



Plain Tobacco Product Packaging as a Means to protect Young People and Adult Consumers

Background

Several EU Member States are currently considering introducing plain packaging for tobacco products as one element of a comprehensive ban on tobacco advertising and as an additional measure to protect non-smokers.

Plain packaging

Plain packaging consists of a design that is devoid of all advertising and commercial features and instead employs standardised design features, e.g. font, font size and font colour, and does not include any brand logo, lettering and other advertising features¹.

Plain tobacco product packaging:

- is less attractive than traditional packaging to young people and adults^{2,3},
- can reduce false beliefs of consumers due to advertising on traditional packaging^{2,3},
- is also compatible with measures to combat the illicit trade in tobacco products and
- is consistent with international⁴, European and national legislation.



Figure 1: Plain tobacco product packaging

International consensus

Plain tobacco product packaging was recommended unanimously by more than 160 parties to the WHO Framework Convention on Tobacco Control (WHO FCTC) in November 2008⁵

1. to prevent the use of tobacco product packaging as an advertising vehicle and
2. to enhance the visibility and effect of health warnings⁶.

Cigarette packs as advertising space

The pack is an essential component of tobacco advertising⁷ and also needs to be taken into account within the scope of an extensive advertising ban if the WHO Framework

Convention on Tobacco Control is to be implemented consistently.



Figure 2: Sample cigarette packs

The pack is the marketing instrument with the most direct links to the consumer. The pack invites consumers to repeatedly identify with both the product's image and the product's message. Tobacco manufacturers have long since been aware of the positive promotional effect of packaging. Even as far back as the 1980s a major US manufacturer stated: "...if you smoke, a cigarette pack is one of the few things you use regularly that makes a statement about you. A cigarette pack is the only thing you take out of your pocket 20 times a day and lay out for everyone to see. That's a lot different from buying your soap powder in generic packaging."⁸ A Norwegian study revealed that young adult smokers see the pack design as an integral part of their identity as a smoker and view the cigarette pack as an accessory – a way to express their own identity and personal views⁹.

Particularly when other advertising channels do not exist, the cigarette pack becomes a key element of brand communication^{10 11}. As an advertising channel the pack attracts the consumer's attention, conveys the brand identity and promotes the product¹¹. It addresses consumers directly and is used to reinforce the brand image, to influence expectations regarding taste, to minimise perceptions of the health risks and to convey messages about alleged differences in the risks of various brands^{11 12}. This is done mainly by three elements:

1. Pack colour

A colour is generally used to influence consumers' perception of the health risks^{11 12}.

Independent studies and formerly undisclosed tobacco industry documents have shown that consumers associate the "strength" of a cigarette with the colour used for the packaging: red shades are considered to be stronger than blue or gold, and silver and white shades or light-coloured backgrounds are perceived to be "lightest"^{12 13 14 15}.

2. Link with product design and emission values

Filter characteristics and emission values derived from smoking machine measurements are frequently used to suggest a lower level of risk, even if they do not take into account either smoking behaviour or health risks. In Canada it was demonstrated that 80% of smokers associate low values in the brand name with lower tar levels and a lower health risk¹⁶.

3. Brand descriptors

Even though the European Union bans deceptive qualifiers such as "light" or "mild" (2001/37/EC), terms such as "gold", "natural" or "advance" continue to be used, which indirectly suggest a higher-quality, healthier, lower-toxin or additive-free consumption. In a Canadian study 70% of smokers considered terms such as "smooth" and "silver" to be less detrimental to health than standard "full-flavour" cigarettes¹⁶.

Plain packaging as a means to protect young people and adult consumers

As no country has yet implemented legislative measures to introduce plain tobacco product packaging, to date no data exist as to its practical effect on the consumer behaviour of young people and adults. However, initial experiments as to the effectiveness of generic packaging on both the attitudes and behaviour of young persons and adults in the United Kingdom, New Zealand and Canada have shown that it can:

- reduce the attractiveness and identifying link of tobacco packaging and brands, especially among young people^{2 3},
- increase the effect, message recall and credibility of warnings^{17 18} and

- reduce false beliefs relating to the health risks².

With an increasingly generic packaging design and reduction of brand features (smaller font size, grey-brown background), a measurable reduction in positive pack perception, positive expectations on the product and the probability of consuming the product was observed^{2 3}. In addition, the smokers interviewed (n=813) reported that they would perceive consumers of plain tobacco product packaging to be less trendy and stylish, less young, and less sociable and outgoing³.

A British study on the perception of plain versus conventional cigarette packaging revealed that young people (n=806) perceive plain packaging to be significantly less attractive and less likely to be the preferred brand if they were to try smoking². In the case of adult smokers (n=516) plain packaging was perceived as significantly less attractive and less "mild" than conventional packs. Unlike brown, plain cigarette packs, a white, plain pack was described as being lower in tar and less detrimental to health and was assumed to make quitting easier than in the case of equivalent conventional packs². It is thus important when introducing plain packaging to consider the varying risk perceptions. If brand descriptors such as "gold" or "smooth" are used on otherwise plain packaging, the study demonstrated that both young people and adults falsely associated such epithets with increased attractiveness, smoother taste, lower health risk, lower tar content and easier quitting².

Comparative experiments as to the effect of warnings on plain packaging in comparison with conventional tobacco product packaging consistently indicate that plain packaging can direct the attention of viewers towards the warnings and can enhance active recollection of brief, direct and succinct warnings^{19 20}. The above mentioned studies show how important it is to focus attention on the warnings without being distracted by colour, images or lettering.

By reducing the attractiveness and the advertising effect of tobacco product packaging and also by possibly reinforcing the dissuasive effect of

warnings, it is plausible that the introduction of generic packaging could both reduce the uptake of tobacco consumption⁴ and also increase the chances of quitting permanently⁸.

The Canada House of Commons Standing Committee on Health thus already confirmed in 1994 that, after weighing up the evidence, plain packaging could be an appropriate step in the overall strategy to reduce tobacco consumption¹⁹.

In June 2009 the Australian government's Expert Commission in the report on the National Preventative Health Strategy demanded to "eliminate the promotion of tobacco products through design of packaging". In the opinion of the Expert Commission, "... there can be no justification for allowing any form of promotion for this uniquely dangerous and addictive product [...]. Requiring cigarettes to be sold in plain packaging would reinforce the idea that cigarettes are not an ordinary consumer item"²⁰.

Aptness to combat the illicit trade in tobacco products

At present the parties of the WHO Framework Convention on Tobacco Control are drafting an international protocol to combat illicit trade in tobacco products. All proposed measures to reduce and prevent illicit trade in tobacco products could also be applied to generic packaging. The position, size and technical implementation of standardised safety features (such as designation of country of origin and destination, as well as tracking and tracing technologies) can be prescribed by a central body, with the result that they would be easier to recognise on plain packs and counterfeits would thus be easier to detect by enforcement officers and consumers alike.

The legal situation in relation to plain tobacco product packaging

Introduction of plain packaging for tobacco products can be implemented on either national or EU level. Although it is preferable to introduce plain packaging on EU level, as this is more effective, both measures comply with international

law, EU legislation and German legislation, to quote one example.

Compatibility with national law – Germany as a reference for other EU Member States

A regulation introducing plain tobacco product packaging does not infringe the German Constitutional Law [Grundgesetz (GG)]. Neither property rights as per Art. 14 GG, nor freedom of expression as per Art. 5 Para. 1 GG, nor occupational freedom as per Art. 12 Para. 1 Clause 2 GG are wrongfully infringed by a regulation introducing plain tobacco product packaging, as these fundamental rights are not absolute and may be restricted by an exemption.

Therefore, restriction of Art. 12 Para. 1 Clause 2 GG is justified and appropriate for reasons of public welfare. Reasonable assessment of the public welfare, which seems appropriate, is already sufficient to justify this²¹. The above remarks have explained that plain tobacco packaging helps reduce the attractiveness of packs and, as a result, e.g. young people are less liable to start consuming the product or continue consuming it²². Appropriateness results from the fact that there is no other similarly effective, yet less restrictive means that is capable of informing the public better about the risks involved in smoking when purchasing tobacco products. The warnings on tobacco product packaging that were already introduced some years ago are not perceived effectively enough, particularly by German consumers, due to the overall design of the packaging²³. Only plain tobacco product packaging can ensure that the consumer's attention focuses sufficiently on the warnings without being distracted by colour and font.

In its decision to introduce warnings on tobacco products the German Federal Constitutional Court also ascertained that Art. 5 Para. 1 GG was applicable to tobacco products only if advertising has a value-related or opinion-forming content or contains features, which serve to shape opinions²⁴. In doing so, it must be noted that, the less a statement contributes to shaping an opinion in a matter affecting the public, the more it serves

self-interests and is thus less defensible²⁵. Defence of Art. 5 Para. 1 GG may thus be challenged, but at very least intervention may be justified with the aim of safeguarding public health.

Art. 14 Para. 1 GG is also not infringed. Introducing plain packaging for tobacco products would probably reduce revenue and profit prospects for tobacco manufacturers; however it does not affect property rights. Art. 14 Para. 1 GG only protects legal positions, which are already attributed to a legal entity, and does not therefore in principle affect prospective profits and possible earnings at a future date. This would, therefore, not constitute an intervention. Intervention in intellectual property rights, which are also protected under Art. 14 Para. 1 GG, would be utterly justifiable for reasons of public welfare, as already stated. In particular, the intervention is not subject to compensation within the terms of Art. 14 Para. 1 Clause 2 GG, as the brand owner may continue to use the brand name on packaging. In addition, generic tobacco product packaging does not cause brands to be removed from the trademark register, as they may continue to be used²⁶.

Compatibility with EU law

A ruling to introduce generic tobacco packaging would not infringe EU legislation, particularly if it is introduced on a European level. Infringement of Art. 1 (2) of Regulation 207/2009 (formerly Reg. 40/94 EC) or Art. 28 EC Treaty (ECT) can be presumed only if a Member State grants better or different protection to its own commodities or brands. If generic packaging is introduced universally throughout the entire European Union, pan-European trademark protection is safeguarded to the same extent throughout Europe. With the entry into force of the Lisbon Treaty [Treaty on the Functioning of the European Union (TFEU)], the EU obtains by means of Art. 168 Para. 5 TFEU the new competence to enact measures, which serve directly to safeguard public health from tobacco consumption. By extending competence into the sphere of public health, the EU is thus entitled to pass a regulation on generic tobacco product packaging.

Also in accordance with Art. 13 Para. 2 of Directive 2001/37 on tobacco products, all Member States retain the right in accordance with the EU Treaty to enact stricter regulations on the manufacture, sale and consumption of tobacco products, which they consider to be necessary to safeguard public health. The flexibility of the EU Treaty even goes so far as to state that specific trade restrictions of individual Member States, which are however not given in this case, may be justified for urgent reasons, such as e.g. the promotion of public health in accordance with Art. 30 ECT²⁷.

In the course of discussions in relation to the introduction of warnings on tobacco products the European Court of Justice (ECJ) clarified in its ruling that the fundamental right to ownership (Art. 259 ECT) and related rights to intellectual property are not infringed by a European packaging regulation. Exercising an ownership right may also be subject to restrictions, in so far as such restrictions do in fact comply with the Community objectives of common welfare and do not represent a disproportionate, intolerable intervention with regard to the objective pursued, which affects the fundamental content of the rights thus protected²⁸. The Court went on to state that the Community legislator should not base a decision solely on the basis of scientific findings, but that when exercising authority in this field the legislator may also take into account other considerations, such as the increasing political and social significance of combating tobacco consumption²⁹.

Tobacco product manufacturers are subject to restrictions by a regulation to introduce plain tobacco product packaging in the interest of public welfare, in particular the health of young people. Such a constraint is, however, not unreasonable, as on the one hand the product per se is not banned, and on the other hand tobacco product manufacturers can still avail themselves of the right to utilise their brand names.

For the same reasons infringement of the ECHR is also not apparent. Art. 1 of the 1st Additional Protocol of the European Convention on Human Rights (ECHR)³⁰ does also in fact protect

intellectual property, nevertheless such protection is not unrestricted, nor is protection of the freedom of opinion [Art. 10 (1) ECHR]. Such rights can likewise be curtailed in the interest of public welfare and safeguarding health, cf. Art. 10 (2) ECHR.

In addition, there is no doubt as to the promotional effect of tobacco packaging³¹. Due to large-scale advertising bans throughout Europe in print media and on television, and in some Member States also bans on billboard advertising and point-of-sale advertising, the tobacco industry has concentrated more and more on the promotional effect of tobacco packaging. It is thus only consistent that advertising of this type on tobacco packaging be included within the scope of an extensive European advertising ban in accordance with Directive 2003/33 EC or be subsumed in this Directive.

Compatibility with treaties under international law (Conventions on Trade-related Aspects of Intellectual Property Rights TRIPS and Paris Convention for the Protection of Industrial Property)

These international treaties are flexible also in the context of safeguarding health due to several exemptions. Art. 8 (1) TRIPS contains an explicit exemption relating to the protection of intellectual property (also trademark protection as per Art. 20 TRIPS) for the protection of public health and diet and also the promotion of public interest. Considering the effects of generic packaging demonstrated to date (cf. above), a regulation restricting trademark protection would be justified.

Trademark protection under the terms of the Paris Convention is also not undermined as a result of the introduction of plain packaging. The Convention guarantees the right to register a brand (Art. 6 quinquies Paris Convention) and to protect its use by third parties. However, it does not offer any protection allowing use of the registered trademark in any particular way. As the brand name remains intact by the use of generic packaging, its registration and protection against usage by third parties would also remain intact.

Competitive infringement as per Art. 10 bis of the Paris Convention is also invalid, as all tobacco product packaging for the national market (domestic or imported) has to be generic, with the result that there can be no differential treatment. The fact that individual tobacco product packaging is already produced for every EU Member State, as warnings now have to be printed in the appropriate national languages, should not be ignored. This does not therefore entail any additional outlay for the EU market.

Credits

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Responsible editor:

Dr. Uwe Prümel-Philippson

Aktionsbündnis Nichtraucher (ABNR)

c/o Bundesvereinigung Prävention und Gesundheitsförderung e.V. (BVPG)

Heilsbachstr. 30

D-53123 Bonn

Tel.: +49 228 9872711

Fax: +49 228 6420024

E-mail: pruemel-philippson@abnr.de

Webpage: www.abnr.de

Authors:

Galina Manthei (Aktionsbündnis Nichtraucher, Berlin), Nick K. Schneider (Deutsches Krebsforschungszentrum, Heidelberg), Dr. Martina Pötschke-Langer (Deutsches Krebsforschungszentrum, Heidelberg)

Translated and adapted by:

Michael Forrest, European Network for Smoking Prevention (Brussels)

European Network for Smoking Prevention aisbl

Chaussée d'Ixelles 144

B-1050 Brussels, Belgium

Tel.: +32 2 2306515

Fax: +32 2 2307507

E-mail: info@ensp.org

Internet: www.ensp.org

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