

**Comments and Recommendations on  
Draft Guidelines on  
the Implementation of Article 13 of  
the WHO Framework Convention on  
Tobacco Control**


**( Tobacco Advertising, Promotion and Sponsorship )**

**October 2008**



**Bureau of Health Promotion  
Department of Health**

**Asian Center for WTO and International Health Law and Policy  
National Taiwan University College of Law**



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“DRAFT GUIDELINES ON THE  
IMPLEMENTATION OF ARTICLE 13 OF THE WHO  
FRAMEWORK CONVENTION ON TOBACCO  
CONTROL (TOBACCO ADVERTISING,  
PROMOTION AND SPONSORSHIP)”  
(FCTC/COP/3/9)**

CONTENTS

<b>Preface</b> .....	<b>1</b>
<b>PURPOSE AND OBJECTIVES</b> .....	<b>3</b>
Scope of a comprehensive ban.....	3
Retail sale and display .....	4
Packaging and product features .....	5
Internet sales .....	7
Brand stretching and brand sharing .....	8
Obligations related to Article 13.4 of the Convention .....	16
Consistency .....	18
Responsible entities .....	22
Domestic enforcement of laws on tobacco advertising, promotion and sponsorship .....	27
Public education and community awareness .....	32
International collaboration .....	33



**Comments and Recommendations on  
“Draft guidelines on the implementation of Article 13 of  
the WHO framework convention on tobacco control  
(tobacco advertising, promotion and sponsorship)”  
(FCTC/COP/3/9)**

Preface

We are delighted to see the issuance of the “Draft guidelines on the implementation of Article 13 of the WHO framework convention on tobacco control (tobacco advertising, promotion and sponsorship)” (FCTC/COP/3/9) (hereinafter “Draft guidelines on the implementation of Article 13 of FCTC”). This is a significant progress made by the working group established by the Conference of the Parties to the WHO Framework Convention on Tobacco Control, at its second session.

The Asian Center for WTO and International Health Law and Policy of National Taiwan University College of Law is formed by a group of experts in international health law. We are very keen to observe the development of international regime for the control of tobacco. Thus, we carefully review the draft and it is our belief that the mandate of the working group has been successfully achieved. Nevertheless, we also believe that it is the interest of international community to see the perfection of the draft through additional inputs offered from people outside the working group.

This booklet is prepared with such purpose of offering our inputs so that some different views will also be taken into consideration. They are made in accordance with the order of the issues discussed in “Draft guidelines on the implementation of Article 13 of FCTC”, with the original paragraphs being included in each column, followed by our reasoned comments and recommendations. These comments and recommendations are discussed and written by a group of experts and persons with the interest in the field of tobacco control in Taiwan after many rounds of deliberation. This is not our first time to make comments and recommendations on the FCTC documents. In June 2008, we made our Comments and Recommendations on “Drafting and Negotiation of a Protocol on Illicit Trade in Tobacco Products”. This document was sent to the experts and ministries of health

all over the world and we have received some positive responses. We do hope that our constant and continuous efforts will be of help to enhance the negotiations and to perfect the future protocol on illicit trade as well as other documents.

## PURPOSE AND OBJECTIVES

### Scope of a comprehensive ban

#### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

##### Para. 8

*It is important to note that both “tobacco advertising and promotion” and “tobacco sponsorship” cover promotion not only of particular tobacco products but also of tobacco use generally; not only acts with a promotional aim but also acts that have a promotional effect or are likely to have a promotional effect; and not only direct promotion but also indirect promotion. “Tobacco advertising and promotion” is not restricted to “communications”, but also includes “recommendations” and “actions”, which should cover at least the following categories: (a) various sales and/or distribution arrangements (b) hidden forms of advertising or promotion, such as insertion of tobacco products or tobacco use in various media contents; (c) association of tobacco products with events or with other products in various ways; (d) promotional packaging and product design features; and (e) production and distribution of items such as sweets and toys or other products that resemble cigarettes or other tobacco products. It is also important to note that the definition of “tobacco sponsorship” covers “any form of contribution”, financial or otherwise, regardless of how or whether that contribution is acknowledged or publicized.*

#### **Comments and recommendations:**

Since “tobacco company or brand name” also has an advertising effect, it is suggested to extend the coverage of Paragraph 8 so as to include “tobacco company or brand name” as the contents of “tobacco advertising and promotion”. For example, the term “association of tobacco products with events or with other products” in category (c) should be replaced by “association of tobacco products, tobacco company or brand name with events or with other products”.

## Retail sale and display

### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

#### Para. 12

*Display of tobacco products at points of sale in itself constitutes advertising and promotion. Display of products is a key means of promoting tobacco products and tobacco use, including by stimulating impulse purchases of tobacco products, giving the impression that tobacco use is socially acceptable, and making it harder for tobacco users to quit. Young people are particularly vulnerable to the promotional effects of product display.*

#### Para. 13

*To ensure that points of sale of tobacco products do not have any promotional elements, Parties should introduce a total ban on any display and on the visibility of tobacco products at points of sale, including fixed retail outlets and street vendors. Only the textual listing of products and their prices, without any promotional elements, would be allowed. As for all aspects of Article 13, the ban should also apply in ferries, airplanes, ports and airports.*

### **Comments and recommendations:**

For the purpose of eradicating the promotional elements of tobacco products and reducing tobacco consumption, the carrying bags of tobacco products should also be subject to strict regulation, in addition to only paying attention to the display of tobacco products at points of sale. For example, tobacco companies should not be allowed to print their brand names on the carrying bags, which are most commonly used by duty free shops at airports. Likewise, transparent carrying bags should be banned because people can easily see the brand name on the tobacco products inside. If a carrying bag is durable and can be used repeatedly, the promotional effects could be amplified. We urge not to ignore the regulation on the carrying bags.



## Packaging and product features

### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

#### Para. 15

*Packaging is an important element of advertising and promotion. Tobacco pack or product features are used in various ways to attract consumers, promote products, and cultivate and promote brand identity, for example by using logos, colours, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products.*

#### **Comments and recommendations:**

Apart from the various ways mentioned in Paragraph 15, tobacco companies may also attract consumers, promote products, and cultivate and promote brand identity by using slogan, sound and fragrance on or in packs or on individual cigarettes or other tobacco products. These are also important elements of advertising and promotion; therefore, should be included in the scope of prohibition.

**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”****Para. 16**

*The effect of advertising or promotion on packaging can be eliminated by requiring plain packaging: black and white, or two other contrasting colours, as prescribed by national authorities; nothing other than a brand name, a product name and/or manufacturer’s name, contact details and the quantity of product in the packaging, without any logos or other features apart from health warnings, tax marks and other government-mandated information or markings; prescribed font style and size; and standardized shape, size and materials. There should be no advertising or promotion inside or attached to the package or on individual cigarettes or other tobacco products.*

**Comments and recommendations:**

Certain warning pictures printed on cigarette packs which demonstrate the adverse health consequences or other damages resulting from smoking, should constitute exceptions to plain packaging prescribed in Paragraph 16.

## Internet sales

### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

#### Para. 19

*The most direct way of avoiding tobacco advertising or promotion on the Internet is to ban tobacco sales on the Internet. The ban should apply not only to entities that sell the products but also to others, including credit card companies, that facilitate payment and postal or delivery services for the products.*

#### **Comments and recommendations:**

1. We recognize banning tobacco sales on the Internet would be the most direct way to avoid tobacco advertising or promotion on the Internet. Nevertheless, the ambit of this provision should be described in a more precise manner in order to justify its legitimacy. For example, since website managers have the power to choose and supervise commodities, it should be reasonable to bring online auction and shopping websites into this provision.
2. Although Internet sales cannot be conducted without the participation of credit card companies or banks, these financial institutions can hardly have access to the objects of internet transactions; therefore, they may unintentionally facilitate payment and postal or delivery services for tobacco products. Under such circumstances, it might not be reasonable to include them in the prohibition.
3. If the Convention expects to have overall control over tobacco advertising or promotion on the Internet, each and every country in the world should be encouraged to adopt the same measures set out in this Protocol, for the purpose of effectively controlling cross-border sales of tobacco products.

## **Brand stretching and brand sharing**

### **Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”**

#### **Para. 22**

*“Brand stretching” occurs when a tobacco brand name, emblem, trademark, logo or trade insignia or any other distinctive feature (including distinctive colour combinations) is connected with a non-tobacco product or service in such a way that the tobacco product and the non-tobacco product or service are likely to be associated.*

#### **Comments and recommendations:**

In addition to the circumstances stipulated in Paragraph 22, it would be more appropriate to extend the definition of “brand stretching” to any other situations in which distinctive features of tobacco product are connected with any “non-tobacco event” in such a way that the tobacco product and the “non-tobacco event” are likely to be associated.

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**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”*****Corporate social responsibility*****Para. 25**

*It is increasingly common for tobacco companies to seek to portray themselves as good corporate citizens by making contributions to deserving causes or otherwise promoting “socially responsible” elements of their business practices.*

**Para. 26**

*Some tobacco companies make financial or in-kind contributions to organizations, such as community, health, welfare or environmental organizations, either directly or through other entities. Such contributions fall within the definition of tobacco sponsorship in Article 1(g) and should be prohibited as part of a comprehensive ban, because the aim, effect or likely effect of such a contribution is to promote a tobacco product or tobacco use either directly or indirectly.*

**Para. 27**

*Tobacco companies may also seek to engage in “socially responsible” business practices (such as good employee-employer relations or environmental stewardship), which do not involve contributions to other parties. Promotion to the public of such otherwise commendable activities should be prohibited, as their aim, effect or likely effect is to promote a tobacco product or tobacco use either directly or indirectly. Public dissemination of such information should be prohibited, except for purposes of required corporate reporting (such as annual reports) or necessary business administration (e.g. for recruitment purposes and communications with suppliers).*

**Para. 28**

*Tobacco industry public education campaigns, such as “youth smoking prevention campaigns”, should be prohibited on the basis that they involve*

*“contributions” when implemented by other parties or represent corporate promotion if conducted by the industry itself.*

***Recommendation***

*The Parties should ban contributions from tobacco companies to any other entity for “socially responsible causes”, as this is a form of sponsorship. Publicity given to “socially responsible” business practices of the tobacco industry should be banned, as it constitutes advertising and promotion.*

**Comments and recommendations:**

1. The provisions in this Article only ban contributions from tobacco companies to any other entity for “socially responsible causes”. However, not only tobacco companies but also people owning or managing these companies (such as executives, administrators, and managers) are also in a position to make contributions to deserving causes or otherwise promote “socially responsible” elements of their business practices. Thus, we are of the opinion that individuals in charge of the tobacco companies should also be subject to this Article.
2. With regard to Paragraph 26, the scope of the organizations, which are prohibited from receiving contributions from tobacco companies, should be expanded so as also to cover the government, educational organizations and research institutes.
3. The exceptions for “recruitment purposes” and “communications with suppliers” in Paragraph 27 are potentially too broad because with these exceptions the tobacco companies can easily justify their public dissemination which this Paragraph intends to prohibit. Therefore, we are of the view that, concerning the second half of Paragraph 27, “communications with suppliers” should not be treated as “public communications” and they should be prohibited. Similarly, if the recruitment would have such an effect of inducing tobacco product use, then it should not be deemed as an exception to tobacco promotion. Also, even it is about the required corporate reporting, the tobacco products should never be disclosed to the public because of the promotional effects.

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**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”*****Legitimate expression*****Para. 29**

*Implementation of a comprehensive ban on tobacco advertising, promotion and sponsorship should not prevent legitimate journalistic, artistic or academic expression or legitimate social or political commentary. Examples include news images with coincidental tobacco-related content in the background, the depiction of historical personalities or presentation of views on regulation or policy. Nevertheless, appropriate warnings or disclaimers may be required.*

**Para. 30**

*In some cases, journalistic, artistic or academic expression or social or political commentary may contain elements that are not justified for editorial, artistic, academic, social or political reasons and must be regarded as advertising, promotion or sponsorship rather than genuine editorial, artistic or academic content or genuine social or political commentary. This is obviously the case if an insertion is made for commercial, tobacco-related reasons, for example, paid placement of tobacco products or images in the media.*

**Comments and recommendations:**

There is no conflict between the exception of legitimate expression and the ban on public dissemination of tobacco companies’ “socially responsible activities” because Paragraph 30 deals with the prohibition of placement marketing while Paragraph 27 deals with prohibition of dissemination of tobacco companies’ social responsibility.

## **Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”**

### ***Depictions of tobacco in entertainment media***

#### **Para. 31**

*The depiction of tobacco in entertainment media products, such as films, theatre and games, can strongly influence tobacco use, particularly among young people. Therefore, Parties should take the following measures:*

- Implement a mechanism requiring that when an entertainment media product depicts tobacco products, use or imagery of any type, the responsible executives at each company involved in the production, distribution or presentation of that entertainment media product certify that no money, gifts, free publicity, interest-free loans, tobacco products, public relations assistance or anything else of any value has been given in exchange for the depiction.*
- Prohibit the depiction of identifiable tobacco brands or tobacco brand images in association with, or as part of the content of, any entertainment media product.*
- Require the display of prescribed anti-tobacco advertisements at the beginning of any entertainment media product that depicts tobacco products, use or images.*
- Implement a ratings or classification system that takes into account the depiction of tobacco requiring adult ratings which restrict access of minors) and that ensures that entertainment media aimed at children (including cartoons) does not depict tobacco products, use or imagery.*

#### ***Recommendation***

*Parties should take particular measures concerning the depiction of tobacco in entertainment media products, including requiring certification that no benefits have been received for any tobacco depictions, prohibiting the use of identifiable tobacco brands or imagery, requiring anti-tobacco advertisements and implementing a ratings or classification system that*



*takes tobacco depictions into account.*

**Comments and recommendations:**

One of the tobacco advertisement strategies is paying celebrities to smoke a specific brand of cigarette in their daily lives or to promote that cigarette to the public in mass media. This tobacco advertisement strategy does not squarely fall into the scope of this Paragraph nor can be regulated in the current draft. We are of the view that paying celebrities for tobacco promotion in daily lives should be regulated separately. We also share the opinion that any act with promotional effects should be prohibited if the act was conducted in exchange for remuneration.

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**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”*****Communication within the tobacco trade*****Para. 32**

*The objective of banning tobacco advertising, promotion and sponsorship can usually be achieved without banning communications within the tobacco trade.*

**Para. 33**

*Any exception to a comprehensive ban on tobacco advertising, promotion and sponsorship for the purpose of providing product information to actors within the tobacco trade should be defined and applied strictly. Access to such information should be restricted to those persons who make trading decisions and who consequently need the information.*

**Para. 34**

*Tobacco manufacturers’ newsletters can be exempted from the comprehensive ban on tobacco advertising, promotion and sponsorship, but only if they are destined exclusively for the manufacturer’s employees, contractors, suppliers and other business partners and only to the extent that their distribution is limited to those persons or entities.*

***Recommendation***

*Any exception to a comprehensive ban on tobacco advertising, promotion and sponsorship to allow communication within the tobacco trade should be defined and applied strictly.*

**Comments and recommendations:**

1. We notice that the exception for “communications with suppliers”, which is stated as an exception to Tobacco companies’ public dissemination of “socially responsible business activities” in Paragraph 27, has been reiterated in

Paragraph 32.

2. We are of the view that the definition of newsletter should be clarified; otherwise many advertisements might be circulated under the disguise of “newsletter” for the purpose of promotion.
3. We suggest that the scope of “employee” should be limited to the management level since they, and only they, have the need to know tobacco industry information for the purpose of business operations. Non-management employees who could also be smokers or potential smokers should not be allowed to have access to the documents. Otherwise it would result in such situations where promotional activities are made with regard to the workers of tobacco companies.
4. Since the main function of newsletters is to exchange information, there is no justification for advertising and promotional information carried in the newsletter. In other words, newsletter should not be exempted from the comprehensive ban on tobacco advertising, promotion and sponsorship.

## Obligations related to Article 13.4 of the Convention

### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

#### *Constitutional principles in relation to a comprehensive ban*

##### **Para. 40**

*Parties should consider giving health or other warnings and messages accompanying any tobacco advertising, promotion and sponsorship at least equal prominence as the advertising, promotion or sponsorship. The content of the required warnings and messages should be prescribed by the relevant authorities and should effectively communicate the health risks and addictiveness of tobacco use, discourage the use of tobacco products and increase motivation to quit tobacco use. In order to maximize their effectiveness, the warnings or other messages required by Parties under Article 13.4(b) of the Convention should be consistent with the warnings or other messages on packaging that Parties require under Article 11.*

##### **Para. 41**

*Parties should require disclosure by the tobacco industry to relevant governmental authorities of any advertising, promotion and sponsorship in which it engages. The disclosures should be made at regular intervals prescribed by law and in response to specific requests. They should include, both in total and by brand, information about:*

- the kind of advertising, promotion or sponsorship, including its content, form and type of media;*
- the placement and extent or frequency of the advertising, promotion or sponsorship;*
- the identity of all entities involved in the advertising, promotion and sponsorship, including advertising and production companies;*
- in the case of cross-border advertising, promotion or sponsorship originating from a Party’s territory, the territory or territories in which it is intended to be, or may be, received; and*

- *the amount of financial or other resources used for the advertising, promotion or sponsorship.*

### **Comments and recommendations:**

1. We suggest that the word “should consider” in Paragraph 40 be replaced with “shall” to emphasize its essence as an obligation.
2. An independent regulation regarding the disclosure of information of cross-border advertising should be inserted to supplement Paragraph 41, Point 4. In the situation of cross-border advertising, if Country A does not have a comprehensive ban while Country B imposes an overall ban concerning tobacco advertisement and promotion, Country A should have an obligation to request its tobacco companies to comply with the regulations of Country B or to provide relevant information to Country B, even though it does not prohibit tobacco advertisement in its own territory. In other words, while the receiving country has the right to ban tobacco advertising according to its domestic law, the originating country also has the obligation to request its companies to avoid such behaviors.
3. We are of the view that making the information available to the public might have unintended consequence of adversely enhancing the effect of advertising; therefore, whether this provision is appropriate should be reconsidered.

## Consistency

### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

#### *Cross-border advertising, promotion and sponsorship originating from a Party’s territory (out-flowing material)*

##### **Para. 46**

*Article 13.2 of the Convention states that “a comprehensive ban shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory.”*

##### **Para. 48**

*The ban should also apply to placing tobacco advertising, promotion and sponsorship on the Internet or another cross-border communications technology by any person or entity within the territory of a Party whether the material is targeted to persons outside or inside that Party’s territory.*

### **Comments and recommendations:**

1. In the situation where the originating country does not ban tobacco advertising, promotion and sponsorship while the receiving country imposes a comprehensive ban on such activities, the originating country should bear the obligation to dissuade its enterprises from making advertising, promotion or sponsorship to the receiving country in order to accomplish the objective of a comprehensive ban on tobacco advertising, promotion and sponsorship.
2. The issue of constitutionality may arise in some jurisdictions if a comprehensive ban on tobacco advertising, promotion and sponsorship is introduced. Paragraph 48 inhibits tobacco advertising, promotion and sponsorship on the Internet and other cross-border communications whether the material is targeted to persons outside or inside that Party’s territory. Therefore, there might be a contradiction between Paragraph 48 of these

Guidelines and the Constitution which disallows a comprehensive ban on tobacco advertising, promotion and sponsorship.

**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”****Para. 50**

*A comprehensive ban on advertising, promotion and sponsorship originating from a Party’s territory should also ensure that a Party’s nationals – natural persons or legal persons – do not engage in advertising, promotion or sponsorship in the territory of another State irrespective of whether it is imported back to their State of origin.*

**Comments and recommendations:**

Even if one Party is not capable of imposing regulations of comprehensive ban due to freedom of speech protected by its constitution, it should still undertake the obligation of preventing its nationals from engaging in the business of advertising, promotion and sponsorship in the territory of other countries stipulated under Paragraph 50. Such extraterritorial advertising activities should not be regarded as within the scope of its constitutional protection.



**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”*****Cross-border advertising, promotion and sponsorship entering a Party’s territory*****Para. 52**

*Implementation of the ban should cover, for example, publications and products printed or produced in other States entering the territory of a Party or targeted to persons in that territory. Parties should consider carrying out sampling checks for imported consignments of printed publications. If such publications are printed, published or distributed by nationals of a Party or entities established in a Party’s territory, they should be held liable and the ban enforced to the fullest extent possible. The ban should also apply to all Internet content that is accessible within a Party’s territory, and to any other audio, visual or audiovisual material broadcast into or otherwise received in a Party’s territory, whether or not it is targeted to persons in the territory of that Party.*

**Comments and recommendations:**

A typical pattern of cross-border advertising of a tobacco company provided in Paragraphs 47-52 is to print publications and products within the territory of a Party in advance and then transport them to the territory of another Party. But we note that there exist other patterns. For example, tobacco companies in Country A can send the manuscripts to Country B through the Internet, and then print them out in Country B. Such pattern should also be considered as “cross-border” in Paragraph 52.

## Responsible entities

### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

#### Para. 53

*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.*

#### Para. 54

*Moreover, many other entities are involved in tobacco advertising, promotion and sponsorship and should also be held responsible.*

#### Para. 55

*Responsibility cannot be attributed in the same manner to all entities, as their involvement in the production, placement and dissemination of tobacco advertising, promotion and sponsorship varies. In the case of tobacco sponsorship, the responsible entities are those that make any relevant form of contribution, those that receive any relevant form of contribution and any intermediaries that facilitate the making or receiving of a relevant form of contribution. When tobacco advertising and promotion involve communication, the way in which entities should be held responsible depends on their role in the production and dissemination of the content of the communication and the possibilities they have to control it. The disseminator should be made responsible in so far as it is aware of, or was in the position to become aware of, the content of the advertising and promotion. This is true whatever media or communications technology is involved, but it applies especially to controlling content on the Internet and direct broadcast satellite.*

### **Comments and recommendations:**

1. In the situation mentioned in the previous comment, as to the subject of regulation, the content provider may be included

through the interpretation of Paragraph 54. As for the designer of advertisement, though it may be impossible for he/she to foresee that the design print will ultimately be used in another foreign country, since Paragraphs 53-55 do not require any subjective element, the designer should still be considered as being in violation of the Guidelines as long as the behaviors satisfy the objective elements.

2. We are of the opinion that the media as well as persons having certain level of participation in the dissemination of tobacco advertising, promotion and sponsorship should be subject to punishment if they are aware of the tobacco-advertising content. But of course the punishments that they receive should be less severe than those received by the Parties making the advertisement, promotion or sponsorship.
3. Suppose a magazine which contains tobacco advertisement is provided on board of an airplane flying from Country A to Country B. For the nationals of Country B who have access to the magazine, the provision of a magazine under such situation should be considered as falling within the category of “cross-border advertising, promotion and sponsorship” in Paragraphs 46-52. We suggest to include such situation in the Guidelines.

**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”****Para. 56**

*In relation to all forms of media and communications:*

- *Persons or entities that produce or publish content (e.g. advertising agencies, designers, publishers of newspapers and other printed materials, broadcasters and producers of films, television and radio programmes, games and live performances, and Internet, mobile phone, satellite and game content producers) should be banned from including tobacco advertising, promotion and sponsorship.*
- *Persons or entities, for example media and event organizers, sportspeople, celebrities, film stars and other artists, should be banned from engaging in tobacco advertising, promotion and sponsorship.*
- *Particular obligations (such as that to remove or disable access to content) should be applied to other entities involved in analogue or digital media and communication (such as social networking sites, Internet service providers and telecommunication companies), once they have notice of tobacco advertising, promotion and sponsorship.*

**Para. 57**

*A contract, agreement or arrangement concerning tobacco advertising, promotion or sponsorship should be held invalid if it is agreed in violation of a comprehensive ban.*

**Comments and recommendations:**

We are of the view that other than legal entities, the persons owing or managing the businesses, i.e. managers or directors, should also be held liable for the conduct of the corporate entity.

## **Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”**

### **Para. 58**

*In relation to the Internet, for example, there are five principal categories of responsible entity upon which bans or particular obligations should be imposed.*

- Content producers create the content or cause it to be created. These include tobacco companies, advertising agencies, and producers of television programmes, films and games that are distributed online. Content producers should be banned from including tobacco advertising, promotion or sponsorship in the content they produce.*
- Content publishers include publishers and entities that select content before it is made available to Internet users (e.g. Internet sites of newspapers or broadcasters). Content publishers should be banned from including tobacco advertising, promotion or sponsorship in the content they make available.*
- Content hosts are entities that control Internet-connected computer servers on which content is stored, including entities that aggregate content produced by others without selecting the content before they make it available to Internet users (such as social networking Internet sites). Content hosts should have an obligation to remove or disable access to tobacco advertising, promotion and sponsorship once they have received notice of the content.*
- Content navigators are entities that facilitate the location of content by users of communications services, such as Internet search engines. Content navigators should have an obligation to disable access to tobacco advertising, promotion and sponsorship once they have received notice of the content.*
- Access providers are entities that provide end-user access to communications services, such as Internet service providers and mobile telephone companies. Access providers should have an obligation to disable access to tobacco advertising, promotion and sponsorship once they have*

*received notice of the content.*

**Comments and recommendations:**

It is suggested to impose the obligation on Content hosts, Content navigators, and Access providers to disable the access to tobacco advertising, promotion and sponsorship through the sites or platforms they provide “once they are aware of the content or when they are in a reasonable position to be aware of the content”.

## Domestic enforcement of laws on tobacco advertising, promotion and sponsorship

### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

#### *Sanctions*

#### **Para. 60**

*Parties should introduce and apply effective, proportionate and dissuasive penalties (including fines, corrective advertising remedies and license suspension or cancellation). In order that the penalties imposed be effective deterrents, they should be graded and should be 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.*

#### **Comments and recommendations:**

1. The term “proportionate” suggests that the penalty measures should correspond in the degree or extent of the respective conditions in different Parties. The proportionality principle might limit the ability of individual Parties to adopt strengthened penalty to deter violation of law. We propose to delete this term in order to ensure that the effects of dissuasive penalties would not be decreased.
2. The use of “corrective advertising” measure might increase the exposure of specific tobacco companies or products and thus create the advertising or promotional effects. We suggest to use the “corrective advertising” measure with greater cautions.

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**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”****Para. 61**

*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, for example by:*

- *removal of the advertising, promotion or sponsorship;*
- *the publication of the court decision in a manner to be determined by the court and at the expense of the party or parties designated by the court; and*
- *funding of corrective or counter-advertising.*

**Comments and recommendations:**

1. Sanctions (Penalties) should be imposed in the event of the first infringement has been found. There seems no solid ground to impose sanctions upon illegal tobacco companies until the second infringement takes place.
2. The sanction with respect to “the publication of the court decision” may incur the unexpected consequence that more consumers would be aware of specific tobacco companies or products, and thus may lead to the result that the tobacco companies or their products would be indirectly made known to more people. We are of the opinion that it might not be an appropriate measure.
3. The approach of “funding of corrective or counter-advertising” will involve financial supports or assistance. It seems inconsistent with the fundamental principle of a comprehensive ban on tobacco sponsorship.



**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”****Para. 62**

*Sanctions should be applied to the conduct of entities and not only to individuals (including corporate entities that can be held responsible for the conduct of related corporate entities outside the territory but with an effect within the territory). 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.*

**Comments and recommendations:**

This Paragraph provides that the sanctions should be applied to individuals such as managers and directors; however, in contrast, Paragraph 56 states that the responsibility should not lie on individuals. There appears to exist a contradiction between these two Paragraphs and it requires further clarification.

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**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”****Para. 63**

*Licensing of tobacco manufacturers, wholesale distributors, importers and retailers can be an effective method for controlling advertising, promotion and sponsorship. A licence would be granted or renewed only if the applicant could ensure compliance with the legal requirements. In cases of noncompliance, the license could be withdrawn for a certain time or cancelled. For responsible entities not directly involved in producing or selling tobacco, e.g. broadcasters, when such entities are required to be licensed, compliance with the provisions on tobacco advertising, promotion and sponsorship should be included in the criteria for granting, renewing, suspending or revoking a license.*

**Comments and recommendations:**

We suggest that the contents of the provisions of this Paragraph should also be included in license-related provisions under the Protocol on Illicit Trade in Tobacco Products.

**Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”*****Monitoring, enforcement and access to justice*****Para. 65**

*Parties should designate a competent, independent authority to monitor and enforce the laws and entrust it with the necessary powers and resources. This agency should have the power to investigate complaints, seize unlawful advertising or promotion and pronounce on complaints and/or initiate appropriate legal proceedings.*

**Comments and recommendations:**

Conceptually, it seems likely to cause practical problems to implement the “seizure” of advertising and promotion. It is suggested that the issue of cease and desist orders or injunctions aimed at preventing further conduct of unlawful advertising or promotion would be more appropriate.

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## Public education and community awareness

### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

#### Para. 69

*In the spirit of Article 12 of the Convention,<sup>1</sup> Parties should promote and strengthen public awareness of tobacco advertising, promotion and sponsorship in all sectors of society, using all available communication tools. Parties should, inter alia, adopt appropriate measures to promote broad access to effective, comprehensive educational and public awareness programmes that underline the importance of a comprehensive ban, educate the public concerning its necessity, and explain why advertising, promotion and sponsorship by the tobacco industry is unacceptable.*

#### **Comments and recommendations:**

To achieve the objective of a comprehensive ban on tobacco advertisement, the increase of public awareness and appropriate education on the hazards of tobacco are crucial. We suggest that the health-related programmes concerning the use of tobacco, including the health threats caused by tobacco use and various preventive measures, should be incorporated into elementary school and high school curriculum. As such, it would enable teenagers to have correct understanding on the hazards of tobacco and preventing them from getting addictive in their youth.

## International collaboration

### Original texts of “Draft guidelines on the implementation of Article 13 of FCTC”

#### Para. 72

*The effectiveness of efforts to eliminate tobacco advertising, promotion and sponsorship depends not only on the initiatives undertaken by individual Parties but also on the extent to which Parties cooperate in addressing tobacco advertising, promotion and sponsorship. Effective international cooperation will be essential to the elimination of both domestic and cross-border tobacco advertising, promotion and sponsorship.*

#### Para. 73

*Parties to the Convention already have undertaken commitments with respect to international cooperation, including under Article 13.6 (Cooperation in the development of technologies and other means necessary to facilitate the elimination of cross-border advertising), Article 19 (Liability); Article 20 (Research, surveillance and exchange of information), particularly Article 20.4 (Exchange of publicly available, scientific, technical, socioeconomic, commercial and legal information, as well as information regarding the practices of the tobacco industry); Article 21 (Reporting and exchange of information), Article 22 (Cooperation in the scientific, technical, and legal fields and provision of related expertise) and Article 26 (Financial resources).*

#### Para. 74

*In addition to the recommendations in these guidelines, the working group is making further recommendations to the Conference of the Parties on any other measures that would contribute to the elimination of cross-border advertising, promotion and sponsorship (see Annex 3). Recommendations are made with respect to facilitation of the exchange of information and other cooperation between Parties. If the Conference of the Parties decides to establish measures designed to facilitate the exchange of information and other cooperation between Parties with respect to cross-border advertising, promotion and sponsorship, for example as outlined in Annex 3, the working group recommends that consideration also be given to the benefits*

*of applying such measures to domestic tobacco advertising, promotion or sponsorship, recognizing that Parties would benefit from sharing information, experience and expertise in respect of all tobacco advertising, promotion and sponsorship, not only cross-border tobacco advertising, promotion and sponsorship.*

### **Comments and recommendations:**

For the purpose of promoting all forms of international collaboration, Parties should be strongly urged in the Guidelines to engage in cooperation with Non-Parties. Non-Parties should also be encouraged in the Guidelines to enter into consultation with Parties for the purpose of developing any kinds of collaboration schemes, projects or agreements which would help the control of promotion, advertisement and sponsorship.

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**THE COMMENTS AND RECOMMENDATIONS**

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Comments and Recommendations on  
Draft Guidelines on the Implementation of Article 13 of  
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(Tobacco Advertising, Promotion and Sponsorship)



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