



Tobacco control at the Walk the Talk: The Health for All Challenge, 2022.

# Tobacco advertising ban after the popular vote Switzerland on track for the WHO Framework Convention

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This column of your magazine reported on the successful Swiss popular vote of 13 February 2022 to ban tobacco advertising that reaches youngsters and children.<sup>2</sup> Now the next legislative step is in full gear in Switzerland.

The tobacco advertising ban was made possible through a popular initiative, which means, under the Swiss constitutional rules, that it takes the form of an amendment of the Federal Constitution. Thus, in order to be implemented in effect, the new constitutional norm needs to be transposed into a legislative act. This is because, at the federal level, an initiative cannot directly propose a new legislative norm. The first step towards a new legislative norm has now been completed: on 31 August 2022, the Federal Council (Swiss Government) adopted a draft set of amendments to the Law on Tobacco Products and

sent it into public consultation. Swiss cantons, political parties, associations and civil society organisations have a deadline until 30 November 2022 to submit comments to the draft. After that, the Federal Council will review its draft, publish a summary of the consultation outcomes, and submit the draft to the Parliament.

With this draft, the Federal Council aims to have a Swiss law that would make it possible for the country to ratify the Framework Convention on Tobacco Control (FCTC) adopted by the World Health Organization (WHO) in 2003. An earlier draft law submitted to the Parliament in 2015 already had this aim, but MPs have watered it down so much that ratification was no longer possible. Now, the voters have rectified the domestic legal situation.

In short, the draft sets out the legislative details of the advertising

ban and, additionally, introduces a transparency obligation for the tobacco industry in respect of their expenditures for tobacco and e-cigarette advertising, promotion and sponsorship.

## Advertising ban

The ban on advertising, promotion and sponsorship for tobacco and e-cigarettes set out in the draft derives strictly from the text of the popular initiative, especially the terms “notably” and advertising “that reaches youngsters and children”. While the present law already prohibits some aspects of advertising, promotion and sponsorship, the main amendment proposed in the draft is a general ban in the printed press and on the Internet. Based on a quite convincing set of arguments, the Federal Council argues that for advertising through those two media not to “reach” young people, there is no other avenue than a general

ban. Actually, one of the criticisms made by the opponents to the initiative during the voting campaign was precisely that the initiative was, in their view, pretending to protect children only, but *de facto* could only be implemented through a general ban, because of the broad meaning of the term “reach”. Let us hope that in the coming parliamentary process, the same groups will not attempt to turn the argument the other way around and argue that the draft overshoots the constitutional mandate.

For the sake of accuracy, since Switzerland respects the principle of territoriality, journals and magazines printed for export will not be subject to the Swiss ban. It is noteworthy that the Federal Council proposes the same treatment for printed media and for Internet contents: even though the term “technological neutrality” has never been mentioned in the context of this issue, the approach proposed clearly amounts to a technologically neutral implementation of the constitutional mandate, and this is undoubtedly a sound direction.

Another amendment in the draft law is the ban of tobacco and e-cigarette promotion and sponsorship in national and local public events, which goes beyond the present ban applied only to events of international character. The proposed ban will also apply to shops.

The above does not mean, though, that advertising, promotion and sponsorship for tobacco and e-cigarettes will be banned altogether. In line with the letter of the initiative, advertising that unequivocally targets an adult will be allowed. This may apply to events or premises that exclude minors from admission, strictly professional newsletters or journals, or postal or electronic mail addressed specifically to

an adult. This is why Switzerland will not qualify, under the FCTC, as a country implementing a “comprehensive ban on advertising, promotion and sponsorship”. To date, 182 States are parties to the FCTC, and 128 of them notified that they implement a comprehensive ban. 37 States notified a partial ban (and others have their notification pending). The fact that Switzerland would belong to this small group has a practical implication, which relates to the transparency obligation. Where any kind of advertising and promotion for tobacco and e-cigarettes is banned, it is assumed that the industry spends virtually nothing for this purpose. However, where a partial ban is implemented – such as in the case of Switzerland – the FCTC contains an additional transparency obligation, to which we now turn.

#### Transparency obligation

As Switzerland will not belong to the 128 countries implementing a comprehensive ban of advertising and promotion for tobacco and e-cigarettes, it will have to apply article 13(4)(d) of the FCTC which requires “the disclosure to relevant governmental authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited”. Because the intention of the Federal Council is to be in a position to propose a ratification of the FCTC, it had to include such provision in the draft law. Actually, the earlier draft of 2015 already contained that provision, but it was one of the many items rejected by MPs in the parliamentary process. Now, with the clear popular backing provided by the Swiss people, the Government is in a strong position to come back to it. The proposed provision offers two options to the industry: reporting by an individual company, or reporting by several companies or an association. In both options, data are provided

to the Federal Office of Public Health, but in the latter option the data is aggregated already before it is provided. Whatever the option, the raw data received will remain confidential and not subject to the Swiss Law on Transparency (which allows persons to access government-owned information).

We stated that the proposed law is technologically neutral. When it comes to monitoring and enforcement, however, things may be different. Here, Switzerland’s federal structure needed to be considered. In the Swiss federal system, monitoring and enforcement of this legal act would fall within the competence of the cantons, for example in respect of printed media produced on their territory. But would it make sense that 26 cantons monitor the Internet? Obviously not, and the Federal

Council acknowledges that. It proposes that in the case of this legal act, the monitoring of Internet advertisement be done centrally by the Federal Office of Public Health. In case of an alleged infringement, the Federal Office would report the case to the canton where the company is established, and that canton would then handle the case.

Several steps are still necessary to finalise the new law, and an entry into force is not expected before 2025. ■

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2 “Votation suisse du 13 février: Interdiction de la publicité pour le tabac qui atteint les enfants et les jeunes”, *newSpecial*, March 2022, Issue 817, pages 20-21, by Christian Pauletto.

