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Title: Tobacco industry attempts to undermine Article 5.3 & the 'good governance' trap

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Industry Watch: Tobacco industry attempts to undermine Article 5.3 & the ‘good governance’ trap

The Framework Convention on Tobacco Control^[1] (FCTC), which has now been ratified by 166 countries, is the first global public health treaty to be developed by the World Health Organisation (WHO) and represents a crucial milestone for tobacco control. In recognition of systematic, often covert tobacco industry efforts to undermine tobacco control policy, Article 5.3 of the FCTC specifically requires that, ‘in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.’^[1] The impact of Article 5.3 depends on governments’ commitment to implementing the guidelines agreed in Durban, last November.^[2] Given that tobacco industry success in undermining tobacco control to date has relied on its ability to influence policy,^[3] it is perhaps unsurprising that tobacco companies lobbied hard against the Article 5.3 guidelines and are now trying to undermine their implementation by claiming that they contravene existing commitments to ‘better regulation’ and ‘good governance’. What the companies fail to acknowledge is that at least one major tobacco company, BAT, played a lead role in promoting these concepts.

In the EU and the UK, the strategy being employed by major tobacco companies (both prior and subsequently to the agreement of the Article 5.3 guidelines) is to claim that Article 5.3 contravenes existing official standards on consultation because it requires complete exclusion of the tobacco industry from policy discussions (in fact, it merely requires that consultation should be limited to that which is strictly necessary and should be transparent and accountable). Such claims are frequently framed within broader policy commitments to ‘better regulation’ or ‘good governance’, as

Table 1 illustrates:

Table 1: Tobacco Industry Attempts to Undermine Article 5.3 (emphases added)

Company / organisation, context & date	Claim in relation to Article 5.3 / proposals to limit tobacco industry interference within policymaking
<i>Prior to Article 5.3 Guidelines being agreed in Durban in November 2008</i>	
Japan Tobacco International to the European Affairs Office, 12 th June 2008	‘The benefits of stakeholder consultation have been widely recognized both at national and international levels and JTI, therefore, believes that the Parties [to the FCTC] should <u>reject any suggestion that the tobacco industry should be excluded, whether expressly or in fact, from the regulatory process.</u> Such an approach would be contrary both to accepted international practices, of which stakeholder consultation forms an essential part, and national constitutional

	principles and law. [...] <u>The protection of the legislative process should be founded on internationally accepted principles of Better Regulation...</u> '[4]
BusinessEurope (which BAT has close connections with ¹) to Jose Manuel Barroso (President of the European Commission), 29th August 2008	'BusinessEurope has always been a <u>strong supporter of the Commission's policy to try to achieve Better Regulation for growth and jobs in the EU.</u> [...] <u>[P]roper consultation of all affected stakeholders carried out in accordance with the Commission's general principles and minimum standards is crucial</u> for getting an idea about the cost-effectiveness of legislation. For this reason, we are seriously worried about developments in the framework of the ongoing negotiations within the World Health Organisation on draft guidelines that will implement Article 5.3 of the WHO Framework Convention on Tobacco Control (FCTC) where one of the issues is the <u>attempt by national and EU health authorities to exclude the tobacco industry from being consulted on policy and legislation.</u> '[5]
BAT response to the UK Department of Health discussion document 'Consultation on the future of tobacco control', 5 th Sept 2008	'[W]e are concerned that the draft Guidelines pursuant to Article 5.3 of the Framework Convention on Tobacco Control (FCTC) could result in less than full and proper consultation with the tobacco industry. Such a proposal would be <u>inconsistent, not only with UK Government policy but with the European Commission's commitment to open consultation.</u> [...] We request that the UK Government promotes in international fora, such as discussions relating to the development of the FCTC Guidelines, <u>the principles of better regulation to which it is committed, to ensure that all relevant stakeholders, including the tobacco industry, are properly consulted and listened to, now and in the future, on issues affecting their businesses.</u> '[6]
<i>Subsequently to Article 5.3 Guidelines being agreed in Durban in November 2008</i>	
Imperial Tobacco letter to the House of Lords in the UK, 28 th April 2009	After explaining that an amendment has been submitted to a Health Bill, 'to establish a review of the government's policies on engagement with the tobacco industry in line with Article 5.3,' Imperial Tobacco's letter claims that: <u>'This amendment is completely opposed to the general principles of Better Regulation that were documented in 2006</u> [...] Governments must acknowledge that to be effective, <u>consultation must start as early as possible.</u> Interested parties should therefore be involved in the development of a policy at an early stage.'[7]

What these claims do not reveal is that British American Tobacco (BAT), lobbying through various front groups, played a crucial role in promoting the concept of Better Regulation in the EU and the UK, including the notion that the European Commission must consult 'interested parties' and undertake a form of impact assessment (or cost-benefit analysis) focusing on potential costs to businesses.[8,9] Internal company documents, released as a result of litigation, show that from 1996 onwards, BAT established a coalition of companies and worked with a widely respected think tank, the European Policy Centre (EPC), to ensure that corporations would be included in European policy discussions and formally consulted early in policymaking processes.[10,11] These efforts included the publication by EPC, in September 2001, of an officially commissioned paper on business impact assessment.[12] This paper was based on work by the EPC Risk Forum which was chaired by BAT's head of science and regulation. It argues that better consultation is

¹ BusinessEurope's members are European Member State national federations of industries. The UK federation is the Confederation of British Industry (CBI). BAT is a member of the CBI and has a history of working closely with it. The current President of the CBI is Martin Broughton, who was Chair of BAT from 1998-2004.

needed during policy development and recommends that the Commission should establish '*mandatory standards for consultation*' which would involve stakeholders at a very early stage in the policymaking process. This paper is drawn on heavily in a Business Impact Assessment Pilot Report subsequently produced by the Commission,[13] whose recommendation that '*[k]ey minimum standards for consultation should be implemented*' appears to have been based directly on the EPC paper. In December 2002, precisely such *Minimum Standards* for consultation were published by the European Commission (taking effect on 1st January 2003).[14] As might be expected, these standards stress the need for early consultation with interested parties and, according to interviews we undertook in September 2008, were being interpreted by Commission staff (even those in the Directorate General for Health and Consumers) as requiring in-person consultation with the tobacco industry. It is not yet clear whether this interpretation has changed since the strong guidelines on the implementation of Article 5.3 were agreed in November 2008[2].

Paradoxically, the *Minimum Standards* were also part of a drive to improve governance in the EU[15] following a major scandal at the Commission in 1999, in which 20 Commissioners resigned over allegations of nepotism and corruption.[16] Therefore, as well as emphasising the need to consult widely, they stress the importance of transparency and 'good governance' in consultation processes, warn against allowing particular groups to gain privileged access to the Commission and specifically state that interested parties must themselves operate in a transparent manner, making clear which interests they represent. Whilst this has the potential to reinforce the principles underlying Article 5.3, in practice its interpretation has been appropriated by business lobbyists, who have successfully linked 'open' governance (within the EU at least) to wide consultation with business representatives, including the tobacco industry.[4,5] The idea that good governance in tobacco control can be achieved through routinely consulting the tobacco industry is, of course, absurd. However, BAT appears to have been able to covertly contribute to the policy developments in the EU that were explicitly intended to overcome problems of inappropriate and non-transparent policy influence. Hence, it is perhaps less surprising that it first seems that such policy developments are now being used by tobacco companies to try to secure their inclusion in policy discussions.

In summary, lobbying by BAT has played an important role in securing the production of *Minimum Standards* for consultation in the EU and the tobacco industry is now deploying these same Standards in its attempts to weaken the EU's interpretation of Article 5.3. A similar strategy is being employed in the UK, where BAT and Imperial Tobacco have both appropriated the policy commitments to consultation that are made within 'Better Regulation' strategies to challenge Article 5.3.[6,7] Thus, it would seem that the claims being made by tobacco companies about Article 5.3 (**Table 1**) are an attempt to secure tobacco industry consultation on the basis of commitments and guidelines that were introduced at least partly as a result of the industry's political influence. Although we do not yet have the evidence to link BAT's lobbying activities to policy reforms beyond the EU, it is clear from the documents that BAT intended to undertake similar activities in other regions.[8] We also know that commitments to 'better regulation' and 'good governance' have now been made in a wide range of countries, including in Australia,[17] Ireland[18] and various other EU member states (e.g. Denmark, Germany, the Netherlands, Sweden[19]). These developments include commitments to consulting widely and, in most cases, particular emphasis is placed on consulting businesses, thus potentially enabling tobacco companies to make similar claims about Article 5.3 to those already made in the UK and EU (see **Table 1**). Indeed, there is already evidence that such lobbying is taking place in Australia.[20-22]

Although strong guidelines were agreed for Article 5.3 in Durban last November, it is unclear how Parties to the FCTC that have also signed up to principles of 'Better Regulation' or 'good governance' will address tobacco companies' contention that there is a tension between the two commitments. The fact that Article 5.3 makes it clear that necessary consultation can still take place as long as it is transparent and accountable, suggests that claims the two are in some way incompatible have been overstated. However, if policy officials *believe* there is a tension, there is a risk that they may feel compelled to implement the guidelines in a more relaxed or piecemeal manner than they otherwise might. In addition, given that Article 5.3 focuses on public health policy, tobacco control policies which fall beyond the remit of health ministries (e.g. taxation) may be particularly susceptible to tobacco companies' attempts to secure their inclusion in policy discussions. If this happens, the potential for the FCTC to help reduce the fatal impact of tobacco use could be severely undermined. The tobacco control community therefore needs to keep a

careful eye on tobacco companies' use of terms such as 'better regulation' and 'good governance' and ensure that policymakers are not duped into believing their claims about Article 5.3.

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JC: Conflict of interests: I was part of a WHO Tobacco Free Initiative (TFI) Expert Committee convened to develop recommendations on how to address tobacco industry interference with tobacco control policy, and as such my travel to a meeting in Washington DC was reimbursed by WHO TFI.

Authors' contribution statements:

KS: undertook the majority of the research and analysis from which these findings emerged and was the lead author of this article.

AG: developed the design of the broader research study (of which these findings form part), contributed to the document analysis involved in this research and helped write and edit this article.

GF: undertook some of the initial document searches from which these findings emerged, contributed to the document analysis involved in the research and helped edit this article.

JC: developed the design of the broader research study (of which these findings form part), contributed to the document analysis involved in this research and helped edit this article.

HW: helped with specific searches which contributed to the research on which this article is based and helped edit this article.

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