



THE TOBACCO INSTITUTE OF SOUTHERN AFRICA

Submission on Draft Regulations in terms of section 37(3) of the Namibian Tobacco Products Control Act, 2010

1. Introduction

- 1.1 The Tobacco Institute of Southern Africa (“TISA”) is the industry body representing tobacco growers, leaf merchants, leaf processors, manufacturers, importers and exporters of tobacco products in Southern Africa.
- 1.2 TISA has considered the draft regulations in terms of section 37(3) of the Tobacco Products Control Act, 2010. This written submission is made in response to the invitation to comment on the regulations published in the Namibian Government Gazette of 14 November 2011.
- 1.3 30 days have been provided for interested parties to comment on the draft regulations. In terms of The Namibian Interpretation of Laws Ordinance, 1920, days are calculated by excluding the first and including the last day. On this basis, comments must be submitted by Wednesday 14 December 2011.
- 1.4 TISA supports the objectives of the draft regulations and wishes to make positive, constructive recommendations to ensure they are reasonable, practical, enforceable and do not elicit unintended consequences. To this end, our submission addresses the following:
 - 1.4.1 Under point 2, we consider the progressive appropriation of the tobacco manufacturer’s intellectual property rights.
 - 1.4.2 Under point 3, we consider the size and placement of health messages, warnings and graphic pictorial health warnings.

- 1.4.3 Under points 4, 5 and 6, we explore the practicality of complying with the draft regulations, public place smoking and the rotation of the health warnings, pictures and pictograms and propose possible solutions.
- 1.4.4 Under point 7, we emphasise that the draft regulations in their current form will result in an unintended consequence of exacerbating the ever-increasing trade in illicit tobacco products.

2. Intellectual Property and Pack Space Appropriation

- 2.1 In recent years there has been a trend to increase the size of mandated warnings on tobacco packaging and to make those warnings graphic. The stated aim is to discourage the uptake of tobacco use and encourage smokers to quit, despite the fact that there is no reliable evidence that larger health warnings deter people from smoking.
- 2.2 For instance, Canada was the first country to introduce large, pictorial health warnings in 2001, going from 35% on the front and the back of the package to 50% on the front and the back of the package. Researchers who assessed the impact of that policy found that the new, larger health warnings had not had a statistically significant effect on either smoking rates, or consumption. The relevant study notes:

“Have the ‘heavy-duty’ warnings on cigarette packages in Canada had a significant impact on the prevalence or intensity of smoking in the period following their introduction? ... [W]e have not been able to detect any significant prevalence effects, much as the unconditional data suggest...”^[1]

^[1] Gospodinov N, Irvine IJ, Global health warnings on tobacco packaging: evidence from the Canadian experiment, B.E. Journal of Economic Analysis & Policy, Vol. 4, No. 1, 2004, pp. 1–21 at p. 16. Subsequent research conducted by University of Chicago Economics Professor Casey Mulligan has since confirmed the results of Gospodinov and Irvine. (See: Mulligan C, Smoking Behavior in Canada: Before and After the 2000 Tobacco Warnings, University of Chicago, 2011, commissioned by PMI and available upon request).

2.3 Intellectual property (IP) is a term referring to a number of distinct types of creations of the mind for which a set of exclusive rights are recognized. Common types of intellectual property rights include copyrights, trademarks, patents, designs, know-how and trade secrets in some jurisdictions. A trademark is a distinctive sign, or indicator, used by an individual, business organization, or other legal entity to distinguish its products or services from those of other entities. A trademark is defined in the Trade Marks in South West Africa Act 48 of 1973 as follows:

"trade mark", other than a certification mark, means a mark used or proposed to be used in relation to goods or services for the purposes of-

(a) indicating a connection in the course of trade between the goods or services and some person having the right, either as proprietor or as a registered user, to use the mark, whether with or without an indication of the identity of that person; and

(b) distinguishing the goods or services in relation to which the mark is used or proposed to be used, from the same kind of goods or services connected in the course of trade with any other person;

2.4 Trademarks in Namibia are not only protected by the Namibian Trade Marks in South West Africa Act, 1973, by the rights to property and to freedom of communication in terms of the Constitution of Namibia, but also internationally, by the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

2.5 Tobacco manufacturers own tobacco brands which are registered and protected trademarks. Tobacco manufacturers invest resources into developing these brands. The regulatory depiction of warnings, pictures and pictograms on the brand packaging contained in the draft regulations are, at a minimum, a dilution of their rights, or, at worst an expropriation of their property.

3. The size of graphic warnings and visibility

3.1 TISA concern

3.1.1 The phrase “*closely as possible resemble*” in **section 2(1)** is subjective and unclear.

3.1.2 **Annexure 1** of the draft regulations requires pictures and pictograms to cover not less than 60% of both the front and the back of a pack, although the pack designs set out in that Annexure go beyond that requirement and do not accord with the text of the draft regulations. In short, there appears to be no way of complying simultaneously with sections 2(1) and 2(3) on the one hand, and section 2(2) on the other. The prescripts are internally contradictory.

3.1.3 In addition, Annexure 1 of the draft regulations requires the remaining areas to “*bear the rest of the text*”. If this implies that the remaining areas be covered by additional textual health warnings, then we believe that this infringes on constitutional and intellectual property rights of the brand owner and is in contravention of Namibia’s international trade obligations under the WTO.

3.1.4 **Section 2** of the draft regulations, prescribes a number of pictures and pictograms as set out in **Annexure 2** for use on all packages containing tobacco products. We request that these pictures and pictograms be provided in a clearer format and higher resolution in order for all stakeholders to be able to properly assess the content thereof, as they are unclear in the current format.

3.2 TISA recommendation

3.2.1 We propose the following:

3.2.1.1 The front of the package to bear a text message of not more than **30%** of the package;

3.2.1.2 The back of the package to bear a picture or pictogram of not more than **30%** of the package; and

3.2.1.3 **15%** of the right panel for the tar and nicotine message.

Our proposals can be incorporated by deleting the diagrammatic representations of cigarette packets in Annexure 1 and all consequential references thereto as they are proportionately inaccurate and inconsistent with the associated text in the draft regulations.

We further propose that the text warnings set out in paragraph 2 of Annexure 2 be generic in order to ensure that they do not contradict the text messages featured as part of the pictures and pictograms displayed in paragraph 1 of Annexure 2.

We therefore propose that **sections 2 and 3(1) of Part 2** be amended as follows:

Part 2

Pictures, pictograms, health messages and warnings

2. *(1) Every package in which a tobacco product is sold on a retail basis must contain the following information:*

(2) A package referred to in sub-regulation (1) must reflect -

- (a) one picture or pictogram set out in paragraph 1 of Annexure 2 with the health message, surrounded by a border, to occupy not more than 30% of the rear panel of the external area of the package;*
- (b) one of the warnings set out in paragraph 2 of Annexure 2, surrounded by a border, to occupy not more than 30% of the front panel of the package; and*
- (c) the statement "This product contains nicotine, tar and other harmful chemicals" as set out in Annexure 3, occupying not more than 15% of the right panel of the package.*

(3) *Loose or pipe tobacco, single cigars, smokeless and oral tobacco, should contain one of the warnings set out in paragraph 2 of Annexure 2, surrounded by a border, to occupy not more than 30% of the bottom front panel of the package.*

(4) *Tobacco product packaging must 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.*

Print and appearance of pictures, pictograms, health messages and warnings

3. (1) *The health messages and warnings referred to in regulation 2(1) to be reflected on a package in terms of regulation 2 must be –*

a) in the official language of Namibia;

b) in Helvetica type;

c) in black, red or blue print on a white background;

d) in upper-case lettering; and

e) surrounded by a border that –

(i) is the same colour as the print used for the text of the message; and

TISA further proposes that the Ministry of Health and Social Services (MoHSS), consult with its citizens on the cultural appropriateness of the pictures and pictograms.

In **section 3(3)**, we noted a typing error. Reference is made to 2(1)(c) instead of 2(2)(c).

4. Practicality of compliance with the draft regulations

4.1 TISA concern – Section 5

4.1.1 **Section 5(b)** provides for the indication of the price of a tobacco product.

4.2 TISA recommendation – Section 5

4.2.1 We propose that the word *cost* is replaced with *price*, or alternatively, section 5(b) is replaced with:

“indicates availability and price;”

4.3 TISA concern – Section 7

4.3.1 **Section 7** of the draft regulations, prescribes that every retailer should prominently display a sign at the point of sale bearing the following wording: “We cannot, by law, sell tobacco products to anyone under the age of 18 years”. Such wording has to comply with section 3 of the draft regulations which prescribes a minimum size, font and colour.

4.4 TISA recommendation – Section 7

4.4.1 It is our respectful submission that the Ministry of Trade and Industry be included in the consultation process as these matters affect the retail sector, particularly the informal trade. For example, if an informal trader is not able to obtain the prescribed, printed signage required for compliance, they will be criminalised and their livelihood threatened.

4.4.2 For enforcement to be effective and rational, it needs to be applied consistently and across the board. With respect to the informal trade, which makes up such an

important sector of the economy, rigorous enforcement will be next to impossible. If regulations are to be effective and respected, they must not ignore the fact that an entire economic sector would *de facto* not fall within its ambit.

4.5 TISA concern – Section 9

4.5.1 **Section 9 (e), (f) and (g)** of the draft regulations, places a positive legal obligation on the owner or person in charge of such public place to, *inter alia*:

- lay a criminal charge against any person who refuses to comply after the prohibition has been explained;
- train all employees on how to handle persons found to be smoking in the public place.

4.6 TISA recommendation – Section 9

4.6.1 We propose that the MoHSS finds other methods to encourage its citizens to comply with the Act other than creating a positive legal obligation to lay criminal charges against one another. The unintended consequence is that the law will make criminals of many persons who are responsible for public places that do not comply. Further, the MoHSS should consider how its citizens will react to such a legal obligation.

4.7 TISA concern – Section 10

4.7.1 **Section 10** of the draft regulations prescribes the size of the packaging of tobacco products. TISA is concerned that the current draft is internally inconsistent, in that the existing section 10(a) provides that cigarettes must be sold in a package of a minimum of 20 cigarettes whilst the second section 10(a) provides for the packaging of single cigarettes.

4.7.2 We would like to point out that in section 10(b) of the draft regulations it is prescribed that the minimum size of loose tobacco to be sold should be 100g. The standard quantity of loose tobacco sold in Namibia is 12.5g. We are concerned that section

10(b) of the draft regulation could create an incentive for illicit traders to sell loose tobacco in the standard size of 12.5 grams without the required health warnings.

4.7.3 Another concern is how single sticks will be packaged.

4.7.4 We have noted a typing error as both the sub-paragraphs are numbered (a).

4.8 TISA recommendation – Section 10

4.8.1 We propose that section 10 be clarified or deleted.

4.9 TISA concern – Section 11

4.9.1 **Section 11(2)**, prescribes that certified copies of contracts should be lodged with the Permanent Secretary of the MOHSS.

4.10 TISA recommendation – Section 11

4.10.1 As the regulation aims to phase-out sponsorship and other contracts relating to advertisement or promotion within six months from the date the final regulations are published, we propose that where existing contracts contain a confidentiality clause, these affected stakeholders provide the Permanent Secretary with an affidavit listing all contracts and not certified copies of the contract itself. This will protect the sanctity of private agreements between persons, allow confidentiality clauses not to be breached and at the same time allow for the effective implementation of the regulations. We also propose that as such contracts will be phased out, section 11(2) will become redundant and the MoHSS could consider deleting the sub-section.

4.11 TISA concern – Section 14

4.11.1 **Section 14** of the draft regulations prescribes the method for testing of tar and nicotine. We agree with the ISO standards as set out in **paragraph 1 of Annexure 3**, however, we propose that reference to the years be removed as the test methods evolve and are updated regularly. The latest test method requirements may differ from

those dated and specified in the draft regulation causing an unnecessary conflict between old and new methodology.

4.11.2 TISA is concerned that the requirement as set out in **paragraph 2 of Annexure 3** regarding testing laboratories should refer to laboratories **accredited** for ISO testing methods.

4.12 TISA recommendation – Section 14

4.12.1 We further propose that **paragraph 2 of Annexure 3** be replaced by the following clause:

(2) Each manufacturer or importer must submit to the Permanent Secretary written certification that each brand variant has been tested in accordance with the ISO standard in a laboratory accredited for ISO testing methods;

4.13 TISA concern and recommendation – Phase-in period

4.13.1 We propose that the Permanent Secretary includes a phase-in period for the sector and other stakeholders to comply with the final regulations. Adapting packaging to new regulatory requirements cannot be done with short notice as new stock will have to be manufactured, shipped, imported and distributed. Retail should also be given sufficient time to phase-out existing stock. We propose a period of 18 months for all manufactured and imported products to comply with the final regulations.

5. Public place signs

5.1 TISA concern

5.1.1 **Section 8** of the draft regulations, contemplates the placement of A4-sized signs indicating “Smoking of Tobacco Products Prohibited” prominently at every entrance to every public place. A public place is defined in the Act as:

“...any indoor, enclosed or partially enclosed, area which is open to the public and includes a workplace, a club, a private dwelling, if that private dwelling is used for any commercial childcare activity or for schooling or tutoring, and a public conveyance.”

Further, **Section 9(a)** and **(b)** of the draft regulations, makes it obligatory to:

- display the provisions of **Sections 22 and 29 of the Act** next to or underneath every sign as contemplated in Section 8;
- display a picture or pictogram as set out in paragraph 1 of Annexure 2 of the draft regulations next to or underneath every sign as contemplated in Section 8;

Our understanding of this draft regulation is that each entrance to every shop, restaurant, bar, shopping mall, office, government building, bus, taxi, pre-school and school, etc, throughout Namibia will be required to display A4 size signs in perpetuity which include :

- a warning sign – “Smoking of Tobacco Products Prohibited”;
- display the provisions of sections 22 of the Act;
- display the provisions of section 29 of the Act; and
- underneath all of the above signs one picture or pictogram in paragraph 1 of Annexure 2 and one of the warnings set out in paragraph 2 of Annexure 2.

5.2 TISA recommendation

- 5.2.1 TISA believes the MoHSS needs to consult its citizens on the cultural appropriateness of the pictures and pictograms.
- 5.2.2 To avoid this unintended consequence, we propose that a public place should have one warning sign stating that “Smoking of Tobacco Products Prohibited”, makes reference to sections 22 and 29 of the Act and one warning sign set out in paragraph 2 of Annexure 2.

6. Rotation of health warnings, pictures and pictograms

6.1 TISA concern

- 6.1.1 **Section 3 (2)** of the draft regulations seeks to regulate the rotation of warnings on “*every successive fifty packages*”. This will not be technically possible on a high-speed, continuous production line.

6.2 TISA recommendation

- 6.2.1 We propose that Namibia considers adopting the standard used in South Africa and to retain the last phrase of section 3(2) of the draft regulations concerning “*random distribution*” if necessary.

Section 3(1)(h)(iii) of the Regulations relating to the labelling, advertising and sale of tobacco products 2 December 1994 (South African Tobacco Products Control Act, 1993) reads as follows:

...alternated in such a way so as to expose each warning on an equal quantity of advertisements for each brand or unit of packages, with a tolerance of 10% during each period of 12 months from the commencement of these regulations.

- 6.2.2 We would further like to include the phrase “*randomly distributed in all areas within Namibia*” after the word “*regulations*” to ensure that the messages will be rotated as equally as possible and not selected at will.

7. Illicit Trade

7.1 TISA concern

7.1.1 The most concerning factor for TISA in the Southern African region is the ever-increasing illicit trade in tobacco products. It is estimated that illegal tobacco products comprise 15% of the cigarette market in Namibia. New regulations will result in an increase in the cost of compliance, which will result in higher prices for consumers. However an increase in legal tobacco product prices will not guarantee that people will stop smoking or refrain from starting to smoke. It is unfortunate that the higher the price of legal cigarettes, the greater the profit incentive is for illegal traders. As these unscrupulous traders will not comply with the regulations, they have the ability to sell tobacco products at much cheaper prices than the legal tobacco industry. It has been experienced that cheaper prices actually stimulate consumption, especially amongst the youth and poor, defeating the health objectives of the Act.

7.1.2 There are two aspects surrounding enforcement that must be borne in mind. Firstly, the illicit trade in Namibia will continue to flourish. We have previously brought this to the attention of government in the past and will continue to do so. An increase in regulation adds to the cost of doing business— parties who flaunt these regulations with impunity do so at the expense of the fiscus and the legitimate trade, and then benefit from an unfair advantage. Every burden placed on the legitimate trade in tobacco products incentivises those who do not abide by them.

7.2 TISA recommendation

7.2.1 We are aware that the Draft Protocol to Eliminate Illicit Trade in Tobacco Products proposes that Health Departments regulate this matter, however given the nature of illicit trade, the MoHSS should involve the Ministry of Finance’s Customs Department,

who are in a better position to assist with matters pertaining to the Protocol. By way of example, **Section 12(2)(a)(ii)** prescribes that the shipment destination should be displayed on the package. This is not practical as the shipment destinations tend to change as a matter of course.

7.2.2 **Section 12** further prescribes that each package containing a tobacco product bear the following statement: “Sales only allowed in Namibia”. In addition it is required that the country of origin be printed on the package and that certain information be contained in import documentation. In light of the cross border nature of illicit trade, current fiscal marking requirements within the Southern Africa Customs Union (“SACU”) are currently receiving immense regional efforts to curb the problem. It is our respectful submission that Namibia becomes part of the process as alignment in SACU will be key to addressing the illicit trade problem. The diamond stamp which is presently used by the South African Revenue Services (SARS) in South Africa has become outdated and is soon to be replaced. The diamond stamp has been issued in South Africa since 1967. SARS in 2006 made a decision that a new marker needed to be found given abuse of the diamond stamp by illicit traders. The matter of the new fiscal marker, which will include digital tax verification, product authentication and volume verification, is presently being developed by SARS, with input from TISA, and will eventually also include well developed tracking and tracing mechanisms. As the tobacco sector and regional treasuries lose billions due to illicit trade in tobacco products, we would be encouraged by any method that would curb this problem.

7.2.3 We refer again to our concerns raised in 4.7.1

8. Conclusion

8.1 We would like to thank you for this opportunity to comment on the Draft Regulations in terms of section 37(3) of the Tobacco Products Control Act, 2010. However, due to the limited time within which to comment, we would like the opportunity to meet with representatives of the MoHSS to discuss the issues raised in this submission.

8.2 We acknowledge that tobacco-use should be regulated to further the government's primary objectives of reducing the incidence of smoking and reducing the health impact of tobacco use. At the same time, however, we must stress that TISA remains very concerned that over-regulation can have the effect of encouraging and stimulating the illicit trade, which today is one of the biggest stumbling blocks to governments around the world achieving their health objectives.

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