REVIEW

An Exemplary Case of Promotion Activities and Taste Panels from the Perspective of Tobacco Control

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Abstract

The Framework Convention on Tobacco Control is a multilateral international agreement which has been generated to protect the health of nationals and nations against the hazards/risks of tobacco and its products. All high contracting parties to the Convention undertake the international responsibility to fulfill all the requirements of the Convention's articles in national legal systems. The Framework Convention on Tobacco Control has a considerable place among other international conventions on health. Within the self-executing desing/ system of the Convention, a vital regulation focuses on banning the advertisement, promotion, and sponsorship of tobacco products. Because they are one of the various components of tobacco advertisement, promotion, and sponsorship, taste panels should be assessed within the content of the Convention. Thus, banning taste panel activities is an important step in tobacco control and it is one of the basic areas where medical and law sciences should collaborate. In this article, a comprehensive frame has been drawn to the issue and recommendations have been developed for the future.

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1INTRODUCTION

The aim of this analysis is to examine the importance of limited promotion, taste panels, and sponsorship for tobacco control considering public health, law, and administrative activities of the government.

The study primarily evaluates the aim and content of the Framework Convention on Tobacco Control (FCTC) legally and explains the process of an international convention and the responsibilities undertaken by the countries. After general assessment of the meaning of these responsibilities under the international identity of a contracting party, the impact of such an international convention on domestic law is analyzed. The positive contribution to this effect would make on the national level to the correct orientation of the country's public health policies and the gains of the industry in its struggle against the strong economic and bureaucratic lobbies of the countries are explained.

After this general framework is formulated, the type of effects activities, such as advertising, sponsorship, and taste panels that is as important as the entire tobacco control process. It is known that one of the most effective methods in tobacco control is the prevention of its advertising, promotion, and sponsorship [1]. Many international documents, including the FCTC and the European Union Directive emphasize the same point.

The FCTC can be said to be an important step taken towards protecting the health of individuals and societies, struggling against the global scale use of tobacco, from the industry's dangerous expansion and initiatives. This Convention created a wide and important domain by regulating fraud and forgery as much as negotiation, promotion, sponsorship attempts of industry, which may differ from country to country but are similar in principle.

In accordance with such a wide variety of content, the regulations of the FCTC in this particular subject and the application of this subject in Turkey are particularly evaluated; an analysis is made with views of international organizations "such as the World Trade Organization" in light of the regulations in the European Union and in other countries.

In relation to the aforementioned processes, the issues of taste panels, advertising, sponsorship, technical side of tobacco and industry's relationship with countries, as well as the issues of advertising, promotion, and taste panels with respect to public health policies of the countries and national-international law are evaluated and the subject is discussed in a multidisciplinary framework.

TOBACCO CONTROL AND THE AIM OF THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

The introductory paragraph of the FCTC as a global aim states that “*Parties to this Convention are obligated to prioritize public health,*” thereby making a prioritized public health aim a prerequisite for being a signatory.

The most efficient actions take action to control the processes of global expansion and tobacco marketing of multinational tobacco companies that exert international economic and political power could be an “international program” in which political administrations of the countries get together. States that take steps to that end now realize the necessity for a joint commitment in the international arena. National authorities will need to get together for a joint multinational supervision against the global expansion of multinational companies. The juridical system will increase the impact, and the power of public activities these authorities will form in an international platform will only arise via the common law and contracts that will occur as a result of joint activities. Apart from those already listed, another method is that this supervision would be expected to be more efficient by the states’ fulfilling their *erga omnes* (inevitable) responsibilities that result from the responsibility of the states to comply with the constitutional provisions of international law, called the “*ius cogens*” rule, to protect the human life.²

In particular, the high economic power of multinational companies, the ease of traveling through borders in an age of expanding technology and globalization, the liberalization of trade within the framework of the WTO, and the direct integration of tobacco industry into the country economy via foreign investment make the efforts directed at tobacco control all the more meaningful. Illegal and forgery attempts and processes via global marketing and promotion/sponsorship will again only be supervised in this way.

The physical and the psychological damage on the consumer arising from a substance for sale not only makes the problem an ethical one, which has milder repercussions, but also a public law and international law problem based on basic rights, which have severe repercussions. Therefore, such a joint approach by the national authorities to a common public risk process that involves such severe responsibilities necessitated establishing this via an international agreement that binds them to one another.

EVALUATION WITHIN THE FRAMEWORK OF LAW OF CONTRACTS AND COMMON LAW

Contracts that are regarded as a general rule (*lex generalis*)³ within the framework of the law of contracts are general

contracts that are aimed towards the goal of public order and human rights, such as the public health that we defined above. The most known of these are the ones known as the twin covenants: International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, both signed under the framework of the United Nations. In particular, the latter covenant’s comment known as the “*General Comment 14*” regarding “the right to the highest attainable standard of health” published by the United Nations’ Committee on Economic, Social and Cultural Rights is important. This subject does not center around countries that have a certain economic or democratic standard and involve steps towards creating the joint concept of “*health in the highest standard*” on a global scale.

Article 25 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights can be thought within this framework as a part and support of programs to improve local and global health policies under the WHO. These two articles differ from other general rule contracts in that they are present in contracts that give states special obligations. Apart from these two regulations, health rights that are deemed as fundamental rights in public health are declared in Articles 11(1)(f) and 12 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 1979, in Article 24 of the Convention on the Rights of the Child of 1989, in Articles 11, 13, and 15 of the European Social Charter of 1961, in Article 16 of the African Charter on Human and Peoples’ Rights of 1981, in Article 10 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights, and in many other conventions [2-4].

For so many years as it has been a part of many international conventions and part of state practice, the right to health has become a right under customary international law. As a result, when a regulation that became customary law is part of a contract, it will be the kind of rule that will bind the relevant state in the international arena even if the said state is not a party to the contract. To put it in a more tangible way, even the obligations stated in the contracts that are cited above and that the Turkish Republic is a party or is not/will not be a party because of various geographical-technical reason will become binding the moment they become a part of the customary international law.

In other words, in addition to the FCTC, other conventions create state parties’ responsibilities about the effects of tobacco control on public health. However, when these conven-

¹World Trade Organization (WTO) is an international umbrella organization, which was first established to popularize and liberalize trade, protect commercial property by General Agreement on Tariffs and Trade (GATT), and later built on other international agreements namely, General Agreement on Trade in Services, Agreement on Trade-Related Aspects of Intellectual Property Rights, and Agreement on Technical Barriers to Trade. Today, it maintains its corporate functions to enforce these agreements, particularly through the Dispute Settlement Understanding and Board of Appeal, which were established to settle the disputes that arise from these agreements.

²According to the terms in the World Health Organization (WHO) booklet, Framework Convention on Tobacco Control serves as a response to the tobacco epidemic. Because it causes the deaths of more than half of the people it involves and deteriorates the health of the rest severely, the legal obligations of the governments to fight with this epidemic must absolutely be reminded. See WHO convention booklet page 5 for this attribution <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>

³These rules regulate more general legal relations when compared to laws governing specific subject matters (*Lex specialis*). These two types of rules are generally compared with each other on subject, timing, and event basis.

tions are evaluated together, the FCTC as a subject of rule of “specific rule overrides” (Lex specialis)⁴ is regarded both by the other states and the Turkish Republic as a rule which gives primacy to this contract that is specific to tobacco control. Apart from this prioritized application, other contracts and customary international law or other rights or obligations that became mandatory regulations, such as right to live, right to health, and right to bodily integrity, continue to be binding for the Turkish Republic.

However, this did not stay in the way of Turkey to sign the FCTC to fulfill its international obligation on tobacco control more effectively and in coordination with other national authorities. Therefore, “The Law No. 5261 Regarding the Approval of the World Health Organization’s Framework Convention on Tobacco Control” was ratified on 11/25/2004 in the Grand National Assembly of Turkey, Turkey was a “party” since 2004, and was duly enacted in domestic law its publication in the 25,656th edition of the Official Gazette on 11/30/2004 [5].

The FCTC was also published in the 25,681st edition of the Official Gazette on 12/25/2014 as a Cabinet Decree (2004/8235) because of its status as an “international agreement” according to Turkey’s constitution [5].

FRAMEWORK CONVENTION ON TOBACCO CONTROL AND ADVERTISING, PROMOTION, AND SPONSORSHIP

Under its Article 1 titled “Use of Terms” FCTC, which was enacted on 2/27/2005 under the framework of WTO and which has, as of 06/23/2013, 178 “party” states (6), defines [1]:

“*Tobacco industry*” as tobacco manufacturers, wholesale distributors, and importers of tobacco products,

“*Tobacco control*” as a range of supply, demand, and harm reduction strategies that aim to improve the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke,

“*Tobacco advertising and promotion*” as any form of commercial communication, recommendation, or action with the aim, effect, or likely effect of promoting a tobacco product or tobacco use either directly or indirectly, and

“*Tobacco sponsorship*” as any form of contribution to any event, activity, or individual with the aim, effect, or likely effect of promoting a tobacco product or tobacco use either directly or indirectly.

As an international Convention, the FCTC’s Article 13 titled “Tobacco advertising, promotion and sponsorship” requires each party country, within the period of 5 years after entry into the Convention for that party, to enforce a comprehensive ban on advertising, promotion, and sponsorship and to supervise these activities.⁵

Article 4 of the FCTC states the “guiding principles.” This article is under Part 2, titled “[...] Objective, Guiding Principles and General Obligations.” This section is the most important instrument because of its explicit provision (*acte claire*)⁶, i.e., the teleological interpretation of the Convention. Teleological interpretation is one of the four distinct interpretation methods used in interpreting contracts and is the most important one. Even though it is sought in *travaux préparatoires* (preparatory work) in many conventions because of its absence in the Convention’s contents, this Convention includes its teleological interpretation in the general introduction and in Part 2 without needing preparatory work. Therefore, the guiding principles can, in fact, be considered as the whole Convention’s preamble.

On the other hand, even though the Guiding Principles cannot be thought as the administrative clauses of the international convention, they are a compulsory guiding system that must be obeyed in the administrative process of the FCTC, which is a self-executing convention. Indeed an organ called the Conference of the Parties⁷ is established and the convention self-executes itself through this organ. It explains why such principles are so important in the administration of a convention executed through such an organ and why states cannot function without them.

The first of these principles deals with the necessity of legislative acts for the awareness in public health. According to this principle, “*Every person should be informed of the health consequences [...] and mortal threat posed by tobacco consumption and exposure to tobacco smoke and effective legislative [...] measures should be contemplated at the appropriate governmental level.*”

Another one is the principle that is prepared to help state parties to the convention in successfully fulfilling international obligations under Article 13 titled “*Tobacco advertising, promotion and sponsorship*” and guides the parties of the convention in “*undertaking a comprehensive ban or restrictions on tobacco advertising, promotion and sponsorship.*” Thus, it aims to create an application standard with

⁴It refers to subject specific rules. In international law, Lex Specialis takes precedence over Lex Generalis. For instance, when it is a general matter such as the protection of the human health, more than one international convention would apply and terms of these provisions may not be compatible with each other. Therefore, it may be controversial as to which one of these terms should be binding. Under these circumstances, the convention on which has the special arrangement on the most related subjects must apply. For example, both universal declaration of human rights, international covenant on civil and political rights, and European Convention on Human Rights propose the right to live and the right to maintain physical integrity when there is an ethical conflict. However, if there is a specific law medium that can be applied to the matter, such as bioethics themed Oviedo Convention, it should be implemented, according to the Lex Specialis. In tobacco control related issues, the FCTC is a Lex Specialis (specific law) on protecting health rights.

⁵Because Turkey is still in the process of fulfilling this obligation, the concepts of “comprehensive ban” and the “effective control” are ambiguous in public opinion.

⁶In international law, this doctrine states that when the script is obvious, it should be interpreted as it would be in the conventional understanding. Here, it is stated that guiding principles are *Acte Claire*; they are indisputable in explaining the reasons for implementing and describing the purpose of the agreement.

⁷In the original English manuscript, it goes by (COP - Conference of the Parties).

respect to “undertaking a comprehensive ban on advertising, promotion and sponsorship.”

In the Guiding Principles of Article 13 of the FCTC [6];

The following is stated on “Responsible Entities”:

“The responsible entities should be defined widely, covering the entire marketing chain. Primary responsibility should lie with the initiator of advertising, promotion or sponsorship, usually tobacco manufacturers, wholesale distributors, importers, retailers and their agents and associations. Moreover, many other entities are involved in tobacco advertising, promotion and sponsorship and should also be held responsible.”

The following is stated on “Sanctions”:

“Parties should introduce and apply effective, proportionate and dissuasive penalties (including fines, corrective advertising remedies and licence suspension or cancellation). In order that the penalties imposed be effective deterrents they should be graded and commensurate with the nature and seriousness of the offence(s), including a first offence, and should outweigh the potential economic benefits to be derived from the advertising, promotion or sponsorship. Repeat infringements should incur a highly significant penalty for a manufacturer or responsible entity. In the case of frequent or flagrant infringements, more stringent sanctions should be imposed, including possible imprisonment. Sanctions should also include the obligation to remedy the infringement [...]. Sanctions should also be applied to the conduct of managers, directors, officers and/or legal representatives of corporate entities when those individuals bear responsibility for the corporate entity’s conduct.”

An indicative (non-exhaustive) list of the forms of tobacco advertising, promotion, and sponsorship within the terms of the Convention are listed below.

- Communication through audio, visual, or audiovisual means: print (including newspapers, magazines, pamphlets, leaflets, flyers, letters, billboards, posters, signs), television and radio (including terrestrial and satellite), films, DVDs, videos and CDs, games (computer games, video games, or online games), other digital communication platforms (including the Internet and mobile phones), and theatre or other live performances,
- Brand-marking, including in entertainment venues and retail outlets and on vehicles and equipment (e.g., by use of brand colours or schemes of colours, logos, or trademarks),
- Display of tobacco products at points of sale,
- Tobacco product vending machines,
- Internet sales of tobacco products,
- Brand stretching and brand sharing (product diversification),
- Product placement [i.e., the inclusion of or reference to a tobacco product, service, or trademark in the context of

communication (see above) in return for payment or other consideration],

- Provision of gifts or discounted products with the purchase of tobacco products (e.g. key rings, T-shirts, baseball hats, cigarette lighters),
- Supply of free samples of tobacco products, including in conjunction with marketing surveys and taste testing,
- Incentive promotions or loyalty schemes, e.g., redeemable coupons provided with purchase of tobacco products,
- Competitions associated with tobacco products or brand names, whether requiring the purchase of a tobacco product or not,
- Direct targeting of individuals with promotional (including informational) material such as direct mail, telemarketing, “consumer surveys,” or “research”,
- Promotion of discounted products,
- Sale or supply of toys or sweets that resemble tobacco products,
- Payments or other contributions to retailers to encourage or induce them to sell products, including retailer incentive programmes (e.g. rewards to retailers for achieving certain sales volumes),
- Packaging and product design features,
- Payment or other consideration in exchange for the exclusive sale or prominent display of a particular product or a particular manufacturer’s product in a retail outlet at a venue or at an event,
- Sale, supply, placement, and display of products at educational establishments or at hospitality, sporting, entertainment, music, dance, and social venues or events,
- Provision of financial or other support to events, activities, individuals, or groups (such as sporting or art events, individual sportspeople or teams, individual artists or artistic groups, welfare organizations, politicians, political candidates, or political parties), whether or not in exchange for publicity, including corporate social responsibility activities; and
- Provision of financial or other support by the tobacco industry to venue operators (such as pubs, clubs, or other recreational venues) in exchange for building or renovating premises to promote tobacco products or the use or provision of awnings and sunshades.

After the enactment of the FCTC, WHO created the MPOWER document in 2008 to enable the effective application of the issues in the Convention [7]; a package that includes the following six written criteria that are proven to be effective on tobacco control and reiterated the necessity of preventing advertising, promotion, and sponsorship:

(M)onitor	tobacco use and prevention policies,
(P)rotect	people from tobacco smoke,
(O)ffer	help to quit tobacco use,
(W)arn	about the dangers of tobacco,
(E)nforce	bans on tobacco advertising, promotion, and sponsorship, and
(R)aise	taxes on tobacco.

MPOWER comprises the application practices of the Convention as an application represented by representatives that are authorized by the national authorities of all countries. These practices can gain a cohesiveness for countries, independent of international conventions. Furthermore, this is a technical application tradition that is developed in the framework organization and that serves best for the purposes of the convention [8,9].

In summary, the text of MPOWER recommends the implementation of comprehensive bans that are well-defined, that have supervision mechanisms in place, and that foresee the strategies and tactics developed by the tobacco industry regarding advertising, promotion, and sponsorship. As clearly stated in the document, to/to be able to sell a product that kills up to half of all its users in fact requires “extraordinary” marketing savvy and in this context, unfortunately, cigarette companies are among the best marketers in the world. In addition to this “great” feat, companies may get increasingly aggressive at circumventing prohibitions on advertising, promotion, and sponsorship that are designed to curb tobacco use.⁸

Thus, the European Union, a supranational organisation that engages in high technocratic activities aiming to provide high standard lives for people that live in their territorial areas published a directive in July 1998 to control tobacco use and created a situation that is directly effective and that is required to be obeyed in the national arenas. The directive of 98/43/EC takes harsh precautions to control tobacco use. Despite eight of the members, more than half of the fifteen members, being manufacturers of tobacco and tobacco-related products, supranational organs published this directive by averting the industry lobby. Counter attack from the industry to this directive that averted promotion, publicity, and sponsorship tricks soon followed and lawyers of the industry published an article titled “Manufacture and Sales Principles of Tobacco Products” that includes the directive 2001/37/EC in one of the Community Law journals with the approach of “a directive that hinders free trade” [10].

On a local scale, the aims, targets, strategies, and activities regarding advertising, promotion, and sponsorship can be seen within the scopes of the chapters “A.5 Advertising,

Promotion and Sponsorship,” “A.6. Product Control and Consumer Awareness,” and “A.1 Informing and Raising the Awareness of the Public and Education” in the National Tobacco Control Program and Action Plan (UTKP-EP), which is prepared based on the contents and provisions of the FCTC.

ASSESSMENTS REGARDING THE TASTE PANELS

Recently, there is a subject which is also in the agenda of Turkey and which must be heavily emphasized within the scope of advertising, promotion, and sponsorship: TASTE PANELS!⁹

Thus, it is important to know the views of the tobacco industry, the party that engages in the commerce of products that poses a health hazard, regarding the promotion of the tobacco products and the taste panels. Some information on this subject is given below:

1. As a concept, promotion works and taste panels regarding the tobacco products that are newly supplied or that are considered to be supplied to the market are commercial communication activities that the tobacco industry did not/will not give up.
2. Tobacco industry not only states this fact in every opportunity but also continues its activities for this purpose in unethical and illegal ways. The following paragraph is the best example for this:

Even though we support comprehensive and effective legal regulations regarding the tobacco industry, we do not support legal regulations that unnecessarily restricts adults from buying or using tobacco or that unnecessarily limits the functioning of the tobacco industry that operates within the framework of the law. In this context, we are against precautions such as monotypic packaging, sales point exhibition bans, a complete ban on communication with adult consumers and a complete ban on additives used in tobacco products” [11].

3. It is known that promotion work or taste panels about the tobacco products that are newly supplied or that are about to be supplied to the market are performed in the sales areas of part time young female university students, and in cafeterias, coffee shops, clubs, concert areas, etc. The brands of the products that are used during promotion or taste panels are explicitly shown to individuals during the presentation and even the products that are advertised through explaining their features are gifted individually or in packs.
4. “Taste panel” studies, which the tobacco industry describes as a quality assessment activity of the products, are conducted to measure consumer reactions and to get feedback with products that are yet to be supplied to the market, that bear no brand and supervision stamp (banderol), and that are only coded with numbers and letters.

⁸The European Union, of which at least eight members are tobacco producers, has a very strict stance against the industry. The directive issued by the Union in 1998 banned all advertising and sponsorship activities in the Union as a rule and prohibited free distribution under every circumstance. The eight countries constituted the majority among the 15 members that were present. Directive 98/43/EC item 3/1 and 3/4. EU Official Journal dated 07. 30.98, issue L213/9.

⁹Tobacco tasting is a method the industry uses and it has different names in the literature: taste test, smoke panels, taste panels.

5. In the taste panels, volunteers who are already cigarette consumers are included in the study and a contract is made with these individuals for a fee and they are given cigarettes free of charge.
6. The tobacco industry sees the quality assessment activity, which includes taste panels, as an indispensable activity for the commercial continuity of every firm that operates within the sector and judges this activity as part of the business processes.
7. The tobacco industry claims that cigarette packages labeled “Not intended for sale, produced for product quality test,” etc. are supplied for this reason, that the performed act is not an advertisement of the company, brand, or product, and that it cannot be treated as being encouraging or incentivizing towards the use and sale of tobacco products.

Legal sanctions directed at these kinds of works of the industry with such a “biased” discourse and things that are unknown by users/consumers are listed below:

ATTEMPTS OF THE TOBACCO INDUSTRY TO VIOLATE THE FCTC UNDER THE WORLD TRADE ORGANIZATION

The tobacco industry makes certain attempts under the WTO to neutralize the FCTC and possibly parallel tobacco control efforts. Based on General Agreement on Tariffs and Trade (GATT) and Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreements, it particularly accuses countries that take precautions for public health with hampering free trade and infringing on intellectual property rights regarding commerce, such as brand-patent. New Zealand accused by Dominic Republic on March 5–6, 2014 for infringing “Geographical Indication” right and brand rights granted under TRIPS Agreement and Australia accused by Honduras on the grounds that she was infringing GATT are recent examples for these countries. Thus, conflict resolution panels under the WTO are being tried to become a kind of a savior legal ground for the industry, and it is predicted that states will need to pass important tests in the future regarding tobacco control.

The current situation elicited quite different viewpoints within the academia. Among these are people who think that liberalization of world trade is a threat to the tobacco control fight [12] as well as people who think that values such as the liberalization of trade and the protection of commercial intellectual rights should definitely be balanced with tobacco control to increase public health [13]. Another view is those who defend the processes of the WTO in fact have a flexibility in restrictions regarding tobacco control [14].

EXAMINATION WITH RESPECT TO NATIONAL SANCTIONS

The national legal sanctions and their justifications are listed below; their legal basis and justifications are investigated by citing one by one. The justification in the first three items is given below:

1. The tobacco industry reserves 6% of its sales revenues on activities of advertising, promotion, and sponsorship, thus spending billions of dollars annually. Presently, only

5% of the world’s population live in countries that have “comprehensive bans” on advertising, promotion, and sponsorship. Approximately half of the children in the world live in countries where it is not illegal to distribute tobacco products free of charge. It is stated that \$9.9 billion were spent on advertising, promotion, and sponsorship in USA alone in 2008 and that this figure is twice than what other industries spend [5].

2. Activities of advertising, promotion, and sponsorship reduce the desire of addicts to quit, encourage those that did quit to start using tobacco products again, and associate their products with desired qualities such as power, success, attractiveness, sportsmanship, and social skills to prevent users with high social awareness from quitting. In a way, activities of advertising, promotion, and sponsorship increase the effects of the tobacco industry on the media, business, sports, and entertainment sectors [15].

3. For the tobacco industry to engage in promotion and taste panels and to distribute these products free of charge with or without a company or brand name to measure the consumer reaction and to get feedback is in breach of the following;

- a. Article 13 of the FCTC and its Guiding Principles,
- b. The aim of Law No. 4207 which states: “... to protect individuals and next generations from the harms of the tobacco products, to take protective measure and precautions against the tempting advertisements, promotions and encouragement campaigns and to enact regulations for everyone to breath clean air.”
- c. The first and the fourth clauses of the Article 3 of Law 4207, and
- d. Paragraph (m) of the fifth clause of Article 8 of Law 4733.

Because “according to the definitions in Article 1 of the Convention, a comprehensive ban on all tobacco advertising, promotion and sponsorship applies to *all forms of commercial communication, recommendation or action* and all forms of *contribution* to any event, activity or individual with the *aim, effect, or likely effect* of promoting a tobacco product or tobacco use either *directly or indirectly*.”

Nevertheless, in the Convention the definition of “*tobacco industry*” includes tobacco manufacturers, wholesale distributors and importers; “*tobacco advertising and promotion*” includes *any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly*.

Aforementioned breach manifests itself as the following, in the exemplary list in which the kinds of tobacco advertising, promotion and sponsorship that is present in Guiding Principles of the FCTC;

“Supply of free samples of tobacco products, including in conjunction with marketing surveys and taste testing,

Direct targeting of individuals with promotional (including informational) material, such as direct mail, telemarketing, "consumer surveys" or "research."

Furthermore, within the scope of the aforementioned survey activity, tobacco products that are given free of charge to the addressees should be accepted as a "marketed item" because it is defined as follows: "Marketing is a set of activities that includes the promotion, packaging, training salespersons, determining and meeting the needs of the market in order to improve the sale of a product, good or service."

Actions committed by the tobacco industry with the claim of "quality assessment" (taste panels, etc.) should be considered as an organized action that includes marketing/advertising/promotion/sponsorship processes.

The breach described by the aforementioned action should be considered within the scope of the first clause of the Article 3 of Law No. 4207,

"Any form of advertising or promotion of tobacco products by using the product's or producer's company's name, logo or trademark is strictly prohibited. Campaigns promoting or encouraging the use of tobacco products are banned. Companies that produce or market tobacco products may not contribute in any manner, to any event or activity by using their names, logos, trademarks."

the fourth clause of the Article 3 of Law No. 4207,

"Tobacco companies are strictly prohibited from distributing their tobacco products to distributors or consumers free of charge or as incentives, gifts, samples or supportive aid." and legal action must be taken according to the third clause of the Article 5 of Law No. 4207.

The sanctions of these provisions are enforced in 2014 by the Tobacco and Alcohol Market Regulatory Authority with a penalty of 76,142 TL–380,715 TL.

At this point, the fact that sanctions are enforced in 2014 with a penalty of 45,684 TL according to the paragraph (m) of the fifth clause of the Article 8 of Law No. 4733 while the Article 5/3 of Law No. 4207 is in effect, is considered a breach of the principles of legal certainty, legality, and equality before the law.

On the other hand, it is considered that the decision to sanction includes all individuals and organizations that play a role in the production, marketing, and distribution process, according to the first clause of the Article 14 of the Misdemeanor Law (Law No. 5326):

"If more than one individual participate in the misdemeanor, each of those individuals shall be imposed an administrative fine."

And in the second clause of the same Article:

"In cases where proscribed qualifications are sought, individuals that participate in the misdemeanor and that do not possess this qualifications shall also be imposed an administrative fine."

It is thought that for people who possess the items that have no special labels or signs and who are subject to Excise Tax (in cigarettes, 250 pack=5,000 cigarettes) in their vehicles, workplaces, or anywhere, the aforementioned breach should further be considered according to the Annunciation of the Ministry of Finance [16], which prescribes a tax penalty.

If considered from the point of users/consumers, the congruence between legal statute and its risk on public/individual health should manifest itself as follows:

1. The use of tobacco products annually causes the deaths of six million people worldwide and approximately a hundred thousand people in Turkey. The WHO, taking into account the devastating health, social, economic, and environmental consequences that consuming tobacco products and being exposed to tobacco smoke leads to, which the WHO describes as a "global outbreak," acceded the FCTC which foresees an international cooperation.
2. It is scientifically proven that consuming tobacco products and being exposed to tobacco smoke lead to various diseases, primary of which is lung cancer. It is known that tobacco products include chemical additives that cause addiction and its continuation and that the smoke caused by these products are pharmacologically active, toxic, mutagenic, and carcinogenic. Furthermore, it is accepted in leading international classification of diseases that addiction to tobacco products is a distinct disease.
3. The WHO describes people that consume even a single tobacco product a day as an "addict."
4. In the preface of the status of the WHO, living with the highest attainable standard of health is stated as one of the fundamental rights of every human regardless of race, religion, political view, and economic or social status.
5. Article 12 of the International Covenant on Economic, Social and Cultural Rights that was enacted by the United Nations General Assembly in 12/16/1966 is predicated upon "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."
6. Article 3 of the European Convention on Human Rights secures the bodily integrity of the individual with the following statement: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment," and article 2 of the same convention secures the right to live with the following statement: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally," and the obligation to protect these rights are given to states. Even when a state is not party to this convention, given that these rules are among the compulsory international constitutional legal rules, it is obligated to protect these rights.
7. Article 17 of the Constitution of the Turkish Republic titled "Personal Inviolability, Material and Spiritual Entity of the Individual" states the following:

"Everyone has the right to life and the right to protect and develop his material and spiritual entity. The physical integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his or her consent. No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity."

8. Article 23 of the Turkish Civil Code No. 4721 titled "B. Protection of Personality, I. Against waiver and extreme restrictions" states the following:

"No person may waive his/her rights and capacity to act freely even if it is in the least degree. Neither a person may waive his/her freedom nor anyone may impose restrictions on a person contrary to the laws and ethics."

The extraction, vaccination and transfer of biological substances of human origin is subject to the written consent of the concerned body. However, no claim may be raised against a person who undertakes to give biological substance, forcing him to fulfil his/her obligations; also, no claim may be raised for compensation of pecuniary and non-pecuniary damages."

In conclusion, taste panels must be prevented [17]. Because, when the universal and national rules of law are taken into consideration within the scope of the text;

1. Making people use, via the survey activities, a product that is known to be not a regular product due to its blend and smoke content, that has an addictive capability higher than many of the drugs, that is definitely proven to kill people and/or to make them sick, and that does not even have a safe dose should not be seen as legal and moral, even if those individuals are volunteers and are already consumers.
2. It should be kept in mind that the commercial act that includes the free distribution of a tobacco product is an explicit act of promotion that serves an encouraging purpose for making these individuals continue to use that product.¹⁰
3. Given that the Turkish Republic became a "party" to the FCTC in 04/28/2004, that it is ratified in 12/31/2004, and that it is enacted in domestic law in 03/31/2005, there is both an international obligation and a Constitutional obligation in the national law to fulfill this obligation pursuant to Article 90/5 of the Constitution.
4. Given that taste panels are, in fact, an effort to improve the taste of tobacco, another factor that should not be omitted is the health hazard aspect of the use of certain additives by the industry to improve the taste. Improving the taste is not only important with respect to addiction but also in making consumption easier. It

is certain that many additives for improving the taste, majority of these are pesticides, pose great risks to health. However, because the subject of this study is, in fact, the banning, from the view point of international contracts and national legislation, of the industry's activities towards creating a Market under the guise of promotion and taste panels, we are of the opinion that it would be better if we did not delve into the details of this subject.

The promotion and taste panel activities of the tobacco industry bring the following questions and breaches to mind within the scope of relevant legislation:

1. In the aforementioned studies, where, when, in what quantities, which tobaccos were used, and which permissions were taken when and from which institutions while producing the tobacco products (cigarettes)? Are these information recorded?
2. In the aforementioned studies, are the taxes paid for the tobacco products (cigarettes) that are consumed without having a banderol on the packaging and/or that are distributed free of charge?
3. Are these products that have no combined warning on the packaging suitable for technical standards and human health in regard to its ingredients and additives? In this context, are there any laboratory studies that need to be conducted prior, pursuant to relevant legislation?

To summarize, taste panels should be considered as part of advertising, promotion, and sponsorship, and step(s) that are necessitated by the national legal, scientific, social, and ethical frameworks and that are in favour of individual and public health should be urgently taken. It is also important that the maximum effort to raise the knowledge and awareness of the public is visible. States, as a public responsibility, should protect public health against the manipulation of the industry. The constitutional responsibility and the human rights responsibility, which is what this situation corresponds to in law, necessitate the state to assume this responsibility on both national and international platforms.

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¹⁰A news titled "Paid cigarette guinea pigs," dated 10/04/2013 in Samsun Denge Newspaper reports that people had been offered an amount of 85 TL daily for 2 months of tobacco tasting and that they were used as paid and insured guinea pigs. For detailed information see SSUK Press Bulletins, "Tobacco advertising and youth - Tobacco advertising, publicity and sponsorship bans - Plain Package for tobacco products", 2011. [Internet] <http://www.ssuk.org.tr/index.php?section=basin>. Accessed: 12. 01.2013.

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