

## Thailand's Increasingly Stringent Regulatory Controls on the Packaging and Labeling of Alcoholic Beverages

**T**hailand has long been regarded as a particularly strict jurisdiction with respect to restrictions on the advertising, sale, and consumption of alcohol and tobacco products. Two recent developments demonstrate that current political uncertainties have done nothing to reverse the trend for increasingly draconian restrictions on international and local brand owners.

On January 22, 2015, the *Notification of the Alcoholic Beverages Control, Re: Rules, Procedures, and Conditions for Labels of Alcoholic Beverages* was published in the *Royal Thai Government Gazette*. It sets out controversial labeling and message restrictions for alcoholic beverages that could result in major losses for the alcohol industry. The Notification has been challenged before Thailand's Administrative Court, but pending the outcome of that case, it has, in the meantime, come into effect on April 22, 2015.

### The Notification

The basis of the Notification is the Alcoholic Beverage Control Act (2008) and its subsequent Ministerial Regulation (2010), under which alcoholic beverages are not allowed to be advertised in any way which boasts of efficacies, benefits, qualities, or induces one to drink.

In January 2014, the Ministry of Public Health (MoPH) notified the WTO Committee on Sanitary and Phytosanitary Measures of proposed labeling requirements for alcoholic beverages. The draft Notification prohibited use of various types of messages on alcoholic beverage labels and packages, including any message "which misleads consumers on the content of products" and any message "using the picture of a cartoon."

The MoPH issued a revised draft Notification in August 2014. This draft Notification combined the labeling restrictions along with measures mandating graphic health warnings on alcoholic beverage packaging which would have seen Thailand becoming the first country in the world to do so. Thailand had earlier introduced the concept of graphic health warnings on alcoholic beverage packaging in 2010. However, this was notified to the WTO Technical Barriers to Trade Committee in 2010 and the issue went silent.



In December 2014, the MoPH signed the final version of the Notification without the graphic health warning provisions, but with revised versions of the labeling and message restrictions, including prohibitions on “a message which materially misleads consumers on the content of products” and “a message using cartoon images, except images which are trademarks of alcoholic beverages which have been legitimately registered prior to enforcement of this Notification.”

Alcoholic beverages have long been branded and marketed with labels, containers, and packaging containing important messages depicted graphically which have been registered as trademarks and/or service marks. The Ministry will likely argue that many such future trademarks unregistered before April 22, 2015 offend the requirements in the Notification, and therefore operators would be prohibited from displaying such trademarks on their products in Thailand. Trademark applications in Class 32 and 33 are seeing a marked increase as of late.



### Trademark Rights Impinged

By registering a trademark, a rights holder obtains the exclusive rights to use the mark and license its use. Section 44 of the Trademark Act sets out a trademark owner’s positive right to use his or her registered trademark as follows: “a person who is registered as the owner of a trademark shall have the exclusive right to use it for the goods for which it is registered.” A ban on the use of trademarks on alcoholic beverage labels, containers, or packaging would disallow rights holders to use their trademarks in accordance with their registration and would put those marks at risk of cancellation based on non-use.

### Possible Remedies

Ministerial Notifications are subject to legal challenge in Thailand’s Administrative Court. The Court has jurisdiction over an alleged “unlawful act by an administrative agency or State Official, whether in connection with the issuance of a by-law or order...” and the power to overturn or amend such measures to the extent they are found to be illegal. Upon application, the Court may issue an injunctive order suspending execution of the measure pending the outcome of the legal challenge.

There are various legal bases on which the Notification may be challenged, including inconsistency with Thailand’s trademark laws and alleging that:

- the Ministry acted beyond its scope of powers granted by the primary legislation;
- the Ministry failed to comply with binding procedural requirements;
- the Notification offends constitutional protections, including the rights to protection of property and to engage in free and fair competition; and
- the Notification offends the principles of necessity and proportionality, which require that any measure restricting the rights of individuals (as the draft Notification in its present form does) may only be enacted to the degree necessary for a legal purpose, and provided that it does not affect the essential substance of such rights.

In our recent experience, the Court has acknowledged the potential illegality of similar Notifications issued by the MoPH that affect the use of lawfully-registered trademarks on consumer products. This was in regard to graphic health warning size increases on tobacco products.

## Graphic Health Warnings

With the Notification now in effect, the MoPH appears to be moving once more toward the reintroduction of requirements for graphic health warnings on alcoholic beverage packaging. The MoPH has now twice—in 2010 and 2014—proposed the introduction of graphic health warnings in the style of those already in place for tobacco products in Thailand.

In a novel move, the MoPH has now, via its [www.thaiantialcohol.com](http://www.thaiantialcohol.com) website, launched a public competition to design new graphic health warnings for alcoholic beverage packaging. The competition, which is open to all, requires that entries:

- may use any graphic design technique, including painting, photography, etc.;
- must warn the public of the harms and consequences of alcoholic beverage consumption;
- must aim to deter children and teenagers and the public to refrain from consuming alcoholic beverages;
- must also contain “warning phases”; and
- must comply with all relevant IP laws and must be new and not previously submitted in any other contest or published in any magazine or website, etc.

Contest participants must agree to transfer all IP rights related to the submission to the Thai Alcohol Control Committee.

Prizes are on offer to the winning designs of THB 2,000 to THB 50,000 (approximately USD 56 to USD 1,398), and the deadline to submit is August 31, 2015.

The MoPH's competition is a clear attempt to engage the public in the MoPH's anti-alcohol efforts, and to drum up support for the imposition of graphic health warnings. The exercise will no doubt raise significant awareness of the issue, and the outcome of the competition will be awaited with interest.

However, the delegation of this part of the regulatory process to the general public is bound to raise questions of whether any resultant notification or regulation is based upon internationally-recognized principles of evidence-based policymaking, and can therefore be demonstrated to be an effective and proportionate measure to tackle genuine public health and social harms associated with alcoholic beverages.

The blanket imposition of large graphic health warnings on all alcoholic beverage products is also likely to meet stiff opposition from alcoholic beverage manufacturers and importers on the basis that it unreasonably restricts their right to use their lawfully-registered trademarks to market their legal products to adult consumers.



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