

THE LEGAL FEASIBILITY OF PLAIN PACKAGING

Céline Brassart
Legal Consultant

Is this possible in the EU?




Tobacco Industry's Arguments

- Violation of Intellectual Property Rights
 - Violation of International Trade Law
- 

Fact 1 – Plain Packaging measures are compatible with Intellectual Property

TRIPS, EU Directive relating to
Trademark

Outline – Intellectual Property

1. Protection offered by Intellectual Property
 2. No positive right to use trademarks
 3. Precedents in the EU
- 

What is Intellectual Property Law?

(Articles 2 and 5 of the Trademark Directive 2008
Article 15.4 TRIPS)

Protections	Compatibility with plain Packaging?
1. Preserve brands so that consumers can distinguish products	YES
2. Right to register a trademark and to have exclusive ownership of the trademark	YES
3. Protection against unauthorized use by a 3 rd party	YES

The use of a trademark is a **PRIVILEGE, not a right**

Related Aspects of Intellectual Property Rights (TRIPs Agreement)


Article 20 (interpretation *a contrario*) – The use of a trademark can be encumbered if it is justifiable.

Article 8(1) "members may adopt measures necessary to protect public health, provided that such measures are consistent with the provisions of this Agreement."

Existing Precedents in the EU

- ▶ **Possible prohibition of the use of trademarks**
Precedent – TPD, Art. 7 – Prohibition of the use of terms "light", "mild" resulted in prohibiting the use of some trademarks (e.g. "Malboro Light")
- ▶ **Possible regulation of the use of trademarks**
Precedent – 2001 *Directive on Medicinal products and Guidelines* prohibits the use of "elements of a promotional nature on the packaging" and regulates the use of the logo.


Keypoints for Intellectual Property Law

- ▶ Distinctiveness of products
 - ▶ Registration right & exclusive property right
 - ▶ No violation of exclusive property right against unauthorised use
 - ▶ No such right as "right to use" in the law – therefore, regulation of the use of a trademark is legal.
 - ▶ Compatible with TRIPs agreement and the EU Directive on Trademarks
- 


Fact 2 – No violation of International Trade & Investment Law

WTO General Agreement on Tariff and Trade,
Technical Barriers to Trade, Bilateral
Investment Treaties


Outline – International Trade

- ▶ 1. What is international trade law?
 - ▶ 2. Exception to Freedom of Trade
 - ▶ 3. Application to plain packaging measures
 - ▶ 4. Other important considerations
- 

What is international trade law?

- ▶ **GOAL** – Freedom of trade i.e. free circulation of goods between countries (import and export)
 - ▶ **MEANS**
 - As little regulation and restriction as possible
 - Equal treatment of all products regardless of their country of origin
- 

Do plain packaging measures interfere with freedom of trade?

- ▶ Like other existing regulations (e.g. labeling of tobacco products), plain packaging measures would interfere with the freedom of trade principle
 - ▶ However, such public health regulations are not in violation of free trade agreements and principles.
- 

Possible Exception to Freedom of Trade

Example of GATT

The adoption of measures restrictive to trade are possible under Article XX(b) if the measure is:

- ▶ Necessary to protect public health
- ▶ Not arbitrary
- ▶ No unjustifiable discrimination between countries
- ▶ No disguised restriction on international trade

TBT sets similar type of exception to the prohibition of restriction to trade

Plain Packaging Measures meet the requirements to qualify as a public health exception


- ▶ **Necessary** for public health purposes
- ▶ **Not arbitrary** – Reasonableness of the measures required by FCTC art 11, 13, 2 & Guidelines
- ▶ **No unjustifiable discrimination** between countries – applies equally to any country that want to export packs to that country
- ▶ **No disguised restriction on trade** – good faith intention to promote public health

- ▶ => **Compliance with International trade**

Other interesting Elements

- ▶ A Tribunal's function is **not to review the substantive policy choice of a country** and it is reluctant to evaluate the relevance of such policy choices **unless clearly arbitrary or discriminatory**.
- ▶ Lawsuits under WTO agreement are difficult to bring, as only Member States can bring them.
- ▶ The WHO FCTC is on **equal footing with Trade Agreements**. Recent WTO case on took into account Article 9 WHO FCTC and Guidelines (*Clove Cigarette Case*, November 2011)

Conclusions International Trade & Investment Law

- ▶ It is likely that judges would conclude that these measures comply with GATT and TBT
 - ▶ Most bilateral investment treaties have public health exceptions. Even if some don't, it is unlikely that a tribunal would interfere with the sovereign power of a state to adopt legitimate public health regulations.
- 

SUMMARY OF ALL KEY POINTS

▶ **Intellectual Property Law**

- No interference with ownership rights
- Regulation of use a Trademark is legally possible

▶ **International Trade Law**

- Restriction to trade is justified by the public health purpose of Plain Packaging measures.

This is possible!



Thank you!

celinebrassart@gmail.com

