



ESSENTIAL ELEMENTS OF TOBACCO ADVERTISING, PROMOTION, AND SPONSORSHIP LEGISLATION

INTRODUCTION

This resource is intended to assist lawyers, advocates, and government officials involved in developing legislation for tobacco control. It provides a framework for analyzing and drafting tobacco advertising, promotion, and sponsorship (“tobacco APS”) legislation that reflects FCTC Article 13, the Guidelines for its implementation (“Guidelines”), and lessons learned from a review of tobacco APS laws in many countries.

Effective tobacco APS legislation fulfills FCTC Article 13 requirements, fully incorporates the Guidelines, which provide direction for developing and successfully implementing Article 13 compliant legislation, and incorporates best practices. Such legislation:

1. defines key terms in accordance with FCTC Article 1 and the Guidelines;
2. applies a ban on all domestic and cross-border tobacco APS, without exemption;
3. regulates tobacco APS not banned or not yet banned by, at a minimum: prohibiting it from being false, misleading or deceptive; mandating accompanying health warnings; and requiring the tobacco industry to report on its APS activities and expenditures;
4. imposes appropriate legal duties of compliance on all persons and entities in the entire marketing chain, based on their role in the initiation, production, placement, and/or dissemination of tobacco APS, and their engagement in certain APS activities;
5. specifies inspection and enforcement authorities and their powers and duties, and the responsibilities that fall to each authority if more than one has inspection/enforcement responsibilities;
6. provides a range of deterrent penalties that are proportionate to the seriousness of the violation and the degree of responsibility of the violator;
7. empowers and enables civil society to make complaints and take legal action to compel compliance with legal requirements;
8. requires the appropriate authority to evaluate the effectiveness of the legislation and its enforcement and make this information readily available to the public; and
9. provides the appropriate authority with regulatory power to address implementing details and any other matters necessary or appropriate for effectual implementation of the legislation.

FCTC ARTICLE 13 AND ITS GUIDELINES

Parties to the FCTC recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products. In accordance with this recognition, Article 13 requires each Party, consistent with its constitution or constitutional principles, to undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship within five years of the treaty's entry into force in that country.

The Guidelines, designed to assist Parties in meeting their FCTC Article 13 obligations, are based on the strongest and most widely accepted evidence and were adopted by consensus of the Parties. They incorporate international best practices and are informed by Parties' experiences with tobacco industry tactics to circumvent tobacco APS regulation.

Parties to the FCTC have an obligation to perform their treaty obligations in good faith, in accordance with Article 26 of the Vienna Convention on the Law on Treaties. The Guidelines are a subsequent agreement between the Parties and must be taken into account in interpreting the scope and content of Parties' obligations, in accordance with Article 31 of the Vienna Convention.

Incorporating the Guidelines into domestic legislation will establish the comprehensive tobacco APS ban required by FCTC Article 13, minimize loopholes, and facilitate proper implementation of legal requirements.

1. DEFINING KEY TERMS

FCTC Article 1 provides comprehensive definitions of "*tobacco advertising and promotion*," "*tobacco sponsorship*," "*tobacco products*," and "*tobacco industry*," as follows:

- "*tobacco advertising and promotion*": "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."
- "*tobacco sponsorship*": "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."
- "*tobacco products*": "products entirely or partly made of the leaf tobacco as raw material which are manufactured to be used for smoking, sucking, chewing or snuffing."¹
- "*tobacco industry*": "tobacco manufacturers, wholesale distributors and importers of tobacco products."

¹ The definition provided in FCTC Art. 1(f) can be modified slightly to be sure it covers all tobacco products regardless of the means by which they are consumed, such as by adding "or any other means of consumption" at the end.

Integrating these definitions into domestic legislation is critical for proper interpretation and application of the comprehensive tobacco APS ban required by FCTC Article 13. Without these definitions, there is risk that the terms could be interpreted in a manner that is less comprehensive than required by FCTC Article 13.

2. APPLYING THE TOBACCO APS BAN

Comprehensive ban

FCTC Article 13.2 requires that Parties, in accordance with their constitutions and constitutional principles, undertake a comprehensive ban of all tobacco APS within five years of the treaty's entry into force in their country. A Party not in a position to undertake a comprehensive ban due to its constitution or constitutional principles must apply restrictions on all tobacco APS.² In that case, restrictions should be as comprehensive as legally possible.³ The comprehensive ban (or restrictions, where applicable) should apply to both domestic and cross-border tobacco APS.⁴

The Article 13 Guidelines make it clear that a “comprehensive ban” as required by Article 13 applies to all APS *without exception*.⁵ This is because restrictions or a ban on only some forms of tobacco APS have only a limited effect. In the absence of a complete ban, tobacco companies will shift their vast resources to promotional means that are not banned.⁶ Experience demonstrates further that tobacco companies are very adept at exploiting mere restrictions, rendering them ineffective. As a result, a complete ban on all forms and means of direct and indirect tobacco APS is necessary, subject to some very limited forms of relevant commercial communications, recommendations, or actions that the Guidelines recognize might continue to exist after implementation of a comprehensive ban. These limited forms are:

- display of brand name, product name, and/or manufacturer's name on tobacco product packaging that meets prescribed standards, without any logo or other promotional features on or in the package;⁷
- a textual listing, without any promotional elements, of tobacco products and their prices at points of sale;⁸
- dissemination or reporting of information on tobacco company business practices (e.g., good employee-employer relations, environmental practices) that do not involve contributions to other parties where, and only where, this information is required for necessary business administration (e.g., for recruitment purposes, communications with suppliers) or for mandated corporate reporting (e.g., annual reports);

² FCTC Article 13.3.

³ Guidelines, para. 35.

⁴ FCTC Articles 13.2 and 13.7; Guidelines, paras. 46-52 and the following Recommendation.

⁵ Guidelines, Recommendation following para.11.

⁶ Guidelines, paras. 5 and 6.

⁷ Guidelines, para. 16. Even without promotional features as part of tobacco product packaging, product displays at points of sale, or commercial displays at any other location, would still need to be prohibited.

⁸ Guidelines, paras. 13, 20.

- legitimate journalistic, artistic, or academic expression of tobacco content and genuine social or political commentary (e.g., news images with coincidental background tobacco-related content, views on regulation or policy) for which no payment or any other consideration is made by tobacco manufacturers, importers, or sellers or any person acting on their behalf;⁹
- product information provided to entities within the tobacco trade, with access only to persons/entities who need the information for trading decisions, and only to the extent access is limited to those persons/entities;¹⁰ and
- tobacco manufacturers' newsletters destined for and distributed only to the manufacturers' employees, contractors, suppliers, and other tobacco-related business partners, and only to the extent their distribution is limited to such persons/entities.¹¹

Careful consideration should be given to whether these limited communications, recommendations, and actions should be acknowledged in the legislation as falling outside of the comprehensive ban. If not acknowledged, they might be interpreted as fitting within the definition of “tobacco advertising and promotion” or “tobacco sponsorship” and, consequently, within the scope of the ban. Acknowledging these as not covered by the ban can prevent the legislation from being considered over-broad. In addition, doing so should also make it clear that all communications, recommendations, or actions *not* so acknowledged are prohibited. On the other hand, acknowledging these can create opportunities for exploitation by the very clever tobacco industry and its allies.

Indicative list

The Appendix to the Guidelines provides an indicative, non-exhaustive list of tobacco APS falling within the scope of a comprehensive ban. Including the examples from this list in the legislation or implementing regulations, with any adaptation appropriate for the country's context, is advisable. This is because there are so many forms of tobacco APS that are indirect, hidden, and not easily recognized as such. The examples could be provided in the legislation with clear power given to the appropriate authority to expand the examples as it deems appropriate and useful. Alternatively, the legislation could authorize the appropriate authority to provide non-exhaustive examples of tobacco APS falling within the ban in implementing regulations. Whether the examples are provided in the legislation or in regulations, it is critical to clearly state that any examples given are only for illustrative purposes and are in no way meant to be exhaustive.

3. REQUIREMENTS FOR TOBACCO APS NOT BANNED OR NOT YET BANNED

⁹ Guidelines, paras 29-31. As provided in Guidelines para. 29, these depictions could be made subject to a requirement for the inclusion of appropriate warnings or disclaimers prescribed by the government. When tobacco is depicted in entertainment media products, anti-tobacco-advertising and other requirements and prescriptions specified in Guidelines para. 31 should be imposed.

¹⁰ Guidelines, para. 33.

¹¹ Guidelines, para. 34.

To implement FCTC Article 13.4, domestic legislation should impose the following requirements with respect to any form of tobacco APS not banned or not yet banned:

- a prohibition of the use of any term, descriptor, trademark, emblem, marketing image, logo, color, figurative or any other sign that promotes a tobacco product or tobacco use directly or indirectly by any means that are false, misleading, deceptive, or likely to create an erroneous impression about the characteristics, health effects, hazards or emissions of any tobacco product, or about the health effects or hazards of tobacco use, including, but not limited to, use of the terms or signs indicating the terms “low tar,” “light,” “ultra-light,” “mild,” “extra,” “ultra,” and other terms in any language that may be misleading or create an erroneous impression;¹²
- a requirement that prescribed warnings/messages consistent with required pack warnings/messages appear on all tobacco APS in equal prominence to the APS;¹³ and
- a requirement that businesses in the tobacco industry report to the government periodically and upon request the information required by FCTC Art. 13.4(d) and outlined in paragraph 41 of the Guidelines with respect to any tobacco APS in which they engage.¹⁴

4. IMPOSING LEGAL DUTIES OF COMPLIANCE ON ALL PERSONS OR ENTITIES INVOLVED IN THE ENTIRE MARKETING CHAIN

It is critical that the legislation create a legal duty of compliance on *all* persons/entities responsible for tobacco APS. The duties imposed will depend on the role played. The Guidelines identify the following responsible persons/entities and their duties:

- *initiators*, who should bear primary responsibility for compliance and who should be prohibited from initiating any tobacco APS;¹⁵
- *producers and publishers*, who should be prohibited from including tobacco APS in the content they produce, publish, or make accessible;¹⁶
- *entities that disseminate communications content*, who should have a duty to remove prohibited content or take reasonable efforts to disable access to it, when technically possible, when they are in a position to control the publication or dissemination of the

¹² FCTC Art. 13.4(a); Guidelines, para. 39.

¹³ FCTC Art. 13.4(b); Guidelines, para. 40.

¹⁴ The Guidelines recommend that all Parties, even those that consider their ban comprehensive, implement this requirement.

¹⁵ Guidelines, para. 53. Initiators may include, but are not limited to, tobacco manufacturers, wholesale distributors, importers, and retailers, and their agents and associates.

¹⁶ Guidelines, para. 56. Producers and publishers include, but are not necessarily limited to, tobacco companies (e.g., with respect to online content), advertising agencies, designers, publishers of printed materials, broadcasters and producers of television and radio programs, games, and live performances, and internet, mobile phone, satellite, and game content producers.

content and when they become aware of or are in a position to become aware of the prohibited content;¹⁷

- *persons or entities engaged in tobacco APS as media and events organizers, sportspeople, celebrities, film stars, and other artists, who should be prohibited from so engaging in tobacco APS;*¹⁸ and
- *persons or entities who make, receive, or facilitate any sponsorship contribution, who should be prohibited from making, receiving, or facilitating such contributions.*¹⁹

5. SPECIFYING MONITORING AND ENFORCEMENT AUTHORITIES, POWERS, AND DUTIES

Legislation should specify the authority that has the power and duty to monitor and inspect for compliance and initiate enforcement action, including investigating and resolving complaints. The authority's powers should include entering relevant premises, obtaining evidence, and seizing unlawful advertising and promotion.²⁰

6. PROVIDING A RANGE OF PENALTIES

Legislation should provide a range of penalties that are sufficiently large to deter violations, that are commensurate with the nature and seriousness of the violation and the legal duty of the violator, and that increase for repeat violations.²¹ Penalties should be applied against corporate entities and managers, directors, officers, and/or legal representatives of corporate entities when they are responsible for the conduct.²²

Appropriate penalties may include:²³

- fines;
- business or operating licensure sanction;
- public notification of violations, with the associated costs levied against the violator(s); and
- possible imprisonment in the case of frequent or flagrant violations.

¹⁷ Guidelines, paras. 55-59. Disseminators include entities distributing content through any communications technology (including, but not limited to, telecommunications and direct broadcast satellite companies and entities responsible for providing internet service or that serve as internet content hosts or navigators) or through any other media.

¹⁸ Guidelines, para. 56.

¹⁹ Guidelines, para. 55.

²⁰ Guidelines, para. 65.

²¹ Guidelines, para. 60.

²² Guidelines, para. 62. This would include entities responsible for the conduct of related corporate entities outside the territory but with an effect within the territory.

²³ Guidelines, paras. 60 and 61.

In addition, ordering corrective action — such as removal of the tobacco APS, confiscation and destruction of materials and items containing prohibited tobacco content, and funding of counter-advertising, all at the cost of the violator(s) — should be authorized.²⁴

7. EMPOWERING AND ENABLING CIVIL SOCIETY

Civil society can play an important monitoring and enforcement role. Legislation should provide that interested persons and civil society organizations may initiate complaints and legal action to compel compliance.²⁵ This would include, as appropriate, legal action against the government if it fails to fulfill its monitoring, inspection, or enforcement duties.

8. REQUIRING EFFECTIVENESS EVALUATION

Imposing a duty on the responsible authority to evaluate the effectiveness of the inspection and enforcement program and of the law's provisions will enable the government to identify and take or recommend action to correct any barriers to enforcement and weaknesses in the law. This would be consistent with the provisions of the FCTC Article 8 and 11 Guidelines calling for effectiveness monitoring and evaluation. Evaluation information should be readily available to the public.

9. GRANTING THE APPROPRIATE AUTHORITY SUFFICIENTLY BROAD REGULATORY POWER

The appropriate authority should be given power to address a broad range of matters in regulations, including, but not necessarily limited to: expanding any indicative list of covered tobacco APS that may be provided in the law, as it deems useful; prescribing warning/message requirements, and the conditions for their use, for any tobacco APS not banned or not yet banned; prescribing tobacco industry reporting requirements (content, frequency, format, and all other details); and any other matter necessary or appropriate for implementing the legislation. Care should be taken to avoid inadvertently limiting the authority's regulatory power, such as by granting only some powers and expressing them in an exhaustive way.

ADDITIONAL PROVISIONS

The following can be helpful in preventing or resolving interpretation issues, ensuring the ability of the strongest tobacco advertising, promotion, and sponsorship measures to emerge in a country, and facilitating civil society's role as an active partner in monitoring.

²⁴ Guidelines, para. 61.

²⁵ Guidelines, paras. 66 and 67.

- ***Statement of rights***

A rights statement can be helpful in providing context for interpreting any specific provision. Such a statement might highlight the inherently deceptive and misleading nature of tobacco APS and assert that all persons, particularly youth who are especially influenced by tobacco marketing, have the right to be protected from exposure to tobacco APS.

- ***Public access to relevant information***

In addition to providing the public with ready access to relevant information from monitoring and enforcement data and evaluation reports, making information from tobacco industry reports to the government accessible to the public can engage the support of the community and help civil society play a robust monitoring role.

- ***Sub-national authority to enact stronger measures***

Where applicable, providing sub-national jurisdictions with clear authority to enact and implement measures that are stronger and more protective than the measures provided in the national legislation will allow the strongest measures to emerge in a country. Stronger sub-national legislation can create pressure to strengthen national legislation. Care should be taken to ensure that language used in the legislation does not inadvertently restrict sub-national jurisdictions' ability to enact and implement stronger measures.

- ***Waiver of fees and cost recovery for public interest litigation***

Providing for waiver of court fees and recovery of litigation costs can enable civil society to exercise any authority given it to undertake legal action to compel compliance.

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