

**Paper regarding the legality of
Plain Packaging and other pack
standardization measures in the Netherlands**

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Introduction

Plain packaging

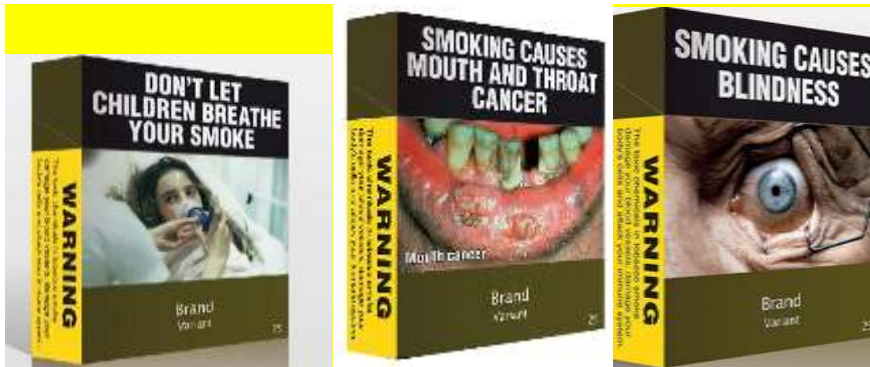
Plain packaging or generic packaging of cigarettes refers to regulations that prohibit the use of and require the removal of brand features such as trademarks, logos, colour schemes and graphics from tobacco products. There is no standard definition of “plain packaging”. However, it was described in 2010 by the European Commission in the following terms:

Plain or generic packaging would standardise the appearance of tobacco packaging. Manufacturers would only be allowed to print brand and product names, the quantity of the product, health warnings and other mandatory information such as security markings. The package itself would be plain coloured (such as white, grey or plain cardboard). The size and shape of the package could also be regulated.¹

In the Impact Assessment for the new draft Tobacco Products Directive of 2012 it was defined in the following terms:

Full standardisation of packages, including brand- and product names printed in a mandated size, font and colour on a given place of the package; standardised package colour; standardised size and appearance of the package; display of required (textual and pictorial) health warnings and other legally mandated product information, such as tax-paid stamps and marking for traceability and security purposes.²

For example, the packaging could look like these actual examples from Australia:



Plain packaging and other pack standardization measures as understood in this paper relate to the encroachment on intellectual property rights by mandatory rules for cigarette

¹ EC Commission Possible Revision of the Tobacco Products Directive 2001/27/EC: A Public Consultation (DG SANCO 2010)

² EC Commission, Commission staff working document, impact assessment, accompanying the document Proposal for a Directive of the European Parliament and of the council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, 19 December 2012, SWD (2012) 452 Final.

packs. This paper does not deal with the desirability of health warnings and other legally mandated product information, such as tax-paid stamps and marking for traceability and security purposes as such, except where they influence the free exercise of intellectual property rights.

Plain packaging is currently being considered by the governments of some countries as an initiative to reduce smoking, particularly amongst younger people and children. At the end of 2012 plain packaging legislation was introduced in Australia, with full effect as of 1 December 2012.

In the Netherlands, the Ministry of Health, Welfare and Sports has indicated several times that the concept of plain packaging is too far-reaching. The Minister does not think that plain packaging is a good idea since cigarettes are a legal product.³ This point of view is to be applauded. Hereinafter it will be further substantiated that plain packaging is disproportionate, unjustified and a breach of national, European and international law.

TPD proposal – Pack standardization measures

The European Commission plans to introduce new rules on labelling and packaging in article 7 – 13 of the proposal for a revision of the Directive on the manufacture, presentation and sale of tobacco and related products (Tobacco Products Directive, hereinafter "TPD"). As such, plain packaging is currently not made compulsory on the Member States in this proposal, although Member States are not prevented from introducing plain packaging.

However, the following standardizations measures – tantamount to full standardized packaging from a legal perspective – are mandatory under the proposed TPD:

- Front and back surface of a unit packet and of outside packaging of tobacco for smoking shall for 75% consist of a combined health warning of text and a photograph, positioned at the top edge of the packet.⁴ This proposal will hereinafter be referred to as the "75% rule". However, due to the provision under article 7 section 3 that these warnings shall not be interrupted by e.g. tax stamps, price marks and the like, the remaining free surface may be less than 25%;
- Further 50% text warnings on the lateral sides of the unit packets of cigarettes;
- Standardized cigarette pack size and form (must be cuboid), other shapes even if trademarked are prohibited;⁵
- Broad prohibition of product related information on the packet, even if such information is true or if the element is trademarked;
- Only flip-top lid packets hinged at the back of the packet are allowed for re-closing or resealing of cigarette packets;
- Prohibition of innovative features such as flavours in filters and other technical features (see article 6(5) of the TPD proposal)

³ "Sigaretten zijn een legaal product, de Minister ziet daarom niets in plain packaging". [Since cigarettes are a legal product, the Minister does not see any point in plain packaging.]

⁴ The rules are not limited to just a 75% rule, but include other requirements. All of these together are referred to as the 75% rule. The requirement to use 75% of a side of the package in itself is an infringement on intellectual property and fundamental rights, but so are the other requirements, as pointed out in the Draft opinion of the rapporteur of the Committee on Legal Affairs of 29 April 2013, 201/0366 (COD), hereinafter referred to as JURI opinion, page 18 – 19.

⁵ This is a violation of intellectual property rights according to the JURI opinion, page 22 – 24.

- In addition, the TPD proposal includes provisions that prohibit characterising flavours and certain additives, including menthol;
- Slim cigarettes are not prohibited directly, but shall be deemed to be misleading and thus prohibited under article 12(2)⁶.

In addition to trademark rights, these proposed measures also affect other intellectual property rights. In as far as the shapes of cigarette packets will be restricted, the exploitation of design rights protecting novel designs for such packets will also be affected. The effect goes even further, because some technical innovations of cigarettes, cigarette filters and cigarette packets that are protected by patents are also affected, meaning that also such patents can no longer be exploited.

The proposal was published on 19 December 2012.⁷

Article 7(6) provides that Member States shall not increase the size of the health warnings in any way. The proposal, however, according to article 24(3) and recital 41, allows Member States to introduce further pack standardization measures, including plain packaging. Thus the TPD proposal does not bar Member States from introducing plain packaging. Although the relationship between article 24(3) and 24(2) is quite unclear, the intention may have been that such further restrictions can only be introduced if the Commission is satisfied that they serve overriding needs relating to the protection of public health. However, such Commission approval will not prevent violation of the obligations that Member States have under international law and will not prevent the courts from finding such violations and act on them. Thus, if plain packaging were introduced by Member States following the article 24(2) procedure, this could still be stopped by the courts. Article 24 of the TPD proposal also does not limit the scope of protection awarded by EU Directives and Regulations that protect intellectual property rights, meaning that also under the proposed TPD, national law that introduces plain packaging will be a violation of European Union law, as well as of international law. If for instance the Netherlands would use the possibility provided by article 24, this would still constitute a breach of national, European and international law as further described in this paper.

The standardization measures in the TPD proposal lead to restrictions and prohibitions on the use of registered trademarks, patents and possibly design rights which are tantamount to the restrictions imposed by plain packaging. On the basis of the TPD proposal *inter alia* the exploitation of all shape marks is banned, as well as of trademarks that refer to flavours or certain products descriptions. The freedom to use device marks is banned or limited, in particular for those device marks that require a portrait-shaped free portion of the front or back of a cigarette pack, since only a landscape-shaped part of 25% of the packet size at the bottom will be available to show the device mark. This space will be further reduced by other compulsory information such as tax stamps. All design rights for cigarette packs that are not cuboid can no longer be exploited. Some patented technology may no longer be exploited.

⁶ This is a violation of intellectual property rights according to the JURI opinion, page 22.

⁷ Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products 2012/0366 (COD)

The proposed measures violate national, European and international law. Similarly, the introduction of plain packaging at EU level or unilaterally by a Member State such as the Netherlands would violate national, European, and international law.

In addition, it should be noted that there is Draft Report by the rapporteur for the Committee on the Environment, Public Health and Food Safety, Linda McAvan, that does propose to introduce much more far reaching measures into the TPD, including mandatory plain packaging (proposed articles 13 section 2a, 2b and 3). That proposal is a full violation of the legal obligations of both the European Union and its member states, as is addressed in the discussion of plain packaging in this paper.⁸

This paper addresses selected legal issues of both the introduction of the TPD proposal by the European Union, its implementation by Member States and the legal issues of an introduction of plain packaging, all from the perspective of intellectual property law.

In the meantime, also other objections have been raised. The Committee on Legal Affairs of the European Parliament has raised the issues that some measures cannot be based on article 114 TFEU, since they cannot be seen as improving the conditions for the establishment and functioning of the internal market, like for instance the ban on menthol and on slim cigarettes and thus the TPD proposal would even be in violation of article 168 TFEU.⁹ That however is outside the scope of this paper, which focuses on intellectual property law aspects.

Nevertheless, this might indeed mean that the European Commission and the member states cannot lawfully rely on the Directive as tool that on the basis of public health arguments limits the free enjoyment of intellectual property rights, if that tool does not have a sufficient legal basis on the TFEU; in such a situation, the courts would have to assess the TPD and its implementation as an unlawful interference with intellectual property rights, which would make it quite easy to come to a conclusion.

However, in this memo we will assume for the sake of a clear evaluation of the intellectual property aspects as such, that all measures of the TPD proposal would have a sufficient basis in European Union law.

⁸ Draft report of the rapporteur of the Committee on the Environment, Public Health and Food Safety of 10 April 2013, 2012/0366(COD), hereinafter McAvan Report.

⁹ JURI opinion, page 3.

Executive summary

An analysis of the consequences of plain packaging clearly shows that there are serious risks involved in the adoption of plain packaging measures and other standardization measures contained in the TPD proposal. In particular:

Plain packaging constitutes an attack on brands that is counterproductive to public health

It is widely acknowledged that branded goods can sell for a higher price than generic or unbranded goods. Plain packaging, however, would effectively make tobacco products look uniform and standardized. As a result, the tobacco industry can no longer rely on brands (and designs) to compete at the level of brand image. By contrast, plain packaging would likely result in lower prices of cigarettes. This, in turn, may increase consumption and enhance the risks for public health. Other serious limitations on brand communication, as proposed in the TPD proposal, are likely to have similar effects.

Plain packaging and the further standardization measures of the TPD proposal will increase illicit trade

Standardized tobacco packaging makes the production of counterfeit tobacco products much easier and less costly. It will become simpler to reproduce packaging, cheaper to produce counterfeit and more difficult to identify counterfeit products. Plain packaging, therefore, involves extra costs for border and product control and comes as a welcome incentive for illicit traders. This is contrary to the initiatives to reduce counterfeit and illicit trade of cigarettes. The problem is exacerbated as the TPD proposal bans certain kinds of cigarettes which is likely to lead to illicit trade from outside the EU.

Plain packaging will destroy the ability to innovate and develop reduced risk products

When tobacco producers are no longer able to derive extra benefits from their valuable tobacco brands and facing fierce price competition on the tobacco market, there will be less room for investing in reduced risk products. The TPD proposal even makes it impossible to exploit the investments in innovation that are protected by patents, if the technology is banned by provisions of the TPD. This is in fact the case both for packet technology and cigarette technology.

Plain packaging and the 75% rule are not based on facts

There is no credible evidence that plain packaging or the 75% rule or, for that matter, other standardization measures will reduce overall tobacco consumption or prevent young people from starting to smoke. By contrast, the various studies conducted so far testify to the fact that plain packaging is a useless measure in the fight against addiction and resulting smoking related diseases.

Plain packaging and the TPD proposal violate national, European and international law

Since plain packaging clearly excludes and impairs the use of trademarks, plain packaging runs afoul of national and European trademark law principles. Plain packaging and other standardization measures set forth in the TPD proposal constitute a deprivation of property and violate the fundamental guarantee of property and freedom of expression as laid down in the European Convention on Human Rights and the EU Charter of Fundamental rights. Plain packaging and the TPD proposal are also contrary to the obligations which the European Union and the Netherlands have under international treaties, in particular the TRIPs Agreement and the Paris Convention in the field of intellectual property and the Technical Barriers to Trade (TBT) Agreement regulating national marking or labelling requirements. The violation of these international treaties may substantially reduce the credibility of the European Union and the Netherlands at the international level. It casts doubt upon the intention of the European Union and the Netherlands to ensure the protection of intellectual property and reduce barriers to trade in accordance with their international obligations.

Lack of credible evidence

There is no credible evidence that plain packaging would reduce overall tobacco consumption or that it would reduce the number of people (in particular young people) starting to smoke.

Studies that have been conducted only prove that people prefer branded packaging if they would have the choice between branded products and plain packaged goods. This is no evidence whatsoever for the proposition that these people are less likely to buy the product at all if cigarettes would be sold only in less appealing plain packaging.

No government has yet put forward credible evidence in support of a plain packaging proposal which would be sufficient to make the introduction of such legislation justifiable and proportionate which is a required under international law, as will be discussed below. The previous Dutch Minister of Health, Welfare and Sports (Klink) already indicated in 2010:

From a health point of view I am of the opinion that there is insufficient scientific evidence available that supports plain packaging as an effective measure that discourages the use of tobacco.¹⁰

In this respect, the McAvan Report lacks any evidence in support of its proposed recital 22a, which claims without any substantiation that evidence would show that standardised packaging is particularly effective in dissuading young people from starting to smoke.

In 2011 the current Minister of Health, Welfare and Sports of the Netherlands (Schippers) confirmed that plain packaging measures would be too far-reaching within the context of a policy of discouragement.

With regard to plain packaging, I confirm that I find that policy measure too sweeping in the context of a control policy. I will inform the European Commission that I will not support the policy option.¹¹

The Dutch government is not alone in its views on plain packaging. Similar statements have been made by other EU governments such as the Swedish government:

Sweden believes that until now, empirical evidence is lacking that shows which impact standardized tobacco packs have on public health.¹²

Also the European Commission has chosen for a less stringent option than plain packaging "*given the current lack of real life experience in the EU*".¹³

¹⁰ Letter dated 11/1/2011 from Dutch Ministry of Public Health, Welfare and Sports to the National Manufacturing Association for Cigarettes (vanuit gezondheidsperspectief ben ik van mening dat voor plain packaging nog onvoldoende wetenschappelijk bewijs beschikbaar is. Het standpunt van Nederland inzake plain packaging is dan ook niet gewijzigd en dit standpunt is op meerdere momenten in de voorbereidende fase van de Raadsaanbeveling ingebracht).

¹¹ Letter dated 17 December 2010 of the Ministry of Health, Welfare and Sports to Tobacco Points of Sale Platform.

¹² Communication of the *Swedish Ministry of Social Affairs/Health* to DG SANCO of 2 September 2010.

¹³ EC Commission, Commission staff working document, impact assessment, accompanying the document Proposal for a Directive of the European Parliament and of the council on the approximation of the laws,

But apart from the lack of credible evidence in relation to plain packaging, there is no evidence either on the effectiveness of (large pictorial) health warnings.

In a case regarding the proposed introduction of health warnings in the USA the United States Court of Appeals for the District of Columbia Circuit¹⁴ found that:

"the FDA did not provide a shred of evidence – much less the "substantial evidence" required (...) showing that graphic warnings will "directly advance" its interest in reducing the number of Americans who smoke."

and

"the study did not purport to show that the implementation of large graphic warnings has actually led to a reduction in smoking rates."

We are not aware of any evidence on the effects of regulating packet shapes or cigarette flavours, and also not of bans on applying innovative techniques.

Illicit trade / counterfeit

Not only is there no credible evidence that the far-reaching measure of plain packaging and other measures as contained in the TPD proposal would actually work in terms of reducing smoking, plain packaging and such measures also have serious downsides when it comes to illicit trade of cigarettes.

Illicit trade of cigarettes is already a huge problem in the current situation where the packaging of tobacco products is not restricted by a plain packaging measure. Recent EU Customs statistics over 2011 show that cigarettes are in the top 3 categories (with 18%) of the overall amount of articles detained by European Customs, being 91,245 cases consisting of 115 million articles. 20 million packets of cigarettes with a retail value of 88 million Euros have been detained¹⁵

The extent of the problem is confirmed by information of the Dutch Ministry of Finance. The Fiscal Intelligence and Investigation Service (FIOD) and Customs intercepted and seized over 209 million illegal cigarettes in 2009:

"If all the cigarettes and tobacco products that were intercepted had been sold on the Dutch market, the Dutch Treasury would have lost more than 36 million euros in tax revenue"¹⁶

regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, 19 December 2012, SWD (2012) 452 Final, page 95 and 96.

¹⁴ United States Court of Appeal for the District of Columbia Circuit, 24 August 2012, R.J. Reynolds et al vs. Food & Drug Administration. The US government did not appeal the case.

¹⁵ European Commission (DG TAXUD) Report on EU Customs Enforcement of Intellectual Property Rights – Results at the EU border - 2011

¹⁶ Website Government of the Netherlands: <http://www.rijksoverheid.nl/onderwerpen/invoer-en-douane/sigarettenvangsten>

Apart from fiscal fraud, the manufacturer's trademark rights are often infringed as well. It could be established with certainty of more than 105 million cigarettes (51 percent) that they were counterfeit. It was apparent of 98 percent of the more than 47 million cigarettes seized destined for the Netherlands that they had counterfeit brands.

“FIOD and Customs therefore give high priority to intercepting illegal cigarettes. The government wants to stop this form of fraud by tightening up checks and improving cooperation with cigarette manufacturers and other EU member states.”¹⁷

Plain packaging, however, would dramatically aggravate the problem of counterfeit cigarettes instead of contributing to its solution. It would lead to standardized packaging with only the brand name in standard font, and information concerning the product content and health warnings. All packaging will thus be made uniform which will make counterfeiting easier. This is because it becomes simpler to reproduce the packaging, cheaper to produce counterfeit and more difficult to identify them.

Limitations on packet designs such as making cuboid packets mandatory are likely to have the same effect.

Plain packaging and the further standardization measures would also encourage illicit trade in branded products either counterfeit or purchased abroad. As branded products offer the traditional brand experience, consumers having the choice between expensive original cigarettes in plain packages, and cheaper counterfeit or contraband cigarettes in branded packages, are likely to prefer illicit goods over original cigarettes in plain packaging.

As a result, plain packaging would involve huge costs for the Dutch government in terms of lost taxes and extra investments in the fight against counterfeit tobacco products. It is contrary to the priority of the Dutch government to push back counterfeit and illicit trade of cigarettes.

The TPD proposal bans certain cigarettes such as menthol cigarettes. This entails the risk of creating more illicit trade. As the Advocate – General Geelhoed already considered in the case *UK vs BAT*¹⁸ regarding the validity of the current Tobacco Products Directive:

“it is entirely reasonable to assume that an illegal market will be established in cigarettes that are banned within the EU but which can be obtained outside it”.

Violation of national and European law, including European fundamental rights

Apart from insufficient evidence for beneficial effects on public health and the facilitation of illicit trade, plain packaging goes against the purposes and objectives of national and European law. Plain packaging is all about the removal of brands, trademarks and logos from the product's packaging. This effectively prevents the tobacco industry from using

¹⁷ Website Government of the Netherlands: <http://www.rijksoverheid.nl/onderwerpen/invoer-en-douane/sigarettenvangsten>

¹⁸ ECJ 10-12-2002, C-491/01, *UK vs Bat*, paragraaf 158.

figurative, pictorial or colour trademarks. Each of these trademarks constitutes a separate property right under Art. 1 of the First Protocol to the European Convention on Human Rights (ECHR, which will be discussed hereafter). The only remaining option is the use of brand names as traditional word marks. Even the use of these basic trademarks, however, is impaired by the additional obligation to use standardized text style.

The TPD proposal has a similar effect in that it strongly limits the possibility of the tobacco industry to use its trademarks, designs and patents, *inter alia* in respect to shape marks, device trademarks that are portrait shaped, or which would become illegible if limited to 25% of the height of a cigarette packet. Though such limitations would be introduced by way of a European Union Directive, they would still be a violation of national intellectual property laws as well as Directives and Regulations on intellectual property at the European Union level. Therefore, such limitations should not easily be accepted by the European Parliament without good grounds and solid evidence of their effect, even if they could not be invalidated by the General Court of the European Union on the basis of a violation of European Union law. Of course, in as far as such limitations infringe on international fundamental rights, they will also be subject to legal action and their implementation in Member States can be prevented in court.

The TPD measures would affect all portrait-shaped Community trademarks and Benelux trademarks owned by Philip Morris. They would also affect certain patent rights that Philip Morris owns, including patents which are in force in The Netherlands, such as European patents EP 1 889 550 B1 (Art. 6 TPD) and EP 1 626 916 B9 (Art. 13 section 2 TPD).

Conflict with European Union and Benelux trademark law

Harmonized EU trademark law, as implemented in the Benelux countries with the Benelux Convention on Intellectual Property, protects the rights vested in trademarks to perform the functions of a trademark as accepted in recent case law by the Court of Justice of the European Union (CJEU). As pointed out by the CJEU, trademark law in the EU aims not only to protect the essential function of trademarks, which is to guarantee to consumers the origin of the goods or services, but also the other functions of trademarks, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertising.¹⁹ In this context, the CJEU underlined explicitly that the exclusive trademark rights guaranteed under harmonized EU trademark law were conferred

*in order to enable the trade mark proprietor to protect his specific interests as proprietor, that is, to ensure that the trade mark can fulfil its functions...*²⁰

Plain packaging interferes with these core functions of trademarks. With plain packaging depriving the tobacco industry of the possibility to use logos, colours or other figurative elements, it de facto erodes all tobacco trademark rights relating to figurative, pictorial or colour trademarks. These trademarks simply cannot fulfil any of the protected trademark functions any longer. For the industry, this is even the more severe as these brand

¹⁹ CJEU, judgment of 18 June 2009, case C-487/07, L'Oréal/Bellure, para. 58.

²⁰ CJEU, *ibid.*, para. 58.

identifiers are the key communicator with the final consumer after the ban on tobacco advertising.²¹

The remaining option to use brand names in standardized text style on tobacco packaging also erodes the protected trademark functions of the word marks involved. Being presented in standardized text style, the brand names' capacity to clearly distinguish tobacco products is substantially impaired. For consumers confronted with plain packaging, the brand name attached to a particular tobacco product is presented in a way in which it cannot fulfil its functions to the extent provided by law, since it cannot stand out from the other (mandatory) information on the package and it is deprived of its additional characterizing features. Instead, it is made to look the same as the competitor brands. It will be extremely difficult for consumers to distinguish one brand from another. With this inability to recognize a brand, instead, the price of the product becomes the decisive factor for consumers' buying decision.

The trademarks, therefore, are rendered incapable of guaranteeing any particular product quality. Moreover, they can no longer fulfil any investment or communication function. According to the European Commission plain packaging would reduce the possibilities for brand differentiation in particular affecting high margin/ premium brands.²² Currently, there is no basis in European Union law for a plain packaging obligation.

At the same time, there is harmonisation on a European level on the use of trademarks in the Trademark Directive. National trademark laws (or, in the case of the Benelux, regional trademark law) should be interpreted and applied in conformity with the text and objectives of the Trademark Directive. This means that such application and interpretation should respect the functions of a trademark as identified by the CJEU. Thus, a national law providing for plain packaging, which would thereby limit the exercise of the trademark functions by its owner, would interfere with the purposes of the Trademark Directive. In addition, such national law would constitute an infringement of article 34 of the Treaty on the Functioning of the European Union²³ (TFEU), which cannot be exempted under article 36 TFEU²⁴ since it will not meet the test of proportionality inter alia because there is no evidence of a positive public health effect. Hence, a plain packaging obligation under national law would go against the purpose of the Trademark Directive and may thus also be a violation of the principle of sincere cooperation as laid down in Art. 4 section 3 of the Treaty on European Union. This principle creates an obligation for the Member States not to enact national laws that would go against the purpose and objective of EU instruments,

²¹ The crucial importance of brand communication has been acknowledged by the European Commission in case No. COMP/M.4581, recital (68). Similar points are raised by Spyros Maniatis and Anselm Kamperman Sanders, "A quixotic raid against the tobacco mill", *European Intellectual Property Review* 1997, 237.

²² EC Commission, Commission staff working document, impact assessment, accompanying the document Proposal for a Directive of the European Parliament and of the council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, 19 December 2012, SWD (2012) 452 Final, page 95.

²³ Article 34 TFEU: "*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.*" Please note that "all measures having equivalent effect" could also be packaging requirements.

²⁴ Article 36 TFEU: "*The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*"

like in this specific case the Community Trademark Regulation and the Trademark Directive.

In as far as it would affect Community trademarks, it would arguably constitute a violation of the first sentence of Art. 14 section 1 of the Community Trademark Regulation. That provision stipulates that the effects of Community Trademarks shall be governed solely by the provisions of the Regulation. Section 2 provides that the scope of protection may be de facto broadened by actions based on national laws on unfair competition, but there is no provision that allows the limitation of the effects of Community Trademarks by national law. The functions of a trademark as accepted by the CJEU should be regarded as effects as meant in Art. 14 of the Regulation. Thus plain packaging laws would prevent Community Trademarks from having their full effect as provided for by Art. 14 of the Regulation. Thus, such a national law would also go against the purpose of the Community Trademark Regulation and could also be found to be a violation for that reason. In addition, introducing plain packaging in individual Member States would be a violation of the unitary character of the Community trademark as protected under article 1(2) Community Trademark Regulation.

The corrosive effect of this systematic encroachment upon trademark functions must not be underestimated. Given the erosion of all protected trademark functions, the tobacco industry is in fact deprived of its trademark rights. These rights are effectively expropriated.

For society at large, this means that the industry can no longer rely on brand communication to compete on the tobacco market. There is evidence however that plain packaging, will lead to a drop in prices of cigarettes as the only feasible means to compete are net prices before taxation. As the price is the single biggest factor in smoking prevalence, consumption of tobacco products – and related health risks – are likely to rise considerably. In the RAND Survey “Assessing the Impacts of Revising the Tobacco Products Directive” commissioned by Directorate General for Health and Consumer Affairs (DG SANCO), it is expressly stated against this background:

With possibly less or no space on the pack to display brand logos and recognisable graphical features, it will become difficult for tobacco companies to sustain their brands and sell their products at a premium rate...Currently, highly branded cigarettes are sold with considerably higher margins than unbranded cigarettes. If the brand attraction cannot be maintained, the tobacco market may become more commoditised, and profit margins (but also prices) would drop, having varied impacts on tobacco manufacturers.²⁵

It is clear that this not only applies to plain packaging, but also to the 75% rule.

The corrosive effect on profit margins will particularly affect the industry’s ability to innovate and develop reduced risk products. With tobacco producers being no longer able to derive extra benefits from their valuable tobacco brands and facing fierce price

²⁵ See the RAND Survey, *Assessing the Impacts of Revising the Tobacco Products Directive*, presented in September 2010 and commissioned by DG SANCO, 152, warning of a commoditisation as a result of lost brand value. Cf. Hana Ross and IV Frank Joseph Chaloupka “The effect of cigarette prices on youth smoking” (2003) 12 Health Economics 217.

competition on the tobacco market, they will be rendered incapable of investing in reduced risk products.

Finally, it is to be considered with regard to the erosion of trademark functions that the first recital of Directive 2004/48/EC, the so-called Enforcement Directive, shows that, under EU law, it is an important assumption that for the achievement of the internal market the restrictions on freedom of movement and distortions of competition must be eliminated, while creating an environment conducive to innovation and investment.

In this context, the protection of intellectual property is an essential element for the success of the internal market. The protection of intellectual property is not only important for the promotion of innovation and creativity, but also for the development of employment and the improvement of competitiveness. The Court of Justice of the European Union has developed this important guarantee of EU law in more detail by demarcating the intellectual property rights on the basis of the specific subject matter of protection. In the case of trademarks, this effort has led to the identification of several protected trademark functions. However, if the protection of these functions is unnecessarily encumbered, for instance through plain packaging, this balance carefully created at the European level is distorted.

With regard to Benelux trademarks, if one of the member states of the Benelux would enact plain packaging laws, this would also go against the purpose of the Trademark Directive as described above. The prohibition to use a trademark in one of the Benelux countries because of national plain packaging would also be contrary to article 1(2) of the Community Trademark Regulation that confirms the unitary character of a Community trademark. Moreover, since plain packaging interferes with the functions of trademarks as identified by the European Court of Justice – which also applies to Benelux trademarks – it would interfere with those functions and with harmonization of trademark law at the Benelux level. Although the Benelux Convention on Intellectual Property does not contain any specific provision that blocks an interference with the effect and function of Benelux trademarks through national laws of an individual Benelux member state, such laws would go against the objective of the Convention, as further underlined by the Trademark Directive and the case law of the CJEU. Adopting plain packaging legislation in one of the Benelux countries would be contrary to the unitary character of Benelux trademark law.

All of the above also same applies to the 75% rule in as far as such restriction blocks the exploitation of device trademarks that cannot be depicted properly on the remaining space on the front and back of the packet.

Encroachment upon fundamental rights

Given the erosion of trademark rights, it must also be considered that plain packaging and the 75% rule encroach upon the fundamental guarantee of property in Art. 1 of the First Protocol to the European Convention on Human Rights (ECHR) and Art. 17 of the EU Charter of Fundamental Rights, that has become legally binding under the Lisbon Treaty.²⁶ The guarantee of the peaceful enjoyment of possessions and the right to own, use, dispose of and bequeath lawfully acquired possessions in these legal instruments covers trademark rights and business goodwill.

²⁶ See also JURI opinion, page 4

In the impact assessment of the TPD proposal it is mentioned that the Commission has looked at fundamental rights and that according to the Commission the TPD proposal affects several fundamental rights, more specifically article 8, 11, 16 and 17 of the EU Charter. Of course, the European Parliament should not enact a Directive that negatively affects fundamental rights.

At a national level, in line with these European fundamental rights, the Dutch Constitution guarantees the right of property in Art. 14. The Government and Parliament are bound by the Constitution when enacting a law and by imposing plain packaging they would violate the constitution, unless the industry is reimbursed for the consequences of such obligation.

In addition, compliance with Art. 10 of the First Protocol to the ECHR and Art. 17 EU Charter indeed is a prerequisite for the application of Dutch legislation by virtue of Art. 94 of the Dutch Constitution. Therefore, courts in the Netherlands will consider these European guarantees of fundamental rights and they can declare that a statutory law is not binding or block its effects if such law is in violation of these rights. Since the ECHR supersedes EU Directives, the same applies if such a national law is the implementation of a Directive such as the TPD.

The European Court of Human Rights has held that a registered trademark is an object of property for the purposes of Article 1 of the First Protocol of the ECHR.²⁷ In addition, the European Court has held that business goodwill is also protected under Article 1 of the First Protocol of the ECHR.²⁸ These rulings equally apply in the context of Art. 17 of the EU Charter, which in section 2 even explicitly states that intellectual property shall be protected.²⁹ As plain packaging and the limitations set by the TPD proposal erode the registered trademark rights of the tobacco industry by systematically interfering with all protected trademark functions, plain packaging and the TPD proposal violate these fundamental guarantees of property. The JURI opinion adds to this that there seems to be no justification for the 75% requirement, and that it is even in contradiction with the WHO Framework Convention on Tobacco Control (hereinafter: "FCTC") rules, which provides only 30% as a minimum and does not advise more than 50%. There is also a violation of the protection of patents and registered designs.

With regard to figurative, pictorial and colour trademarks, plain packaging clearly constitutes expropriation. The various restrictions on the use of simple brand names, however, de facto also amount to expropriation.³⁰ As there is no credible evidence that plain packaging will have any positive effects on public health, these encroachments upon the guarantee of property cannot be justified. The health aim pursued could probably better be achieved with less restrictive measures, such as education campaigns and reasonably sized health warnings. Plain packaging obligations are therefore disproportionate. The unjustified expropriation of tobacco brand owners, by contrast, will lead to compensation claims on the basis of the fundamental guarantee of property.³¹

²⁷ *Anheuser-Busch v Portugal* (2007) 45 EHRR 36, para. 72 and 78.

²⁸ *Van Marle v Netherlands* (1986) 8 EHRR 483

²⁹ CJEU, judgment of 5 October 2010, case C-400/10 PPU, J. McB/L.E., para. 53.

³⁰ European Court of Human Rights, *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para. 63.

³¹ Art. 17(1) EU Charter and Art. 14(1) Dutch Constitution both explicitly recognize a right to fair compensation for the loss of property as a result of expropriation.

As plain packaging, moreover, excludes any possibility of tobacco brand owners using product packaging for the purpose of brand communication, it also encroaches upon the fundamental guarantee of freedom of expression in Art. 10 ECHR and Art. 11 of the EU Charter. In accordance with established case law of the European Court of Human Rights, this freedom extends to commercial speech and encompasses messages conveyed on product packaging.³² The tobacco industry, however, would be deprived of this fundamental right in case of plain packaging.

Further, consumers would be prevented, in case of plain packaging, from receiving product-related information conveyed by tobacco manufacturers. The right to receive information, however, is also explicitly guaranteed in Art. 10 ECHR and Art. 11 of the EU Charter. Depriving consumers of this right constitutes a further violation of the fundamental guarantee of freedom of expression and information. In addition, it is to be considered that plain packaging encroaches upon consumers' freedom of choice and their right to self-determination. With a uniform presentation of cigarettes in plain packages, consumers are rendered incapable of making an informed choice of their preferred tobacco product.

Under article 94 of the Dutch Constitution, national laws that are in conflict with binding provisions of international treaties have no effect. Thus, the provisions of the ECHR can be directly invoked against national plain packaging legislation, even if it constitutes an implementation of EU Directives. In such a case, the national law could nevertheless survive if it would be in accordance with another provision of the same treaty and that provision would take priority over the provision that is invoked against the plain packaging law. It is standard Dutch case law that, in case of a conflict between the right protected under Art. 10 ECHR and another fundamental right protected by the ECHR, the court must strike a fair balance between the protection of the rights involved.

In this case the State might try to argue that it acts in the interest of the rights as protected by Art. 2 (right to life) or 8 (right to private and family life) ECHR. Both these rights have been interpreted very broadly by the European Court of Human Rights and the European Commission of Human Rights as to include public health issues. However, there is a margin of appreciation for the individual countries under these provisions, meaning that they do not provide *carte blanche* to limit advertising for tobacco. In a case against Germany, the Commission ruled in 1998 that, in view of the fact that Germany had already restricted the advertising of tobacco products, prohibited smoking in certain public areas and introduced a public information campaign, refraining from a general prohibition on advertising of tobacco products was not a violation of Art. 2 and 8 ECHR.³³ This of course does not only apply to advertising, but also to branding and brand communication, meaning that, given the similar measures that The Netherlands have already taken, there is no infringement of Art. 2 and 8 ECHR by refraining from introducing plain packaging that would have to be balanced against an infringement of Art. 10 ECHR.

And even if such a balance should nevertheless be struck, in view of the fact that there is no conclusive evidence that plain packaging has positive health effects, Art. 2 and 8 ECHR in this case would not outweigh the protection awarded to the industry by Art. 10 ECHR.

³² European Court of Human Rights, *Markt Intern v Germany* (1989) 12 EHRR 161, para. 26; *Casafo Coca v Spain* (1994) 18 EHRR 1, para. 35; *Jacobowki v Germany* (1994) 19 EHRR 64, para. 26. In this respect, Art. 10 ECHR offers a broader protection than Art. 7 section 4 of the Dutch Constitution.

³³ European Commission of Human Rights 16-4-1998, No 32165/96, *Wöckel vs Germany*.

Thus, Art. 2 and 8 ECHR would not protect national plain packaging legislation against a violation of article 10 ECHR.

Given the described corrosive effect on the business activities of tobacco manufacturers, plain packaging also constitutes an encroachment upon the freedom to conduct a business guaranteed in Art. 16 of the EU Charter. As pointed out above, tobacco packaging is one of the very few remaining possibilities for a tobacco manufacturer to convey product information, advertise its product and distinguish this product from those of competitors. The erosion of this remaining communication channel impedes the business activities of established tobacco manufacturers.

The proposed other standardization measures and the 75% rule therein may also be in violation of the fundamental rights to property and the freedom to conduct a business since it will lead to serious limitations or even prohibitions on the use of intellectual property rights of the tobacco industry.

In 2002 the European Court of Justice evaluated the current Directive and assessed the proportionality of the current health warnings.³⁴ The court validated the current health warnings because they still allowed

“sufficient space for the manufacturers of those products to be able to affix other material, in particular concerning their trade marks.” (para 132).

Based on this, the court held with regard to the fundamental right of property:

149. As regards the validity of the Directive in respect of the right to property, the Court has consistently held that, while that right forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (see, in particular, Case 265/87 Schröder [1989] ECR 2237, paragraph 15; Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 78, and Case C-293/97 Standley and Others [1999] ECR I-2603, paragraph 54).

”the only effect produced by Article 5 of the Directive is to restrict the right of manufacturers of tobacco products to use the space on some sides of cigarette packets or unit packets of tobacco products to show their trade marks, without prejudicing the substance of their trade mark rights (...) Article 5 constitutes a proportionate restriction on the use of the right to property compatible with the protection afforded that right by Community law (para 150)

This means that, although the CJEU considered that the current health warnings (30% front and 40% back) did not impair the substance of a trademark, this could certainly be the case if these were expanded to 75%, especially if there is no evidence of a significant health effect of such an expansion over the current situation. The Advocate General in this

³⁴ ECJ 10-12-2002, C-491/01, *UK vs Bat*.

case at least already indicated that the substance would be impaired if “normal usage was no longer possible”.

The 75% rule in fact constitutes an expropriation of those device trademarks that for practical purposes can no longer be used on a cigarette packet and of shape marks that protect other shapes than cuboid. With 75% health warnings on the front and on the back in combination with the other standardization measures, the normal usage of the trademarks is no longer possible. This means that the TPD proposal is disproportionate and infringes the right to property. The same applies to design rights and patents that can no longer be exploited under the TPD.

Compensation

A violation of fundamental rights such as the right of property and the fact that plain packaging and the TPD proposal will de facto lead to expropriation of various trademark rights, design rights and patents of the tobacco industry may lead to considerable damage claims of the tobacco industry against both the European Union and the Netherlands. The European Union may be liable for compensation for enacting the TPD and the Netherlands will indeed be liable for implementing it.

Article 17 of the Charter of Fundamental Rights explicitly refers to the necessity of compensation being paid in case of deprivation, as does the Dutch Constitution. The right to compensation in case of expropriation has also been established in the case law of the European Court of Human Rights.³⁵

The CJEU has explicitly accepted that trademarks also have a monetary function, i.e. the investment function, which is protected by the Trademark Directive and the Trademark Regulation. The actual value of trademarks can be very high, as is shown by transactions that involve transferring trademarks.³⁶ Patents represent considerable investments and the CJEU has accepted that the proprietor should be enabled to make a return on those investments, which has even resulted in specific European Union law in the life sciences and agricultural sector, the Supplementary Protection Certificate Regulations. An encroachment on the right of property would therefore, even in the unlikely case that it would be justified, result in considerable claims for damages.

Violation of international law

The Netherlands is a party to the Paris Convention for the Protection of Industrial Property, as are the other EU Member States. Although the European Union is not bound directly, implementation into national law of a Directive that violates the Paris Convention will be a violation of that convention in the countries concerned. In the Netherlands, this means that the national courts can judge such violations.

Both the Netherlands and the European Union itself are members of the World Trade Organization, and therefore bound by its agreements, including the Agreement on Trade-

³⁵ There is an exception for situations where expropriation is a lawful purpose of the law itself, as for the confiscation of proceeds of crime, but such exceptions do not apply here.

³⁶ In august 2012 the IKEA trademark was transferred for 9 billion Euro's.

Related Aspects of Intellectual Property Rights (TRIPs) and the Agreement on Technical Barriers Trade (TBT).³⁷

The provisions of the Paris Convention and the TRIPs Agreement can be invoked against States that are party to the agreements, including the European Union, as well as directly invoked in relationships between private parties in all Benelux countries with regard to trademarks on the basis of Art. 4.7 of the Benelux Convention on Intellectual Property. Art. 94 of the Dutch Constitution, as mentioned above, stipulates that provisions of Dutch law are inapplicable in case of incompliance with relevant international law. This includes national law that implements European Union Directives. Besides, a court will find such Directives themselves in violation of international law, where applicable. When considering the introduction of plain packaging and the other TPD measures, compliance with international provisions, therefore, must necessarily be ensured.

On top of that, the WTO provides for direct litigation for violation of its agreements against its members, including the European Union, before the WTO panels.

Plain packaging legislation, the 75% rule and the other measures of the TPD proposal would be contrary to the obligations which The Netherlands has under the Paris Convention and which the European Union and the Netherlands have under the TRIPs Agreement. In particular, plain packaging and the other measures of the TPD proposal may violate Art. 7 and 10bis of the Paris Convention and Art.s. 15(4), 17, 20, 26 and 27 of the TRIPs Agreement. Moreover, they are incompatible with Art. 2(2) of the TBT Agreement.

Art. 7 Paris Convention and Art. 15(4) TRIPs

Art. 7 of the Paris Convention and Art. 15(4) of the TRIPs Agreement both provide that

the nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark.

This provision includes, as a logical consequence of registration, the obligation to allow a trademark to be used on a legal product.³⁸ The only grounds for refusing the registration of a trademark are set forth in Art. 6quinquies (B) of the Paris Convention. While this provision allows a trademark to be refused registration when it is contrary to morality or public order, it is clear that denying registration to trademarks on such grounds is only related to the nature of the mark itself or where the mark is proposed to be used in an immoral or deceptive way. Neither the broad ban of product related elements in article 12 section 1 of the TPD proposal, nor plain packaging and the 75% rule can be exempted as pursuant to Art. 6quinquies (B) of the Paris Convention.³⁹

³⁷ Annex 1 C of the General Agreement on Tariffs and Trade (GATT).

³⁸ As indicated above, the legality of tobacco products has been acknowledged by the Dutch Minister of Health, Welfare and Sports by saying “*Sigaretten zijn een legaal product, de Minister ziet daarom niets in plain packaging*”.

³⁹ Annette Kur “Restrictions under Trademark Law as Flanking Maneuvers to Support Advertising Bans” (1992) *International Review of Intellectual Property and Competition Law* 31, 41; Alberto Alemanno and Enrico Bonadio “Do You Mind My Smoking?: Plain Packaging of Cigarettes under the TRIPs Agreement” (2011) 10 *John Marshall Review of Intellectual Property Law* 450, 470.

Accordingly, as tobacco marks can be lawfully registered in line with Art. 6^{quinquies} of the Paris Convention, they can also be lawfully registered and as such used under Art. 7 of the Paris Convention and Art. 15(4) TRIPs. Plain packaging, however, violates this international guarantee of registration and use by effectively depriving the tobacco industry of the use of figurative, pictorial and colour trademarks even though these marks cannot be denied registration and the same goes for a 75% rule with regard to portrait shaped device trademarks.

Art. 10bis Paris Convention

Plain packaging would be inconsistent with Art. 10bis of the Paris Convention, which prohibits

“all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor”.

Plain packaging would lead to all packaging of tobacco products being made uniform. If all packages look the same, consumers will not be able to distinguish one brand from another which will pose a serious risk of confusion as prohibited by Art. 10bis Paris Convention.

Art. 17 TRIPs

Further conflicts with international trademark law arise under the TRIPs Agreement. Art. 17 TRIPs allows the adoption of “limited exceptions” to the rights conferred by a trademark, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties. While the provision, therefore, leaves room for setting certain limits to trademark rights, plain packaging clearly falls outside the scope of Art. 17. As discussed above, plain packaging erodes the trademark rights of the tobacco industry altogether by interfering with all protected trademark functions. As explicitly noted by a WTO Panel interpreting Art. 17 TRIPs, these functions are also relevant at the international level:

The function of trademarks can be understood by reference to Article 15.1 as distinguishing goods and services of undertakings in the course of trade. Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function. This includes its interest in using its own trademark in connection with the relevant goods and services of its own and authorized undertakings. Taking account of that legitimate interest will also take account of the trademark owner's interest in the economic value of its mark arising from the reputation that it enjoys and the quality that it denotes.⁴⁰

In the light of this clarification, plain packaging cannot be deemed a limited exception in the sense of Art. 17 TRIPs. This is confirmed by a further consideration of the WTO Panel stating that the term “limited exception”

⁴⁰ WTO Panel 15 maart 2005, document WT/DS174/R, para. 7.664, online available at www.wto.org.

by itself connotes a limited derogation, one that does not undercut the body of rules from which it is made. The addition of the word “limited” emphasizes that the exception must be narrow and permit only a small diminution of rights. The limited exceptions apply “to the rights conferred by a trademark”. They do not apply to the set of all trademarks or all trademark owners. Accordingly, the fact that it may affect only few trademarks or few trademark owners is irrelevant to the question whether an exception is limited. The issue is whether the exception to the rights conferred by a trademark is narrow.⁴¹

Given this additional explanation given by the WTO Panel, there is no basis for defending plain packaging on the grounds that it constitutes a permissible limited exception under Art. 17 TRIPs. Depriving tobacco trademarks of all functions, plain packaging goes far beyond the boundaries set in Art. 17 TRIPs. It completely neglects the interest of the tobacco industry in using its trademarks in connection with tobacco products.

In fact, this consideration also means that a 75% rule would not be allowed in as far as it would render the use of portrait shaped device marks impossible for all practical purposes.

The JURI opinion has correctly stated that any measure that would exceed the FCTC standard of 50% would constitute a violation of TRIPs which, especially because of the FCTC rules, cannot be overcome.⁴²

Art. 20 TRIPs

A further conflict with international law exists under Art. 20 TRIPs. This provision makes it clear that the use of a trademark in the course of trade

shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

Contrary to this provision, plain packaging and the 75% rule and the other standardization measures impose the obligation on the tobacco industry to use brand names “in a special form”. As standardized text style must be used and figurative, pictorial and colour elements are excluded, or in the case of the 75% rule, the size and position of the trademark is limited, without justification based on scientific evidence, plain packaging and the 75% rule, in addition, adversely affect the trademark’s “capability to distinguish the goods or services”. Brand recognition is minimized because of the severe restrictions on the use of brand identifiers.

Hence, plain packaging and the 75% rule cannot be justified under Art. 20 TRIPs. They violate this international provision by imposing unjustified special requirements that are explicitly mentioned and declared impermissible in Art. 20 TRIPs.

It cannot be asserted in this context that the detriment caused to the tobacco industry is outweighed by important public policies, such as the protection of public health. As there is

⁴¹ WTO Panel 15 maart 2005, document WT/DS174/R, para. 7.650.

⁴² JURI opinion, page 18.

no evidence for beneficial effects of plain packaging on public health, the tobacco industry is burdened with ineffective obligations that do not serve any public interest. As indicated above, plain packaging is even likely to lead to price competition and lower prices on the market for tobacco products. This, in turn, will enhance tobacco consumption and public health risks.

Art. 26 TRIPs

Art. 26 TRIPs is the parallel provision for design rights of Art. 17, as it provides that

Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

Thus, this provision would equally be violated by the requirement to only use cuboid packets, which has no proven effect at all.

Art. 27 TRIPs

Art. 27 TRIPs not only provides that patents can be applied for, but also that

patent rights [shall be] enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

The only allowable limitations relevant for this case are, according to section 2:

Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

Again, this section contains the condition that such limitation shall be necessary to protect human life or health, which requires concrete proof of that necessity. This does not exist, which means that this provision is also violated.

Art. 2(2) TBT

Apart from conflicts with international obligations in the field of intellectual property protection, plain packaging violates international obligations of the Netherlands with regard to the avoidance of technical barriers to trade. The freedom of WTO Members in this area is regulated in the TBT Agreement on the preparation, adoption and application of technical regulations. These regulations are defined as documents laying down

product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols,

*packaging, marking or labelling requirements as they apply to a product, process or production method.*⁴³

Plain packaging, therefore, falls within the scope of the TBT Agreement. Against this background, the Netherlands is bound to ensure, in accordance with Art. 2(2) TBT,

that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

Plain packaging and the TPD measures are such unnecessary obstacles. They are likely to cause sales of branded cigarettes to decline while overall tobacco consumption will not decline. With a decline in sales, imports of tobacco used in brand name products and of finished brand name tobacco products will decline as well. Plain packaging and the TPD measures, therefore, have a significant negative impact on trade in branded products. As pointed out above, credible evidence for positive effects of plain packaging and the TPD measures on public health are lacking. Plain packaging and many of the other measures contained in the TPD proposal, in other words, are an unnecessary obstacle in the sense of Art. 2(2) TBT. With the adoption of such regulations, the European Union and the Netherlands would violate the packaging, marking or labelling requirements under the TBT Agreement.

Damage to the international reputation of the Netherlands and the European Union

Considering the various violations of international law, it is to be added that, if plain packaging measures and the new TPD were adopted, the outlined conflicts would substantially damage the international reputation of the European Union and the Netherlands. Conflicts with the TRIPs Agreement and the TBT Agreement may lead to Dispute Settlement Procedures against the European Union and the Netherlands before the World Trade Organization. Conflicts with the Charter of Fundamental Rights and the Trademark Directive and the Community Trademark Regulation may lead to proceedings against the Netherlands before the European Court of Justice and the national courts. Conflicts with the ECHR and the 1st Protocol to the ECHR may lead to proceedings against The Netherlands before the European Court of Human Rights and also in the national courts. The expropriation of trademark owners may also cast doubt upon the willingness of European Union and Dutch lawmakers to ensure the protection of intellectual property – a crucial asset for the European and the Dutch industry and economic growth, the protection of which is of fundamental importance to the European Union and the Netherlands itself.

⁴³ See TBT Agreement, Annex 1, 1.