



Institute of Practitioners in Advertising

Mr Jose Manuel Barroso
President of the European Commission
European Commission
B - 1049 Brussels

15th December 2010

Dear Mr Jose Manuel Barroso,

CABINET PRESIDENT									
PRES	JL	FF	AJC	M	CJ				
29. 12. 2010									
CMA	AV	HK	MS						
MEMBRE RESPONSABLE					ARCHIVES				

Re: Institute of Practitioners in Advertising (IPA) states concerns about trademark issues in context with the plain packaging proposals in the Tobacco Products Directive

The IPA is the trade organisation that represents the leading advertising, media and marketing communications agencies in the UK. The IPA welcomes the opportunity to respond to the Public Consultation Document published by DG SANCO regarding the possible revision of the Tobacco Products Directive 2001/37/EC.

The IPA understands and supports fully the role and responsibility of the European Union in striving to achieve continuous improvements in public health and we support this vital objective unequivocally. In this context, our response to this consultation is limited strictly to the potential implications of a plain packaging proposal and not to the public health related issues.

The IPA also supports fully any action which could limit underage smoking, as well as possible harmful effects of tobacco use by adults. However, in our opinion, the introduction of plain packaging is not such an action.

Specifically we are responding to questions arising from section 3, "Consumer Information", of the proposed revision. We are particularly concerned about the proposition posited in Option 3 of "3.2 Possible Options" of the proposed revisions: Option 3 - Introduce generic or plain packaging.

Our concern is that a number of fundamental questions and reservations arise from the plain packaging proposal, which need to be addressed and brought to the attention of DG SANCO.

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We have summarised these under the following headings:

1. Intellectual Property Rights
 - 1.1. Trademark Rights
 - 1.2. The competitive role of brands
2. Counterfeiting
3. Consumption drivers

1. Intellectual Property Rights

It is our belief that brands should not be restricted unduly with regard to legally sold products. The beneficial effects of brands are protected by national and Community trademarks. Trademarks are recognised Intellectual Property Rights and protected under various national and international laws and treaties to which the EU is subject.

Intellectual Property Rights are a crucial aspect of the global economy, and trademarks play a significant role in free trade and competition. Used in virtually every type of product and service, trademarks facilitate trade, promote efficiency in commerce and play an important role in job creation, both directly and indirectly.

The WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) states, *"that no specific product can be selected for disparate trademark treatment, regardless of the specific product upon which the brand is used"*.

It is our opinion that plain packaging legislation would restrict unduly the pre-existing rights of trademark owners and deprive them of their assets with regard to their established intellectual property rights. Further, the DG SANCO proposal aiming to prevent companies from using their own trademarks in packaging will establish a very dangerous precedent for all products sold legally.

Tobacco products are legitimate - legal to produce, sell and consume – and the IPA believes that consumers have a basic right to make choices between different brands of products which are available legally on the market. For that reason, the proposed measures challenge the existing Intellectual Property Rights framework.

In a similar proposal from 2008 in the UK, Gillian Merron, the UK Minister of State (Public Health), explained, that: *"Given the impact that plain packaging would have on intellectual property rights, we would undoubtedly need strong and convincing evidence of the benefits to health, as well as its workability, before this could be promoted and accepted to an international level – especially as no country in the world has introduced plain packaging."*

1.1 Trademark Rights

Trademarks are not only brand names. They can also be words and logos, colours, shapes and other distinctive signs¹.

Thus, even if plain packaging allows for the limited use of single brand names in a standard typeface and colour, it would deprive trademark owners of their Intellectual Property Rights which would otherwise be available. The potential implications of such measures on the trademark system as a whole are serious and worrying.

¹ As provided in Article 4 of the Community Trademark Regulation (Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community Trademark: "A Community trade mark may consist of any signs capable of being represented graphically, particular words, including personal names, designs, letters, numerals, the shape of goods or their packaging, provided that such signs are capable of distinguishing goods and services of one undertaking from those of other undertakings."

Prohibiting the use of a trademark also prevents the ability to maintain and protect that trademark.

Regarding a similar proposal in Australia in 2009, the US Chamber of Commerce, in a submission to the Australian Senate Community Affairs Legislation Committee, advised that plain packaging "*would seriously undermine, if not entirely eviscerate, the value of the trademarks and trade dress used by international companies and would ultimately force companies to "commoditize their products and compete solely on the basis of price, rather than on the quality and reputation their trademarks represent"*.

We would ask European Commission to consider the legal issues associated with plain packaging in respect of the following existing EU and international obligations:

- **TRIPS Agreement:** Article 2 (Intellectual Property Conventions), Article 8 (1) (Principles), Article 15 (4) (Registration) and Article 20 (Unjustifiable Encumbrances).
- **Paris Convention:** Article 6 *quinquies* (Protection of Marks registered), Article 7 (Nature of the good to which the Mark is applied) and 10 *bis* (Unfair Competition).
- **EU Law:** Article 17 (2) of the Charter of Fundamental Rights of the European Union, which states that Intellectual Property Rights shall be protected; Article 118 of the Treaty of Lisbon, which provides a new legal basis to establish measures for the creation of IPRs.

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The IPA calls respectfully upon the European Commission to give due consideration to Intellectual Property Rights in any analysis of the legal issues and the evidence base for the impact of plain packaging, including on the functioning of the Internal Market.

1.2 The competitive role of brands

The basic purpose of trademarks is to identify the "source" of products. To the extent that trademarks indicate source, they provide a benefit for consumers as they make their choice of one product over another. Thus, brands/trademarks both encourage the internal market growth and also help prevent confusion in the marketplace. We are, therefore, deeply concerned that the plain packaging option in the proposed EU Directive revision debases the very value and purpose of brands.

Branding is at the heart of all marketing, because companies use brand identity to differentiate their products from others and to provide consumer information. Without brands the entire marketing and advertising industry, which is dedicated to promoting one brand choice over another, has little reason to exist.

Limiting the ability to brand limits the ability to compete; limiting the ability to compete is a clear restriction of trade. Such a severe restraint of trade interferes directly with the stated goals of the EU Internal Market, namely to foster and encourage trade and growth of global markets for EU products.

The generic packaging option in this proposal would mean that a company could not differentiate its products from its competitors, resulting in confusion in the marketplace, which will also encourage counterfeiting.

2. Counterfeiting

We believe the plain packaging proposal will encourage illicit counterfeit trade, which is already a major problem in many industries.

As The Washington Legal Foundation has stated in response to the Australian Senate Community Legal Affairs Committee during a similar Plain Packaging proposal in Australia, *"Counterfeiters are likely the only group that would benefit from a switch to plain packaging."*

Tobacco products are already the prime focus of counterfeiters in the EU and around the globe illicit trade in contraband and counterfeit tobacco products already results in annual losses of approximately €10 billion to the budgets in the EU and its Member States' budgets (cf. Tenth activity report of the Anti-Fraud Office).

In the absence of branding, counterfeit tobacco products would most certainly flood the market, causing prices to drop and this would serve to

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make products such as cigarettes more affordable. The plain packaging proposal is additionally misguided, since a possible reduction of price will encourage purchase, which is the opposite to the intent of the proposal.

Plain packaging is easier to replicate than branded packaging and will make it easier for counterfeit producers to enter the EU market and virtually impossible to detect.

Finally, counterfeit tobacco products are not subject to quality controls and pose further health risks to consumers

Concern that plain packaging would increase the prevalence of counterfeit goods in the market and reduce brand owners' ability to take action against such activity, thereby increasing, rather than decreasing, the burden on already overstretched public agencies working to enforce intellectual property protections in the face of escalating counterfeiting and piracy throughout the EU.

3. Consumption drivers

The most recent Eurobarometer survey of EU consumers' attitudes to tobacco (*Eurobarometer 332 / Wave 72.3*) identifies multiple consumer 'drivers' for selecting cigarettes and for quitting smoking. Among a long list of selection drivers, consumers choose taste (78%), price² (50%) and tar/nicotine/CO levels (39%) as the key factors behind selection of a particular cigarette. Packaging is at the bottom of the list at 15%³.

²This is borne out by research in France by the National Institute of Statistics and Economic Studies, which clearly shows that price is the greatest influence on tobacco purchase:

"Since the introduction of the Loi Évin in 1991, the price of tobacco has been significantly raised several times and purchases at constant prices have fallen by 3,4 % per annum on average. The downward trend has intensified in recent times, as major price increases produced a drop of almost 30 % in the volume of tobacco purchased in France between 2002 and 2004."

³*Eurobarometer 332 / Wave 72.3 / p. 67*

The report specifically states: *"No-one is influenced by the package alone."*

Similarly, when listing drivers to quit smoking, consumers place health (71%), family/partner/friends (47%), price (47%) and the effect on non-smokers (35%) at the top of their priority list.

Next come medical advice (21%), smoking restrictions (20%), societal disapproval (19%) and workplace restrictions (16%). On-pack warnings are near the bottom of the list at 14%.⁴

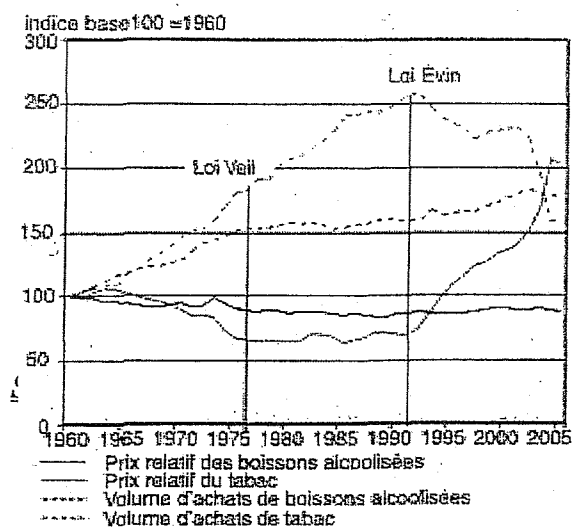
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Despite a lack of convincing evidence that on-pack warnings are an effective deterrent to existing and would-be smokers, particularly young ones, we understand that providing more information to consumers may, over an extended period, have a impact on their consumption patterns – certainly, it can do no harm.

Generic packaging, however, would be wholly disproportionate to the role that packaging plays in influencing consumer decisions, quite apart from the serious legal issues of Intellectual Property Rights and Trademarks which it would create.

Figure 1 - Evolution of purchases of tobacco and alcoholic drinks in France



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In summary, we believe that the DG SANCO proposal aiming to prevent companies from using their own trademarks in packaging will establish a very dangerous precedent for all legally sold products.

We, therefore, urge the Commission strongly to reject the plain packaging proposals in the Tobacco Products Directive.

With best wishes,

Hamish Pringle
Director General

cc. Johannes Laitenberger, Head of Cabinet, European Commission