

Note on Tobacco Advertising and WTO rules

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The WTO and the WHO have published in 2002 a joint report on the WTO Agreements and Public Health.¹ This publication identifies the most relevant WTO rules and/or Agreements for tobacco control, including:

- the Technical Barriers to Trade (TBT) Agreement in relation to product requirements such as packaging and labelling;²
- the Agreement on Agriculture in relation to government support for tobacco production;³
- the General Agreement on Trade in Services (GATS) in relation to restrictions on cigarette advertising;⁴
- the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) in relation to trademark protection and the disclosure of product information considered by producers to be confidential.⁵ And
- Article XX(b) of the General Agreement on Tariffs and Trade (GATT) on general exceptions “necessary to protect human, animal or plant life or health”⁶

Some tobacco control policies, like regulations on tobacco advertising, might be found “illegal” under existing WTO rules. According to Callard, Chiotanondh and Weissman (2001:69)⁷ “internet advertising restrictions, which face a series of potential difficulties under international trade agreements. One problem emanates from the WTO services agreement, expansion of which is now under negotiation. Under the services agreement, a country which agrees to open its borders to advertising might be required to treat foreign advertising agencies providing tobacco advertising over the internet with rights equal to domestic advertisers—even though the content of the foreign ones cannot be effectively regulated under the recipient country’s laws.”

“Advertising and related services” is one of the sectoral proposals for the new negotiations that WTO Members are currently tabling regarding both the structure and the contents of services negotiations.⁸ The sector includes sale or leasing of advertising space or time; planning,

¹ WHO and WTO (2002). “WTO Agreements & Public Health”, Joint study by the WHO and WTO Secretariats, Geneva. Available from http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf

² See http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm

³ See http://www.wto.org/english/tratop_e/agric_e/agric_e.htm

⁴ See http://www.wto.org/english/tratop_e/serv_e/serv_e.htm

⁵ See http://www.wto.org/english/tratop_e/trips_e/trips_e.htm

⁶ See http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20

⁷ Callard, Chiotanondh and Weissman (2001), “Why trade and investment liberalisation may threaten effective tobacco control efforts” in *Tobacco Control* 10:68–70. Available from <http://tobaccocontrol.bmj.com/content/10/1/68.full.pdf+html>

⁸ See http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm

creating and placement services of advertising; outdoor and aerial advertising and delivery of samples and other advertising materials.

Advertising Services are listed in the Services Sectoral Classification List (document MTN.GNS/W/120), which has been developed for scheduling purposes under the GATS, as a sub-category of "Other Business Services". The activities covered are defined through reference to group 871 of the UN provisional Central Product Classification (CPC). In turn, CPC 871 is made up of three sub-categories:

- (i) Sale or leasing services of advertising space or time (services provided in soliciting advertising space or time for newspapers, other periodicals, and television stations);
- (ii) planning, creating and placement services of advertising (planning, creating and placement services of advertisements to be displayed through the advertising media); and
- (iii) other advertising services (other advertising services not elsewhere classified, including outdoor and aerial advertising services and delivery services of sample and other advertising material.⁹

According to the WTO website, there are commitments in advertising services in the schedules of 51 WTO Members (which together represent 80% of world merchandise trade and the majority of global advertising activity).¹⁰ Most of the commitments cover the sector in full and do not exempt any specific market segments. However, in a number of cases, exemptions relate to advertisements for goods which may be considered sensitive for health and safety reasons and/or have been made subject to import authorization. It is conceivable that other Members maintaining similar measures may have felt that these are covered by Articles VI (domestic regulation) or XIV (health- and safety-related exceptions) of the GATS and, thus, need not be scheduled.¹¹

All in all, as regards to the commitments covering less than CPC 871, WTO Members have exempted, for example, specified advertising activities (production of commercials for radio and TV, skywriting) or advertising destined for "sensitive" products (tobacco, alcohols, pharmaceuticals, etc.). Indeed, WTO disputes involved packaging and other aspects related to tobacco, but not advertising. Tobacco-related WTO disputes cited different GATT articles as well as the Agreements on: Customs Valuation; Sanitary and Phytosanitary Measures; Technical Barriers to Trade; and TRIPS. However, no specific citations were made in relation to the GATS.¹²

⁹ See http://www.wto.org/english/tratop_e/serv_e/w47.doc

¹⁰ See http://www.wto.org/english/tratop_e/serv_e/advertising_e/advertising_e.htm . See the Annex for information about Commitments on Advertising Services.

¹¹ See http://www.wto.org/english/tratop_e/serv_e/w47.doc

¹² See http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm

ANNEX: Commitments on Advertising Services (Modes 1, 2 and 3)

	Developed Economies	Developing and Transition Economies	Total
Number of Schedules	23	28	51
Of these:			
Limitations for Modes 1, 2 or 3	-	14	14 ^a
<i>(Foreign equity restrictions)</i>	(-)	(5)	(5)
Commitments based on CPC	22	23	45
<i>(Coverage less than CPC 871)^b</i>	(3)	(9)	(12)
No reference to CPC	1	5	6
<i>(Limited sectoral coverage)^b</i>	(1)	(2)	(3)
<p>Members concerned: Argentina, Australia, Brazil*, Bulgaria, Burundi, Czech Republic, Dominican Republic*, El Salvador*, Gambia*, Honduras*, Hong Kong*, Hungary, Iceland, Israel, Jamaica, Japan, Republic of Korea, Kuwait*, Liechtenstein, Malaysia*, Mexico*, New Zealand, Norway, Panama*, Peru*, Poland*, Switzerland, Sierra Leone*, Singapore, Slovak Republic, Slovenia, Thailand*, Turkey, United Arab Emirates*, United States, Venezuela, and the 15 Member States of the European Union.</p> <p>Members with partial commitments for Market Access or National Treatment are marked with an asterisk.</p>			

a Not including seven Schedules which, although free of limitations, are limited in sectoral coverage.

b **Members have exempted, for example, specified advertising activities (production of commercials for radio and TV, skywriting) or advertising destined for "sensitive" products (tobacco, alcohols, pharmaceuticals, etc.).**

Source: WTO Secretariat (1998) ADVERTISING SERVICES, Background Note by the Secretariat, Document S/C/W/47. Available from http://www.wto.org/english/tratop_e/serv_e/w47.doc