



Descriptor Regulations

Update to Legco Bills Committee May 23, 2006



Smoking (Public Health) (Amendment) Bill 2005

Proposed S.10(3)

- Any manufacturer of cigarettes ... who sells, offers for sale or possesses for the purpose of sale any cigarettes ... which have on their packet or their retail container the words “light”, “lights”, “mild”, “milds”, “low tar”, “醇”, “焦油含量低”, or other words which imply or suggest that the cigarettes are less harmful than others, commits an offence ...



Draft Bill goes beyond international requirements

- Proposed s.10(3) constitutes an **absolute ban** on the words “low tar”, “light”, “special light” and “mild” etc.
- An absolute ban is the most drastic form of legislation possible and **goes beyond** Article 11 of the **FCTC** or the **European Union** requirements as confirmed by Dept of Justice.
- Proposed ban will prohibit both brand names (e.g. **MILD SEVEN**) and general descriptors (e.g. **MILD SEVEN Lights**).



WHO's Framework Convention

- Each Party shall ... adopt and implement, in accordance with its national law, effective measures to ensure that:
- Tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as “low tar”, “light”, “ultra-light”, or “mild”.
- Earlier version of FCTC prohibited specific words (i.e. absolute ban) ... “ the use of the terms ‘low tar’, ‘mild’, ‘light’ or any other similar term... conveying the impression that a tobacco product is less harmful than others shall be prohibited.” (2000 version of FCTC).



WHO's Framework Convention and HK

- Effective Measures must be in accordance with the laws in Hong Kong, i.e. Basic Law, Bill of Rights and laws protecting intellectual property rights. → Banning trademarks such as MILD SEVEN is against the Basic Law (Art. 105 ... “deprivation of private property”) and Bill of Rights etc.
- Effective measures are not required unless a term is false, misleading, deceptive or likely to create an erroneous impression. → Consumer research (Hong Kong, 2005) confirmed that hardly anyone view MILD SEVEN as less harmful.
- “Low tar”, “light”, “ultra light”, “mild” etc are illustrative only. There is no mandatory and absolute ban requirement. → “Low tar”, “light”, “ultra light”, “mild” etc are descriptors. MILD in MILD SEVEN is not.



International examples – no uniform approach

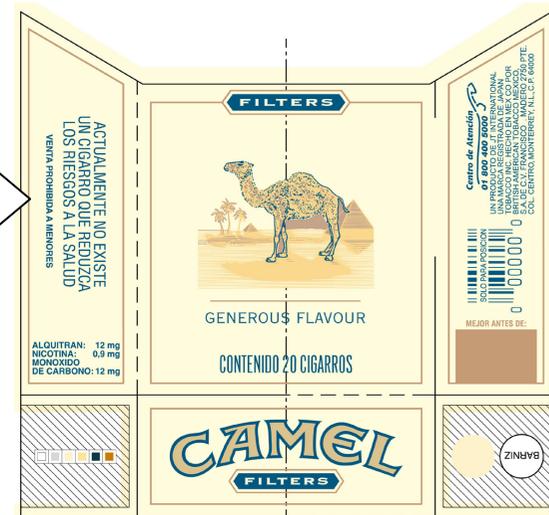
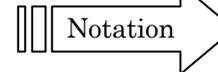
<u>Notation</u>	<u>Grandfather (Exemption)</u>	<u>Ban Descriptors which are false, misleading, deceptive or likely to create an erroneous impression</u>	<u>Ban specific words</u>	<u>No law published to apply to descriptors</u>
Mexico Japan	China Taiwan Hungary	EU Norway Iceland	Belgium Malta Israel	U.S.A. (non ratifying), Canada and many other countries

JT

Mexico - Notation

- Government and tobacco manufacturers came to an agreement to use notation.
- Manufacturers are required to print the following notice on every cigarette packet "*Actualmente No Existe Un Cigarro Que Reduzca Los Riesgos A La Salud*" ("At present there are no cigarettes that reduce health risks").

At present there are no cigarettes that reduce health risks.



JT

Japan - Notation

- Ministry of Finance Ministerial Decree 103 (13/11/2003)
 - When terms such as “low tar”, ”light”, “ultra light” or any other terms are used in the package, an explanation that a particular tobacco products is not less harmful than others must be displayed

The expression (mild, special lights) depicted in the product name on this package does not mean that the adverse effects of this product are less than those of other products.

Notation



The logo consists of the letters 'J' and 'T' in a stylized, bold, green font. The 'J' is on the left and the 'T' is on the right, both with a slight shadow effect.

Taiwan

Committee Agreement after 1st Reading

Art. 6

- " Light/mild cigarettes", "low tar" ... shall not be used as tobacco brand name or printed onto tobacco product containers. However, this provision shall not apply to tobacco brand names which are in existence prior to the enactment of this amendment bill.



Problems of an absolute ban

- Banning well established trademarks = deprivation of private property under Basic Law Art. 105 (*Benjamin Yu, Senior Counsel*)
- “Deprivation does not have to be accompanied by a corresponding acquisition by the state.” (*Court of Final Appeal, Hong Kong, 2004*)
- If a trademark is left with “no meaningful alternative use” after the ban, it is “de facto deprivation”. (*Dept of Justice paper, April 2006*)
- Fair and Balance test needs to be conducted and an absolute ban may fail the test (*Dept of Justice paper, April 2006*).
- If trademark owner launches judicial review, ban could be suspended and costs/compensation would be demanded from govt.



Revised proposal from government

Exempt trademarks + notation

- Existing trademarks will be exempted provided a notation is printed on the pack
- Descriptors will be banned on all new products

Our comments

- Though not a perfect solution, this is less problematic
- Consistent with a consumer research (2005) that notation is effective and “mild” in MILD SEVEN is not misleading (and hence not justified to prohibit)
- Exemption can be backdated
- Govt should conduct more public education on low tar/nicotine products