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Mr. J.M. Barroso
President of the European Commission
European Commission
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Datum
16 december 2010
Betreft
Revision tobacco products
directive

CABINET DU PRESIDENT										
PRES	JL									
30. 12. 2010										
OMA	CH	EV	PIP	QD	HK	SC		HS	MS	
MEMBRE RESPONSABLE:					3	ARCHIVES				

Dear Mr. Barroso,

The Dutch Association of Communications Agencies (VEA) 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.

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. We have summarized these under the following headings:

1. Intellectual Property Rights
2. The competitive role of brands
3. Consumption drivers

1. Intellectual Property Rights

We believe that brands should not be unduly restricted with regard to legally sold products. The beneficial effects of brands are protected by national and Community trademarks. Trademarks are property rights that are 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 firm view that plain packaging legislation would unduly restrict pre-existing rights of trademark owners and deprive them of their property with regard to their established intellectual property rights. The DG SANCO proposal aiming to prevent companies from using



VEA is de officiële vertegenwoordiger van Cannes Lions en Effie in Nederland.



their own trademarks in packaging will establish a very dangerous precedent for all legally sold products.

Tobacco products are legal products - legal to produce, sell and consume. VEA believes that consumers have an essential right to make choices between different brands of products which are legally available 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."*

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

Thus, even if plain packaging arguably allows for the limited use of single brand names in a standard typeface and color, 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.

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 existing legal EU and international obligations.

VEA respectfully calls 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.

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.

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%), price (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%.

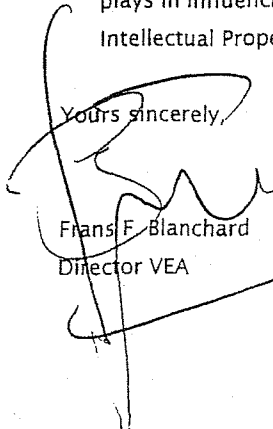
The report specifically states: *"No-one is influenced by the package alone."*

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%.

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.

Yours sincerely,


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