon J, Bovet P. Good compliance with a smoking ban in public places: a rapid assessment in the Seychelles. *Tobacco Control* 2011; 20:427-430.

late 1980s.¹³⁸ A curriculum program related to tobacco control was also developed for children in primary schools.

As already discussed above, landmark developments for tobacco control in Seychelles included the ratification of WHO FCTC by Seychelles in 2003 and the enactment of the Seychelles Tobacco Control Act in 2009. Tax measures are not covered by the legislation but the proportion of tax from the total price of cigarette packets already exceeds 60% for both locally made and imported cigarettes and a further marked increase of the excise tax is expected in early 2015. This should bring the proportion of tax to more than 65% of the total retail price.

A regulation issued in May 2014 requests that health warnings cover at least 50% of the main display areas and that these warnings are selected from a given set of several pictorial warnings available on the web site of the Ministry of Health of Seychelles¹³⁹ and on the Tobacco Free Initiative WHO web site.¹⁴⁰ It is interesting to note that the main local cigarette manufacturer (Amalgamated Tobacco Seychelles), which is a small independent company active only in Seychelles but provides a substantial proportion of all cigarettes smoked in Seychelles, was able to produce packets of cigarettes that were fully compliant with the legislation within just a few months, and largely before the given deadline to do so. This demonstrates that adjusting cigarettes packages to new legislative requirements does not necessarily generate, even for small manufacturers, an overly heavy technical burden.

As already discussed above, two independent surveys conducted in most hospitality premises in the country, conducted in October 2010 and October to November 2014, showed that the total ban in enclosed public and work places was fairly well implemented in more than 90% of all the public hospitality premises. A population survey on NCDs conducted in 2013-2014 shows that 100% of the 1240 participants aged 25-64 years were aware of the existence of the Tobacco Control Act in Seychelles and more than 90% of all respondents, including the majority of smokers, fully supported the ban on smoking in enclosed public places.¹⁴¹ This shows that legislation to ban smoking in enclosed places is well and broadly supported in Seychelles, including by smokers. Stated in other words, most people (including many smokers) recognize and enjoy the benefit of breathing clean air in enclosed public places.

7. Challenges to enforcement and how the challenges have been encountered and lessons learnt

Different factors may underpin the successful development of the comprehensive tobacco control legislation in Seychelles, enacted in 2009.

¹³⁸ World No Tobacco Day 2014 - Minister stresses importance of smoke-free environment, <http://www.nation.sc/article.html?id=238691> (accessed on 19 Nov 2014).

¹³⁹ Seychelles enforces regulation for health warnings on tobacco products <http://www.seychellesnewsagency.com/articles/637/> (accessed on 19 Nov 2014).

¹⁴⁰ WHO, Tobacco Free Initiative <http://www.who.int/tobacco/healthwarningsdatabase/syc/en/> (accessed on 19 Nov 2014).

¹⁴¹ Bovet P, Viswanathan B, Louange M, Gedeon J. National survey of non-communicable diseases in Seychelles 2013-2014: methods and overall findings. Ministry of Health, Seychelles, 2014.

First, data on the prevalence of smoking in the population have been reported from several national surveys in adults in 1989, 1994 and 2004,¹⁴² and several surveys in youth (GYTS, GSHS).¹⁴³ Findings of a high prevalence of cigarette smoking in the population, particularly in men, were instrumental for advocacy of tobacco control to the general public and policy makers.

Second, the development of the WHO FCTC between 1999 and 2005 was a timely opportunity and a powerful inspiration for the development of regulatory approaches of tobacco control at the national level. Seychelles actively participated in all Intergovernmental Negotiation Body (INB) meetings; Seychelles was the first country to ratify the treaty in the African region; and Seychelles subsequently spoke on behalf of all African countries at the ceremony at WHO headquarters for the entry into force of the WHO FCTC in 2005.

Third, strict tobacco control regulations, including bans on smoking in enclosed public places, have been increasingly implemented in several western European countries in the early 2000s, and adoption of similar policies in Seychelles no longer appeared as a threat to tourism and commerce since a majority of tourists from Western Europe visiting Seychelles were already experiencing this policy in their home countries.

Fourth, the expansion of the “National Tobacco Control Committee” into the “National Tobacco Control Consortium” when developing tobacco legislation, which included all interested parties with representatives of more than fifty government, nongovernment, and private organizations in Seychelles, was an instrumental process for building consensus to the new regulatory tobacco control frame. This “whole of society” participatory approach ensured broad support and the Bill submitted to the Parliament, despite bringing new stringent regulatory measures, was then indeed approved unanimously by all the majority and opposition parties representatives, with no substantive change.

A number of other factors underlie the good compliance with the tobacco control legislation in Seychelles, including: long-standing tobacco control activities at the community level to build bottom up support to tobacco control from the population; good awareness of the public on the need for tobacco control resulting from the numerous health education programs in the mass media; continued commitment to develop a strong tobacco control regulatory frame of a few local tobacco control champions within the NCD section in the Ministry of Health; continued support to NCD prevention from the Ministry of Health and other authorities; lack of

¹⁴² Bovet P, Shamlaye C, Kitua A, Riesen WF, Paccaud F, Darioli R. High prevalence of cardiovascular risk factors in the Seychelles. *Arteriosclerosis & Thrombosis* 1991;11:1730-6; Bovet P, Romain S, Shamlaye C, Mendis, Darioli R, Riesen W, Tappy L, Paccaud F. Divergent 15-year trends in traditional and metabolic risk factors of cardiovascular diseases in the Seychelles. *Cardiovascular Diabetology* 2009;8:34.; Bovet P, William J, Viswanathan B, Madeleine G, Romain S, Yerly P, Paccaud F, Gabriel A. The Seychelles Heart Study 2004: methods and main findings. www.who.int/chp/steps/2004_STEPS_Report_Seychelles.pdf.

¹⁴³ Alwan H, Viswanathan B, Rousson V, Paccaud F, Bovet P. Association between substance use and psychosocial characteristics among adolescents of the Seychelles. *BMC Pediatrics* 2011, 11:85.; Faeh D, Viswanathan B, Chioloro A, Warren W, Bovet P. Clustering of smoking, alcohol drinking and cannabis use in adolescents in a rapidly developing country. *BMC Public Health* 2006;6:169(e); Viswanathan B, Warren CW, Jones NR, Asma S, Bovet P. Linking Global Youth Tobacco Survey (GYTS) data to tobacco control policy in the Seychelles. *Preventive Medicine* 2008;47:S33-37; Bovet P, Viswanathan B, Warren W. The Global Youth Tobacco Survey in Seychelles - 2002. Ministry of Health, Seychelles, 2002. http://www.afro.who.int/fr/downloads/doc_download/5505-seychelles-gyts-2002.html (accessed on 19 Nov 2014); Viswanathan B, William J, Madeleine G, Warren W, Bovet P. The Global Youth Tobacco Survey in Seychelles- 2007. Ministry of Health, Seychelles, 2007. http://www.afro.who.int/fr/downloads/doc_download/5506-seychelles-gyts-2007.html (accessed on 19 Nov 2014).

interference from transnational tobacco companies (none of these have local cigarettes producing units in the Seychelles); availability of accurate data on the prevalence of smoking in adults and youth allowing adequate monitoring over time; and the parallel development and implementation of the FCTC with concomitant trends toward “de-normalisation” of smoking in the society in Seychelles and worldwide. More broadly, a number of prevention interventions were implemented in Seychelles in the past 25 years, with a strong focus on tobacco control.

However, Seychelles also faces challenges in enforcing tobacco control legislation. Enforcement of the ban of smoking in enclosed places is not yet optimal. An issue is that the definition of enclosed premises is defined as any area below a roof, whether the roof is permanent or transient, implying that smoking under the sunshade in a garden of a restaurant is not allowed. This stringent measure is neither well understood by the public nor easy to enforce. Another issue arose with the implementation of mandatory health warnings on tobacco packets. The designated set of warnings included a limited number of health warnings. While the local cigarettes manufacturers swiftly complied with the prescribed health warnings before the deadline, importers had difficulties to comply as some of importers tended to apply rules that prevailed in Mauritius which had similar health warnings as in Seychelles but also additional ones.¹⁴⁴ The National Tobacco Control Board is currently reviewing this issue and will update the regulation on health warnings so that the set of pictorial health warnings is also compatible with at least one similar regulation in another larger country, with the aim to facilitate enforcement by importers of cigarettes in Seychelles.

8. Additional comment

Swift ratification of the WHO FCTC, rapid enactment of a comprehensive tobacco legislation, and effective implementation of the main regulatory measures demonstrate high commitment of Seychelles to strong and sound public health action for the prevention of non-communicable diseases. The prevalence of smoking has decreased regularly and markedly over time, as assessed in serial independent population surveys in 1989, 1994, 2004 and 2013: this favourable trend likely relates to strong tobacco control efforts during the past 30 years.¹⁴⁵

Of note, age-adjusted cardiovascular disease mortality has also markedly decreased during the past 30 years in Seychelles, which is likely partially attributable to the decreasing smoking prevalence.¹⁴⁶ Successes in tobacco control in Seychelles illustrate the large public health gains that can be achieved by implementing evidence-based public health interventions, particularly through adequate regulatory frames that help people adopt healthy behaviours.

Yet, while substantial successes in tobacco control have been recorded during the 30 past years in Seychelles, there are a few specific issues that need to be addressed. There is also a need to continuously develop and strengthen the enforcement of tobacco control measures to secure current successes and to address new challenges for tobacco control, e.g. trends for youths and/or women to take up smoking habits in many countries, and new trends for youths to use

¹⁴⁴ WHO Tobacco Free Initiative <http://www.who.int/tobacco/healthwarningsdatabase/mus/en/>.

¹⁴⁵ Bovet, P, Viswanathan B, Shamlaye C, Romain S, Gedeon J. Addressing non-communicable diseases in the Seychelles: towards a comprehensive plan of action. *Global Health Promotion* 2010;Supp(2):37-40.

¹⁴⁶ Stringhini S, Sinon F, Didon J, Gedeon J, Paccaud F, Bovet P. Declining stroke and myocardial infarction mortality between 1989 and 2010 in a country of the African region. *Stroke* 2012;43:2283-88.

shisha/water pipe. The Board is also currently reviewing how to adequately address e-cigarettes and other nicotine delivery systems in Seychelles.

CHAPTER 8: SOUTH AFRICA

1. Constitutional and wider legal context of enforcement

The Constitution of the Republic of South Africa, which was enacted in 1996 and came into operation in 1997, is the supreme law of the country. In terms of the Constitution, South Africa follows a system of cooperative government. There are three tiers of government: national, provincial and local. Each tier has its own executive and legislative authority. The local sphere of government consists of municipalities, with executive and legislative authority both vesting in its Municipal Council.

The Constitution sets out those areas in which the national and provincial legislatures have exclusive or concurrent competence to pass legislation. Consumer protection, environment and health services are all issues falling within the concurrent national and provincial legislative competence. However, the major pieces of legislation which govern tobacco in South Africa have all been passed at the national level. Local government is then empowered to make regulations on a subset of these issues, which include air pollution, building regulations and municipal health services. The national and provincial governments are required to support the municipalities, and cannot compromise or impede their powers or functions. As will be seen below, competence in enforcement of South Africa's tobacco control legislation is shared between the various tiers of government, although municipalities play a significant role. The overall framework, however, is set out at a national level.

South Africa's constitution is a progressive document, setting out an extensive array of civil and socioeconomic rights which accrue to everybody living within the country's borders. These rights are largely found in Chapter 2 of the Constitution – the Bill of Rights – which has been held to create an 'objective normative value system'.¹⁴⁷ Any infringement of a right contained in the Bill of Rights is constitutionally valid only if it satisfies the limitations clause (s36). This states that such a right may only be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In assessing whether this is the case, one must take into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

The Bill of Rights enshrines environmental rights: section 24 states that everyone has the right to an environment that is not harmful to their health or well-being. This is an explicit recognition of public health considerations and encompasses the right to clean air. On a more fundamental level, the right to life is enshrined in s11. There is, however, no constitutionally-enshrined right to smoke. Nevertheless, allowing one to make the decision whether to smoke or not may be seen

¹⁴⁷ *Carmichele v Minister of Safety and Security and Another (Centre of Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

as giving effect to individual autonomy, which flows from rights such as the right to human dignity (s10) and the right to freedom and security of the person (s12).

Anti-tobacco laws clearly give effect to the right to an environment that is not harmful to health and the right to life, as outlined above. They also clearly do not infringe a right to smoke, as such a right does not exist. However, the arguments for individual autonomy or consumer sovereignty are often raised in response to tobacco control laws, which are considered by some to be overly paternalistic. The South African legislature, in enacting the tobacco control laws outlined below, has made a clear decision to prioritize and give effect to public health considerations over the autonomy of the individual.

2. South African National Tobacco Control laws

South Africa is a signatory to the Framework Convention on Tobacco Control (WHO FCTC), which creates an obligation to impose strong tobacco control legislation. The agreement, in which South Africa was in fact also a lead negotiator, was ratified in 2005. The country's first major piece of tobacco control legislation was enacted in 1993, and has been subject to three subsequent amendments. Six sets of regulations have been published in terms of this legislation. The law as it stands today complies with most of the best recommendations of the WHO FCTC. The Tobacco Products Control Act 83 of 1993 was the first piece of legislation to impose a significant set of restrictions on the manufacture, sale and use of tobacco in South Africa. This act required that tar and nicotine yields of cigarette be printed on the packs, and enabled the minister of health to prescribe health warnings on advertisements and tobacco packs. The act also provided for the regulation of smoking in public places, as well as smoke-free public transport. In addition, restrictions were imposed on vending machines. The first set of regulations was promulgated in 1994, detailing the warnings and information to be included on tobacco advertisements and packages.

The Tobacco Products Control Amendment Act 12 of 1999 was the first amendment to the original act, and created a more comprehensive set of tobacco control laws. Significantly, the amendment act imposed a complete ban on tobacco advertising and sponsorship. Free distribution and gifts of tobacco products was also prohibited. Point-of-sale advertising was still permitted, but was limited to price and availability. The amendment act also prohibited the sale of tobacco products to individuals under the age of 16, as well as the sale of single cigarettes. Further restrictions were imposed on vending machines, and smoking in public places and the workplace was restricted for the first time, albeit with certain exemptions. The amendment act empowered the minister to set regulations prescribing maximum yields of tar, nicotine and other constituents. This was done in 2000. As of 1 June 2001, the tar yield of cigarettes could not be greater than 15mg per cigarette, and the nicotine yield not greater than 1.5mg. By 1 June 2006, this was to be lowered to 12mg and 1.2 mg per cigarette respectively.

Three other sets of regulations were passed in 2000. The first of these related to smoking in public places, and specified certain public places in which smoking is permitted, and the conditions under which smoking is permitted. For example, a designated smoking area in a public place may not exceed 25% of the total floor area of the public place, must be separated by a solid partition and an entrance door, and must have a ventilation system which exhausts smoke

directly outside. The regulations state that the person in control of the public place must ensure that no person smokes outside of the designated area.¹⁴⁸ Employers have additional responsibilities, and must ensure that employees are protected from tobacco smoke in the workplace.

The second further set of regulations related to point-of-sale advertising, and specifically the signs indicating price and availability. Such signs were required to be not greater than one square metre in size, positioned within one metre of the point of sale, and contain a warning and prescribed health message. The third set of regulations governed the phasing out of existing sponsorship or contractual obligations. The Tobacco Products Control Amendment Act 23 of 2007 was the second amendment to the original act. This amendment further provided for standards applicable to the manufacture and export of tobacco products. Smoking was prohibited in certain prescribed outdoor public places, as well as within prescribed distances from doors and windows of public places. Smoking was also prohibited in motor vehicles in which a child under 12 years of age is present, and in private dwellings used for educational purposes. The maximum penalty for contraventions of the provisions of the act by various establishments was increased to R50 000, and the maximum penalty for contraventions by individual smokers was set at R500.

The Tobacco Products Control Amendment Act 63 of 2008 is the most recent amendment. This piece of legislation extends the definitions of advertising and promotion to include “viral marketing” and word-of-mouth marketing, as well as product placement. The amendment also bans misleading descriptors, and provides for pictorial health warnings to be prescribed. Furthermore, the minimum age for buying tobacco products was raised from 16 to 18 years, in line with the recommendations of the WHO FCTC.

The constitutionality of certain aspects of the ban on advertising and promotion (as extended by the 2008 amendment act) was challenged in court by British American Tobacco South Africa (BATSA). In 2012, the Supreme Court of Appeal (SCA) dismissed this challenge. BATSA was concerned that the extended definitions of advertisement and promotion would impact upon its ability to communicate one-to-one with consenting adult consumers of tobacco products. It was argued that the definition of ‘advertisement’ was unconstitutional to the extent that it limited BATSA’s right to freedom of expression – more specifically the right of commercial speech – in terms of s16 of the Constitution.

The SCA, finding that this right was indeed limited by the legislation, applied a limitations analysis in terms of s36 of the Constitution (as set out above). This required an exercise in proportionality, balancing the rights of smokers to receive information concerning tobacco products on the one hand, against the government’s obligation to take steps to protect its citizens from the hazardous and damaging effects of tobacco use on the other. The SCA recognised the public health considerations which are addressed by the legislation, and took such factors to make a compelling case for justification of the right’s limitation. It also recognized the government’s international obligations under the WHO FCTC. Ultimately, it was held that the right to commercial speech, while important, was not absolute, and that in this case the seriousness of the hazards of smoking far outweighs the interests of smokers as a group. The

¹⁴⁸ The Tobacco Products Control Amendment Act 23 of 2007 further provides for the person in control of the public place or the employer to ensure that no person under the age of 18 is present in the designated smoking area.

limitation of the right was thus found in this case to be reasonable and justifiable in an open and democratic society.

The most recent set of regulations were published in 2011. These regulations govern the standards for manufacturing of reduced propensity cigarettes. Regulations have not yet been promulgated with respect to graphic warning labels, nor with respect to the distance from entrances, doorways, windows and ventilation inlets of public places within which smoking is prohibited. However, draft regulations with respect to the latter were drawn up in 2012, which would set the distance within which smoking is prohibited at 5 to 10 metres. These draft regulations also completely prohibit smoking indoors, as well as prohibiting smoking in various other venues such as stadiums, schools, health facilities, outdoor eating or drinking areas, and beaches. Public comment was invited, but these regulations have not been promulgated.¹⁴⁹ Section 2(7) of the Tobacco Products Control Act (as amended) provides for the application to that section of sections 80 to 89 of the National Health Act 61 of 2003. These sections of the National Health Act provide for the appointment, powers and functions of health officers and inspectors. The parameters of health officers' powers to conduct inspection in order to ensure compliance are set as, as are their powers to issue notices and warnings.

3. Enforcement structure and operations

At the level of the national government, the tobacco portfolio rests with the Health Promotion Directorate within the National Department of Health. The primary functions of this department in relation to tobacco include the development of legislation, drafting of regulations and negotiations with international bodies such as the WHO (in relation to the WHO FCTC, for example). After having been drafted by the ministry's legal team, the Director for Health Promotion is the one who takes the relevant proposed regulations to the Director-General or Minister of Health for final approval.

However, the National Department of Health has limited functionality with respect to enforcement and compliance of the various tobacco control laws. Although the entire tobacco portfolio sits within the National Department of Health, this likely to be a consequence of the fact that there is no other department which specifically deals with issues relating to tobacco; the core function of the department remains health, rather than enforcing or ensuring compliance with the laws. Whilst some responsibility may lie with the provincial departments of health, it is the health sections of the various city municipalities which are primarily responsible for the enforcement of the tobacco control laws which affect the general public. Specifically, each city has its own Environmental Health Practitioners (EHPs); these are the officers that monitor compliance with the tobacco laws. EHPs have a wide range of responsibilities, and also monitor compliance with various other laws relating to health issues such as air and water quality, sanitation and housing, noise management and food safety.¹⁵⁰

Such enforcement will be in partnership with the South African Police Services (SAPS), as well as the relevant metropolitan police forces and city traffic services. The precise nature of the

¹⁴⁹ CANSA (2013) <<http://www.cansa.org.za/support-ban-on-2nd-hand-smoke-in-public-places-today/>>.

¹⁵⁰ For an outline of the responsibilities of EHPs within the City of Cape Town, see <<http://www.capetown.gov.za/en/MediaReleases/Pages/CityraisesbarEnvironmentalHealth.aspx>>.

enforcement structure and operations, including the division of responsibility between the health services and the police, is determined by the particular municipality in question. Certain activities of the EHPs may be conducted together with a division of the police services, whilst others may be exclusively enforced by one or the other. For example, in the City of Cape Town, EHPs are responsible for enforcement in restaurants and public places, while SAPS, the Metro Police and Cape Town Traffic Services are responsible for enforcing the laws relating to adults smoking in cars with children under the age of 12, night clubs, and the selling of cigarettes to children. As will be seen below, non-governmental organisations (NGOs) also play a significant role in ensuring compliance with the various tobacco control laws. NGOs have tended to step in where government lacks capacity to carry out certain functions, or the political will to do so. Three NGOs which have played a role in regulating tobacco use in South Africa are the National Council Against Smoking (NCAS), the Cancer Association of South Africa (CANSA), and the Heart Stroke Foundation South Africa (HSFSA).

The NCAS is the major tobacco NGO in South Africa. Its mission is to promote health and prevent disease by reducing tobacco use in the population. Both CANSA and the HSFSA have broader objectives in that they are not exclusively focused on reducing tobacco use. CANSA's purpose is to fight cancer generally, and its mission is 'to be the preferred non-profit organization that enables research, educates the public and provides support to all people affected by cancer.'¹⁵¹ The HSFSA is aimed at fighting preventable heart disease and strokes. However, despite these broader objectives, both organizations have played a key role in addressing the issue of tobacco use, and particularly in facilitating the development of the legislation set out above.

4. Enforcement tools

EHPs have competency to inspect premises in order to check compliance with tobacco control laws, and to issue fines in certain circumstances in which there is non-compliance with various aspects of the legislation. City authorities are able to apply to local magistrates to set amounts for admission of guilt fines for the various offences, which may not be greater than the maximum amount prescribed by the legislation. Different amounts may be set for first, second and third offences. Once such amounts have been set, a notice must be issued stating that this has been done. This then grants EHPs (or the legal teams of the health sections within that particular municipality) the competency to issue a summons to persons who are identified as being non-compliant. The recipient of the summons may then either pay the admission of guilt fine of the set amount, or appear in court to challenge the fine.

The alternative is for the EHPs to open a docket with the police. This requires the police themselves to investigate the allegations of non-compliance, and make a case against the accused. Prosecutors will then make the decision as to whether or not to proceed with the prosecution in this instance. Ordinary criminal procedure will need to be followed, and evidence must be adduced to prove beyond reasonable doubt that there was noncompliance with the tobacco control law(s) in question. Such action is often taken in response to complaints from the public, thus constituting passive enforcement. Complaints may be made either to the national, provincial or local authorities. Complaints made to the national or provincial departments of

¹⁵¹ CANSA (2014) <<http://www.cansa.org.za/cansas-unique-role-service-delivery/>>.

health (or indeed any other national or provincial department) will be referred to the Environmental Health Office of the local authority in question.

Certain municipalities – such as the City of Cape Town – have dedicated tobacco complaint lines. Upon calling the City of Cape Town’s dedicated complaints line, one is prompted by an automated voice to leave details on the complaint, including the nature of the complaint and the name of the establishment in question, if applicable. One is also asked to leave personal details, so that an EHP may get in contact with the complainant in order to investigate further. Anonymous complaints are not pursued. The City of Cape Town encourages members of the public either to make use of this complaints line, or to report a complaint to their nearest Environmental Health Office.¹⁵²

Nationally, complaints may also be made via the NCAS quit line.¹⁵³ The NCAS will take down the details of the complaint and pursue the matter themselves. The first step taken is to issue a warning to the alleged infringer, by way of a letter of cease and desist. If the noncompliance was as a result of an ignorance or unawareness of the law, and the violator is cooperative, the NCAS will inform that person of the laws and possibly assist them in becoming compliant. The organization will follow up after a certain period to check that the person or their establishment does now in fact abide by the laws. If there is resistance from an alleged violator, or a lack of a response to multiple letters, the NCAS will then take the matter to the local EHPs or open a docket with the police, and the process outlined above will be followed.

Once a complaint is received, either by the local authorities or the NCAS, the approach is generally to engage with the alleged violator in a constructive and positive way – the approach is not aggressive. According to the Director of the NCAS, this approach is generally successful. When municipalities receive complaints, they will also initially address the owner or manager of the premises in question (who is responsible for ensuring compliance), and advise them on remedial action. The evidence is that such persons will generally cooperate and comply once approached.¹⁵⁴ Active enforcement occurs where authorities do not merely respond to complaints, but proactively carry out inspections of certain premises in order to check compliance. EHPs do carry out routine general inspections of premises. These are carried out in fulfilment of the EHPs’ wide-ranging responsibilities, to check compliance with a variety of public health laws and regulations. Compliance with tobacco control laws will be a component of this. According to Peter Ucko, it is more rare for EHPs to conduct inspections specifically with the object of checking compliance with tobacco laws (and not in response to complaints), but occasionally such blitzes are carried out.¹⁵⁵

In the City of Cape Town, during the period from July 2013 to June 2014, 8 866 inspections of formal food premises were carried out. These inspections included checking for compliance with

¹⁵² City of Cape Town (2014) <<http://www.capetown.gov.za/en/MediaReleases/Pages/CityraisesbarEnvironmentalHealth.aspx>>.

¹⁵³ CANSAs (2013) <<http://www.cansa.org.za/take-action-against-those-who-break-the-law/>>.

¹⁵⁴ This is according to the experience of members of the Municipal Health Services, such as those working within the jurisdiction of the Maguanga Metro (Bloemfontein).

¹⁵⁵ For reports of such blitzes carried out within the City of Cape Town, see further <<http://www.capetown.gov.za/en/MediaReleases/Pages/CitycommemoratesWorldNoTobaccoDay.aspx>> and <<http://www.capetown.gov.za/en/MediaReleases/Pages/MetroPolarr67suspduringwkndopsandpatrols.aspx>>.

tobacco legislation, and the rate of compliance was found to be 98.8%. The City issued warning notices in all cases of non-compliance, and 41 fines were issued of R2 000 each. The City Health Directorate has in the past been willing to provide the media with the names of facilities which did not comply so as to “name and shame” them.¹⁵⁶ In the year ending September 2014, it is reported that the City’s EHPs responded to almost 10 000 complaints from residents (although these were not exclusively tobacco-related complaints).¹⁵⁷ In certain circumstances there are other enforcement mechanisms in place. For example, it is also possible, in terms of s5(3) of the amended act, for the Director-General (Health) to instruct persons to remove vending machines which are illegally placed. This merely requires an individual to request a letter from the Director-General. However, this is a channel which has not been utilized as yet. According to Ucko, it is likely that pursuing this course of action will result in delays, given the backlogs reportedly faced by the Director-General.

There is also the possibility of advocacy groups such as the NCAS to lay a civil charge against alleged offenders. This would likely be a more efficient process than going through the criminal justice system. However, according to the Director of the NCAS, this channel has also not been pursued as yet. Certain regulations – such as those specifying that a designated smoking area cannot exceed 25% of the total floor area of a public place – are enforced at the stage at which building plans are submitted and required to be passed by the relevant local authorities. EHPs play a role in approving building plans, and will ensure that these regulations are met. Also, in certain cases establishments require health certificates to be issued to them before they are able to begin trading. EHPs will conduct a full inspection or evaluation of the premises before granting such certificates.

Tobacco products which are brought into the country – and which therefore must comply with South Africa’s tobacco control laws and regulations – are generally inspected as they arrive at the ports. The port health division of the national department of health, together with the local customs authorities, is responsible for checking compliance with the regulations. Where products are found not to be compliant, the authorities have the option either to confiscate and destroy the product, or send it back to the country of origin. In practice, Ucko reports that authorities are tending towards the former option, given that this is the only way to be sure that such non-compliant product does not return to circulation within the country.

In terms of enforcing the regulations regarding tar and nicotine content, tests are conducted on all cigarettes legally sold the South African market by Test House, a company associated with the South African Bureau of Standards (SABS). The brands are sampled every 2 months, and the results are reported to the Department of Health. Alternative mechanisms exist for enforcing violations of the regulations relating to advertising by tobacco companies. Complaints regarding these types of violations may be filed with the Advertising Standards Authority (ASA). The ASA has authority to make rulings relating to violation of its code, to which all major players in the industry are subscribed. Such rulings are then binding on the companies in question. However,

¹⁵⁶ City of Cape Town (2005)
<<http://www.capetown.gov.za/en/MediaReleases/Pages/CityHealthBlitzesRestrantsToChckOnCmplianceWitNationalSmkin gReglations.aspx>>.

¹⁵⁷ City of Cape Town (2014)
<<http://www.capetown.gov.za/en/MediaReleases/Pages/CityraisesbarEnvironmentalHealth.aspx>>.

the ASA is empowered only to enforce its own code, and does not rule on issues of legality (which is the responsibility of the government).

Nevertheless, the ASA can provide a useful mechanism by which to keep industry in check where it attempts to push the boundaries of the advertising ban or exploit loopholes in the legislation. The Director of the NCAS has noted that the ASA has not been afraid to rule against industry on such issues in the past. One such case involved advertisements relating to illicit cigarettes. In 2010, BATSA ran a national advertising campaign with the aim of raising public awareness of the link between illicit cigarettes and organized crime. The ASA received complaints that this was in fact an indirect method of encouraging the purchase of legitimate cigarettes by way of discouraging the purchase of illegal cigarettes, and that the campaign was thus an attempt to circumvent the prohibition imposed by the legislation. The ASA in this instance did not rule on the legality of the campaign, but instead ordered it to be withdrawn on the basis that BATSA could not provide evidence as to the link between illicit cigarettes and the forms of crime alleged by the advertisements.¹⁵⁸

5. Compliance promotion

The Health Promotion Directorate within the national department of health is responsible for education and communication relating to health issues. The directorate is involved in disseminating information relating to such issues, and raising community awareness. Within the local authorities, EHPs are also responsible for educating the public as to the health dangers posed by tobacco, as well as the relevant laws and regulations. The Department of Health runs a general campaign promoting healthy lifestyles, a component of which is tobacco control. Activities conducted in terms of this campaign – which is ongoing and implemented country-wide – will therefore incorporate certain issues relating to tobacco.

Other activities are also carried out which are targeted specifically at promoting compliance with tobacco control laws, and issues relating to tobacco generally. In 2001, for example, after the 1999 amendment act came into force, the government paid to have large double-page advertisements placed in newspapers around the country in order to educate the public on the new laws. In recent years, publicity regarding tobacco control issues has generally been focused around World No Tobacco Day (31 May). Each year around this time, the Director of Health Promotions reports holding various events and conducting activities to promote awareness of issues relating to tobacco control, and to attract media attention. Occasionally the Department of Health also conducts campaigns in collaboration with the various NGOs and advocacy groups, such as the HSFSA.¹⁵⁹

However, the Director of the NCAS reports that it is largely up to the various advocacy groups to make use of earned or unpaid publicity to promote tobacco issues. This is done by way of media releases and blog posts. Once again, these activities are targeted annually around World No Tobacco Day, which is typically the time at which such groups receive the most coverage.

¹⁵⁸ Van Walbeek, C. and Shai, L. 2014. Are the tobacco industry's claims about the size of the illicit cigarette market credible? The case of South Africa. *Tobacco Control*.

¹⁵⁹ HSFSA <<http://www.heartfoundation.co.za/media-releases/out-puff-%E2%80%93-it%E2%80%99s-high-time-tobacco-companies-are-banned-promoting-tobacco-products>>.

Advocacy groups also play a significant role in mobilizing the public when for instance draft regulations are published and public comment is invited.¹⁶⁰

6. Enforcement successes

Evidence suggests that tobacco control laws in South Africa are to a large degree self-enforcing. This is indicative of a shift in the mind-set of not only the general public, but also those in control of public places such as restaurants and shopping malls. This mindset may be understood in terms of the economic concept of property rights: prior to legislation being passed in South Africa, property rights were contested in the sense that it was unclear whether the default position was that smokers had a right to smoke, or that non-smokers had a right to clean air. This point was explicitly discussed by the Ministry of Health before the passing of the 1999 legislation. Today it is clear that in South Africa the property rights in question are allocated to non-smokers, who have an enforceable right to clean air, and that smokers do not have a right to smoke.

Ucko reports that persons in control of public places, who are responsible in terms of the legislation for enforcement within that public place, are beginning to realize that compliance with tobacco laws makes economic sense for their own businesses. Given that on average fewer than 1 out of 5 of their customers are likely to be smokers, enforcing a ban on smoking in public places amounts to protecting the interests of the majority of their customers. Prevalence rates have been shown to be lower among the wealthier and more educated, which comprise those customers that an establishment would be most interested in retaining. Apart from customer satisfaction, enforcing a ban on smoking within an establishment serves to reduce the cost of cleaning, maintenance and places less of a burden on air-conditioning systems.

According to Ucko, such considerations are in fact prompting certain establishments to impose restrictions on smoking beyond those required by law. In Gauteng, for example, some malls have banned smoking throughout, even in open-air walkways between shops where smoking would technically be permitted in terms of the law. Restrictions have also been imposed prohibiting smoking within certain distances from entrances, despite regulations to this effect not yet having been published. Even if regulations had been passed, it is likely that these restrictions would still go further: discussions around draft regulations have proposed a distance of 5 to 10 metres, whereas some malls have imposed restrictions of between 15 and 20 metres. These self-imposed restrictions are reportedly well-enforced, and smokers are generally compliant where such rules are in place.

The attitude among the South African public has also contributed to high levels of compliance within public places. The Director of the NCAS reports that non-smokers are aware of their right to clean air, and are increasingly demanding that it be respected. Enforcement operations are largely driven by complaints from the public, either to the NCAS national quit line or local authorities. This aids authorities in directing their resources where needed, and streamlines the process of ensuring there is compliance where there has been a failure to abide by the laws and regulations. The City of Cape Town, for example, acknowledges the extent to which EHPs rely

¹⁶⁰ See, for example, the combined efforts of the NCAS and CANSA to garner public support for draft regulations published in 2012: <<http://www.cansa.org.za/support-ban-on-2nd-hand-smoke-in-public-places-today/>>.

on the public to alert them to problems, which vitiates the challenge they face in not being able to actively enforce laws due to a lack of resources.¹⁶¹

There is also a tendency for the public first to approach those in charge (such as their employers), before lodging a complaint with the NCAS or local authorities. As with the approach adopted by the NCAS and local authorities outlined above, engaging with those responsible in a constructive manner tends to be met with cooperation. This is further indication of shifting attitudes mentioned above, as well as an increasing emphasis on the rights of the public. According to the Director of the NCAS, compliance with the ban on advertising and promotion is generally good. Not many direct or clear-cut violations of these laws occur. If such violations are observed, for example if an advert promoting tobacco products is aired on television, advocacy groups will immediately take the issue up with the media house responsible. Media houses will generally cooperate and be careful not to breach the laws, given the potentially severe fines that could be imposed (up to ZAR1 000 000).

7. Challenges to enforcement

Peter Ucko identifies the unfamiliarity of police and prosecutors with the tobacco control laws and regulations as a major challenge to enforcement, as well as a degree of unwillingness to investigate or prosecute cases of noncompliance. Unfamiliarity with the law reveals itself in instances where police have reportedly insisted that non-compliance with the regulations is a civil, rather than a criminal matter. When it comes to prosecution, cases against alleged violators which have actually reached court have tended to fail on technicalities, despite there being clear non-compliance with the regulations. For example, a case against two persons in charge of an establishment which was shown to be non-compliant were found not guilty on the basis that no evidence had been adduced to show that they were in fact the people in charge of the establishment (and therefore responsible for ensuring compliance). Another case involving non-compliance with point-of-sale advertisements was dismissed on the basis that the complainant had not actually bought cigarettes from the vendor, and thus it could not be shown that the non-compliant vendor was actually selling cigarettes.

Unwillingness to investigate or prosecute stems largely from the fact that South Africa is a country with a high rate of (violent) crime, and that tobacco control is perceived as fairly trivial in comparison to other matters. The police services, which lack capacity and resources generally, tend not to prioritise cases on non-compliance with tobacco laws. Similar arguments may be put forward by prosecutors. In individual cases, this requires complainants to pressure police and prosecutors to proceed with the investigation and subsequent prosecution. Such pressure may be exerted for on police by opening a docket against the police officers themselves for dereliction of duty where they have, for example, refused to open a docket in respect of a tobacco issue. With respect to prosecutors, where the decision is taken not to proceed with the prosecution, it is one's right to demand a letter stating the reasons for such a decision. In Ucko's experience, prosecutors will often reopen a docket where such a request is made, given the potential consequences of a failure to provide adequate reasons.

¹⁶¹ City of Cape Town (2014) <<http://www.capetown.gov.za/en/MediaReleases/Pages/CityraisesbarEnvironmentalHealth.aspx>>.

However, the wider structural problem of tobacco control laws not being taken seriously also needs to be addressed. Attitudes have been found to change where time is taken to explain the rationale behind the tobacco control laws, which requires knowledge of the seriousness of the issue. Once it is recognized that exposure to smoke can have potentially life-threatening results (either immediately or in the long-term), it becomes clearer why noncompliance with such laws should not be considered trivial in comparison to crimes such as assault.

These challenges are exacerbated where municipalities have failed to have amounts set for admission of guilt fines. As discussed above, granting EHPs the competence to issue such fines provides for a quicker and more efficient method of enforcement, bypassing the issues outlined above. However, where EHPs lack such competency, reliance must be placed on police and prosecutors, and the above challenges are faced. Other challenges faced when taking such a case to court include difficulties in discharging the evidentiary burden required. The Director of the NCAS reports that in cases where industry employees are caught distributing free cigarettes at student parties, for example, alleged employers will claim that the employees were merely part-time employees who had gone 'rogue'. It is also difficult to prove that such activities were being carried out unless the accused individuals were caught red-handed. Furthermore, when it comes to laying charges, it is found that parties are unwilling to give affidavits.

Another challenge to enforcement is attempts by industry to circumvent legislation, often by adopting a wide interpretation of the laws. Activities will be carried out based on such interpretations, which industry therefore considers legal, and it will be up to the government or advocacy groups to take the matter to court in order to obtain an authoritative ruling on the parameters of the legislation. This is a process which takes time, and requires investment of valuable resources. Industry might also occasionally institute its own litigation in order to challenge certain laws. An example of this is the case discussed above, in which BATSA challenged aspects of the advertising ban. Such litigation often serves to suspend enforcement of a certain aspect of the law while an authoritative ruling is still pending.

Ambiguous or inaccurate drafting of legislation also creates a challenge, and assists industry in this regard. For example, the use of the plural 'signs' in the regulations relating to point-of-sale advertising allows vendors to place multiple signs within the prescribed area, as long as each is not greater than one square metre in size. Similar issues are arising in relation to e-cigarettes: the interpretation of the relevant legislation held by advocacy groups such as the NCAS is that e-cigarettes are only allowed to be sold in pharmacies, whereas industry believes that it is permitted to sell such products from stand-alone stores within malls, for example. However, there is evidence that the legislature is sensitive to such issues, by continuously attempting to strengthen the laws and close any potential loopholes. This is evidenced by the most recent amendment to the legislation, which extended the definitions of advertising and promotion to encompass methods such as viral marketing via text messages.

Problems in drafting might also be symptomatic of a larger problem, namely a general lack of capacity. State legal teams are stretched, and there is a lack of expertise available to draft such legislation. Legislation and regulations are therefore often based on those of foreign legal systems, which are then adapted to the South African context where necessary. Backlogs in the system, however, mean that the drafting process is slow, as is the process of obtaining an official

legal opinion from a state legal team. This stands in stark contrast to the abundant resources and legal expertise available to the members of industry.

8. Drawing lessons from the South African experience

South Africa's successes in enforcing tobacco control laws may be attributed to a number of different factors, but there are certain aspects which stand out and which may be instructive for other countries attempting the same.

First, in the example of South Africa, one sees the value of active citizenry and advocacy groups. As outlined above, authorities are often confronted with a lack of resources, which restricts their capacity to enforce the laws and regulations to the extent that they might wish. However, this challenge has been vitiated by the prominent role that the general public and advocacy groups are playing in facilitating enforcement. The propensity of members of the general public to lodge complaints with the authorities (or the NCAS via the quit line) enables resources to be directed to where they are needed, in an efficient and targeted manner. Local health authorities may indeed be bypassed entirely where an individual takes the matter straight to the police and opens a docket themselves, although this is not as frequent, and would be hampered by the challenges associated with police and prosecutors identified above.

The NCAS is responsible for running the national quit line, which is an essential tool in enforcement in South Africa. The fact that the NCAS itself takes steps towards encouraging compliance before referring the matter to local authorities, serves to alleviate the burden on such authorities. Advocacy groups also play a prominent 'watchdog' role in keeping industry in check by monitoring compliance, reporting non-compliance and initiating litigation where necessary. Although such activities place the burden on civil society, in an environment where capacity is limited, this greatly assists in ensuring compliance with and enforcing the tobacco control laws.

Compliance promotion has been facilitated by a strong media. The publicity given to tobacco issues by (unpaid) reporting in the media serves to raise awareness of the laws and regulations. This increased awareness means not only that people are more informed and therefore more likely to comply with the laws, but also that other members of the public are more likely to recognize and report instances of non-compliance. Overall, there has been a "de-normalization" of tobacco use, which has been assisted by the media. Prevalence rates in South Africa are falling, and ex-smokers are often some of the most vehement anti-smoking advocates. Widespread coverage around World No Tobacco Day and other government health initiatives thus promotes compliance and enforcement. This increased awareness, and strong anti-tobacco advocacy generally, is likely responsible for the shift in mind-set that has led to self-regulation. As outlined above, various establishments are imposing their own restrictions on smoking which go beyond what is required in terms of the law. Effective arguments put forward by advocacy groups – which speak not only to issues of public health, but also the establishment's economic well-being – result in establishments themselves imposing and enforcing their own rules. This again serves to alleviate the burden on the authorities. It also bypasses issues created by delays in promulgation of regulations, which might arise due to lack of state legal expertise and/or political will. This illustrated in the example of smoking within a certain distance of entrances to malls.

Another lesson which emerges from the South African example is the effectiveness in certain cases of a ‘soft’ approach to enforcement. In responding to complaints on non-compliance, both the NCAS and local authorities initially approach alleged violators in a constructive and non-confrontational manner. Rather than proceeding immediately to opening a police docket or issuing a fine, those against whom the complaints have been laid are engaged regarding the complaints. Where non-compliance has been as a result of a lack of awareness of the regulations, those responsible are informed and even assisted in becoming compliant. Only where resistance is encountered are formal procedures for punishment pursued. The response from such an approach generally appears to be positive, with most found to be willing to cooperate once engaged. This is again indicative of the shifting attitude discussed above, coupled with the prospect of significant fines should they not cooperate. In addition, such an approach, by pursuing informal channels to ensure compliance, further alleviates the burden on formal state systems. This approach is likely to be not only more effective, but also more efficient.

CHAPTER 9: CONCLUSION

As the WHO Framework Convention on Tobacco Control reaches the implementation phase, the number of WHO Member States including in the WHO African Region enacting domestic legislation continues to increase remarkably. However, the next important challenge is to ensure that these laws are fully enforced and complied with. Enforcement and compliance measures ensure that both the short-term and long-term public health and other objectives of tobacco control legislation are achieved. As this guide and country case studies have demonstrated, a multi-pronged approach to enforcement and compliance is required. This involves drafting laws that are strong and enforceable, targeting regulated communities, promoting and monitoring compliance, responding to violations, providing appropriate enforcement powers, establishing mechanisms such as judicial action for responding to violations, apportioning enforcement responsibilities within and outside government, as well as extensive public awareness and media campaigns. If this guide can make a difference in helping WHO Member States and other actors enforce and achieve compliance with the law, it will have achieved its goal.

GLOSSARY

Administrative order. A legal, independent enforceable order, issued directly by the tobacco control enforcement programme officials, that imposes specified legal requirements and sanctions.

Authorized officers. Officers who have powers granted under a law to enforce that law. They may be variously referred to as authorized officers, health inspectors, sanitary inspectors, municipal officers, standards officers, police officers, labour officers or environmental health officers.

Beyond reasonable doubt. The standard of proof for a prosecution under the act is “beyond reasonable doubt”. A reasonable doubt is a doubt that would prevent a reasonable and just judge or jury from coming to a conclusion.

Civil action. A formal lawsuit, filed in court, against a person who has either failed to comply with a statutory or regulatory legal requirement or an administrative order, or against a person who has violated a tobacco control legal requirement.

Compliance. Fulfilment by a member of a regulated community of its obligations under a statute, regulation, by-law, rules of common law, awards or agreements

Compensation. An amount given or received as recompense for a loss suffered.

Command-and-control. An approach to public health management in which the government prescribes detailed legal requirements to promote and protect health and then enforces compliance with these requirements.

Compliance promotion. An activity that encourages compliance with legal requirements. Examples of compliance promotion include educational and awareness raising activities as well as technical and legal assistance.

Compliance monitoring. Collecting and analysing information on compliance status.

Compliance strategy. A strategy for achieving compliance with legal requirements.

Civil judicial enforcement mechanism. Enforcement mechanism that involves formal lawsuits brought before the courts to impose specific legal requirements or sanctions in response to a violation.

Criminal judicial enforcement mechanism. Enforcement mechanism that seeks criminal sanctions such as imprisonment or a monetary fine to punish the violator for the violations.

Declaratory relief. An authoritative but non-coercive pronouncement by a court concerning the legal entitlements of parties.

Evidence. Information that is provided in the form of speech, records, written or oral statements, letters, documents, oral or written testimony, physical material or artefacts, etc., which is offered to prove the truth of the matter asserted.

Enforcement. Range of procedures and actions taken by a state and its competent authorities to ensure that persons or organizations failing to comply with statutes, regulations, bye-laws, rules of common law, awards and agreements are brought back into compliance or punished through appropriate action.

Fine. A monetary penalty imposed by an enforcement agency for violation of a legal requirement.

Formal action. An enforcement action, frequently in the form of an administrative order, that is taken when a serious violation is detected or when the owner and operator does not respond to an informal administrative action.

Forfeiture. The immediate loss of all interest in property as well as loss of the right to possession of that property.

Informal enforcement mechanism. An enforcement response that cannot impose legal requirements or sanctions or be enforced, but can lead to more severe response if ignored. Informal responses include telephone calls or documents that provide information about a violation and action needed to correct the violation.

Injunction. An order of a court to prevent someone acting in a particular way (prohibitive injunction) or to require someone to act in a particular way (mandatory injunction).

Inspections. An official review, check and examination of an establishment/facility for its compliance status as required by the law.

Investigation. The process of collecting facts, evidence and witness statements.

Jurisdiction. The power of a state to legislate and enforce its laws; the power of a court or other authority to exercise judgment over the territory or matters over which such power is exercised.

Notice of noncompliance. A document requesting corrective action and compliance.

On the balance of probabilities. This means that once both sides have presented their evidence, the judge will find for the party who, on the whole, has a stronger case, e.g., the party whose evidence tips the balance of probability, however slight the edge may be.

Order. A document backed by the force of law that requires a violator to take certain action within a certain time period to correct a violation or to cease an illegal activity.

Record-keeping. The process by which members of the regulated community maintain their own record of certain regulated activities that they perform.

Regulated community. Collectively, the group of organizations, people, industries, businesses and agencies that, because they perform certain activities, fall under the purview of regulatory acts for tobacco control and are subject to particular legal requirements.

Requirements. Specific practices/actions required by law to control tobacco.

Search and seizure. The power of police and enforcement officers to search premises and seize property. The lawful search and seizure of property may arise under the authority of a search warrant, as an incidental power under a lawful arrest or where legislation specifically empowers search and seizure.

Self-monitoring. The process by which members of regulated community measure and assess its performance and compliance status.

Self-reporting. The process by which members of the regulated community provide enforcement officials with self-monitoring and record-keeping data periodically and/or upon request.

Tobacco control enforcement program. A program dedicated to achieving compliance with tobacco control legal requirements and to correcting or halting situations that endanger public health or other objectives of tobacco control. Government enforcement programs usually include inspections, negotiations and legal action.

Violation. Non-compliance with a legal requirement.

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