

Consultation on standardised packaging of tobacco products – response form

a. Please provide your name and contact information:

Name of respondent:

European Communities Trade Mark Association (ECTA)

Address of respondent:

Rue des Colonies 18/24, 9th Floor
Brussels 1000
Belgium

Contact email address:

Ewa Grabiak- ECTA Legal Coordinator: ewa.grabiak@ecta.org

b. Does your response relate to:

- United Kingdom
- England only
- Scotland only
- Wales only
- Northern Ireland only

c. Are you responding :

- As a member of the public
- As a health or social care professional
- On behalf of a business or as a sole trader (go to question d)
- On behalf of an organisation (go to question e)

d. If you are responding on behalf of a business, what type is it?

- Tobacco retailer (supermarket)
- Tobacco retailer (convenience store)
- Tobacco retailer (other type of shop or business)
- Specialist tobacconist
- Duty-free shop
- Wholesale tobacco seller
- Tobacco manufacturer
- Retailer not selling tobacco products
- Pharmaceutical industry
- Other (please provide details below)

If 'Other', please tell us the type of business

e. If you are responding on behalf of an organisation, what type is it?

- NHS organisation
- Health charity/NGO (working at national level)
- Local Authority
- Local Authority Trading Standards or Regulatory Services Department
- Local tobacco control alliance
- Retail representative organisation
- Other type of business representative organisation
- University or research organisation
- Other (please provide details below)

If 'Other', please tell us the type of organisation

ECTA, the European Communities Trade Mark Association, was formed in 1980.

ECTA numbers approximately 1.500 members, coming from all the Member States of the European Union with associate members from all over the world. It brings together all those persons practising professionally in the Member States of the European Community

in the field of trade marks, designs and related IP matters. These professionals are lawyers, trade mark advisors, trade mark attorneys, in-house lawyers of trademark owners and others who can be considered specialist practitioners in these areas.

f. Do you, or the business or organisation you represent, have any direct or indirect links to, or receive funding from the tobacco industry?

- No
 Yes (please describe below)

If 'Yes', please describe

g. If you do not wish your response to be identified in the summary report of consultation responses, please tick this box

Consultation questions

1. Which option do you favour?

- Do nothing about tobacco packaging (i.e., maintain the status quo for tobacco packaging)
 Require standardised packaging of tobacco products
 A different option for tobacco packaging to improve public health

If you prefer a different option for tobacco packaging, please describe it.

2. If standardised tobacco packaging were to be introduced, would you agree with the approach set out in paragraphs 4.6 and 4.7 of the consultation?

Yes

No

Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

Even if 'plain' or 'standardised' packaging were to be introduced, paragraph 4.6 would in the view of ECTA go too far. For example, there should be no need to prescribe colours of packaging, still less to prescribe colours and typeface for brand names.

In general, we do not consider that any case has been made for plain packaging, i.e. the prohibition of branding or the use of logos or colours.

These tools are essential for manufacturers to be able to distinguish their products from the products of other manufacturers. A brand is a 'trade mark' and the *raison d'être* of a trade mark (under the EU Directive and the UK Trade Marks Act 1994 which implements the main provisions of the Directive) is its capacity to distinguish the products of the trade mark owner from the products of other traders.

Plain packaging significantly diminishes the ability of trade mark owners to use their trade marks to distinguish their goods and is therefore likely to lead to increased consumer confusion between tobacco brands.

Paragraph 4.6 of the consultation proposes that, inter alia, the following information should be permitted on packs of tobacco products, "markings not visible to the naked eye to assist with the identification of genuine, duty-paid products, or other features to prevent fraud".

One of the objections to the proposals for 'plain packaging' is that it would facilitate fraud (including counterfeiting and smuggling), a problem which the UK Government does not appear to have addressed sufficiently seriously. Indeed "markings not visible to the naked eye to assist with the identification of genuine, duty-paid products, or other features to prevent fraud" cannot be seen as the only available and efficient solution to prevent fraud.

ECTA believes that the tobacco companies would accept the need for some means to counteract these problems, even if the proposals for plain packaging are not implemented. In the same way that the tobacco companies have co-operated in the use of health warnings and in other respects, this area is one in which the companies and Government might reasonably be expected to co-operate.

The aim of paragraph 4.7 is not clear. In particular, what is meant by "used openly within the tobacco trade"? What could be the point of this if the brand names, colours and logos could not be used on the packaging? Some further explanation from Government is called for.

3. Do you believe that standardised tobacco packaging would contribute to improving public health over and above existing tobacco control measures, by one or more of the following:

Discouraging young people from taking up smoking;

Encouraging people to give up smoking;

Discouraging people who have quit or are trying to quit smoking from relapsing;
and/or

Reducing people's exposure to smoke from tobacco products?

Yes

No

Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

ECTA does not have the facilities for research or other means of obtaining evidence. Through its members, who are mostly intellectual property lawyers and attorneys, it is concerned with the interests of trade mark owners generally and with ensuring that rights of property such as trade marks and business goodwill are not destroyed or diminished by undue restrictions on their use in relation to lawful products.

It is for Government to make out a case, based on reliable evidence, for introducing measures that would have that effect.

Consideration of the PHRC report, on which Government appears to place much reliance, does not lead to a belief that any of the objectives listed would be more likely to be achieved by the introduction of 'standardised' or 'plain' packaging. To take one instance, it is said in the Executive Summary of the PHRC Report (page ii, last sentence) that "No study examined gender, age or other socio-demographic differences". So far as the UK is concerned (and many of the studies referred to in the Report were undertaken in other countries) the shortcomings of the Government's Consultation exercise in 2008 have not

been acknowledged in the present Consultation process and ECTA considered that insufficient time has been allowed since other measures were introduced, such as the restrictions on the display of tobacco products in retail outlets, for their effectiveness or otherwise to be determined.

4. Do you believe that standardised packaging of tobacco products has the potential to:

a. Reduce the appeal of tobacco products to consumers?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

See under 3 above regarding 'evidence'.

The Consultation document and the PHRC Report do not appear to provide any sufficient evidence that the measures proposed would reduce the appeal of tobacco products to consumers.

b. Increase the effectiveness of health warnings on the packaging of tobacco products?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

A reading of the PHRC Report leads ECTA to believe that health warnings, which under existing legislation are already very prominent, are known as effective in deterring people from taking up smoking and in persuading many people to stop smoking. It is hard to see how these health warnings could be made more effective by the introduction of plain packaging in accordance with the proposals. It has not been established that oversized health warnings would have more impact on consumers. Furthermore, the studies which were undertaken were based on an unrealistic comparison between plain and branded packaging, which is a comparison which smokers will not have to make if plain packaging is introduced. These studies therefore do not confirm whether health warnings are likely to

act as a more effective deterrent to smoking in an environment in which plain packaging has been implemented across the board.

c. Reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

It is thought that some 'descriptors', such as are considered in the PHRC Report, may be capable of misleading some consumers about the harmful effects of smoking. For that reason, while ECTA does not have access to any information on the subject, it might be acceptable to ban the use of potentially misleading descriptors on packaging. ECTA notes that the use of certain descriptors, such as "low tar", "light", "ultra-light" and "mild" has already been banned in the European Union under Directive 2001/37/EC.

Subject only to this, our answer to this question would otherwise be 'No'.

ECTA does not believe that tobacco branding, in its current form (save for the use of misleading 'descriptors') misleads consumers about the harmful effects of smoking.

ECTA therefore does not believe that 'plain' or 'standardised' packaging would make any difference in this respect.

d. Affect the tobacco-related attitudes, beliefs, intentions and behaviours of children and young people?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

Please refer to our response to Question 3 above.

In ECTA's view the Review does not provide any satisfactory evidence that would justify a 'Yes' response to Question 4d.

If you believe that requiring standardised tobacco packaging could also have other public health benefits, please tell us here.

We cannot see any other such benefits.

5. Do you believe that requiring standardised tobacco packaging would have trade or competition implications?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

ECTA believes that requiring 'standardised packaging' as proposed in the Consultation document could well have serious trade or competition implications. This is because the proposals would reduce very substantially the ability of trade marks or brands to inform consumers of the trade source of the products.

Our members are mostly not competition law experts, and therefore this aspect would require further investigation.

6. Do you believe that requiring standardised tobacco packaging would have legal implications?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

ECTA would also comment that the Consultation document and the PHRC Report do not deal adequately with such issues, which have already been raised by others.

There are a number of legal issues related to the fact that under UK/EU law trade marks are rights of property. The EU Trade Marks Directive and the UK Trade Marks Act 1994 (s 2) confer that status on registered marks, and the European Court of Human Rights have held (in *Anheuser-Busch Inc v Portugal* [2007] App No 73049/01) that for the purposes of

Article 1 of the First Protocol of the Convention, applications for registration enjoy the same status. So far as unregistered marks are concerned, these are protected as part of the goodwill in the business in which they are used, and it cannot be denied that such goodwill is a right of property.

There are also relevant provisions of the Paris Convention for the Protection of Industrial Property (Articles 6 Quinquies B2 and 7) the obligations under which are reaffirmed by Article 2 of the TRIPS Agreement; further relevant provisions of the TRIPS Agreement are Articles 15.4 and 20. In the context of these provisions it is to be noted that tobacco products remain lawful products. It is a major objection to the 'plain packaging' measures as currently proposed that, if introduced, they would represent a serious impairment of property rights in trade marks (whether the subject of registration or not) and an '*unjustifiable encumbrance*' on the use of such trade marks, including a requirement of use which is detrimental to the marks' essential and fundamental functions of distinguishing the goods of one undertaking from those of other undertakings (TRIPS Article 20). The encumbrance which 'plain' or 'standardised' packaging would impose on the use of tobacco brands cannot be justified on the grounds that public health is a legitimate policy objective, where the evidence that 'standardised' packaging would reduce smoking is unconvincing and the encumbrance represents a very significant restriction on trade mark rights.

It is to be noted that the UK Government takes its obligations under the WHO Framework Convention on Tobacco Control (FCTC) very seriously (the recommendations of that organisation being, however, for the purposes of the 'plain packaging' proposals, non-mandatory). ECTA believes that the provisions of the ECHR, the Paris Convention and the TRIPS Agreement need also to be taken seriously.

We have not seen any evidence that would justify a conclusion that introducing 'plain packaging' would bring any benefits for retailers or manufacturers; in all probability it would just create confusion, particularly among retailers and their customers.

We have already mentioned (see Question 2) the implications for the availability of, and demand for, illicit tobacco (both smuggled and counterfeit). We have heard of anecdotal evidence that some counterfeit tobacco goods are if anything more harmful to consumers than the genuine product. Moreover, smuggled products may come from countries where the tobacco control laws are less stringent than those already in force in the UK. It seems fairly obvious, in the absence of cogent evidence to the contrary, that the introduction of 'plain packaging' would facilitate counterfeiting, and also smuggling.

7. Do you believe that requiring standardised tobacco packaging would have costs or benefits for manufacturers, including tobacco and packaging manufacturers?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

ECTA does not have the facilities for research or other means of obtaining evidence regarding the benefits or costs incurred. However, it is relevant to mention that one of the consequences, or costs, for any company losing its brands is the loss in the valuation of the company itself. Trade marks are part of the assets used to evaluate the value of a company. The registered trade mark is the legal foundation for the brand which a company uses to market its products. "Brand value" is then the term used to describe the accumulated results of investment in product development and marketing, and which accounts for the ability of a company to generate revenues above the bare cost of the product. For some companies, the brand value is at least as significant as the value of other, more tangible, assets such as factories, plant and buildings. For other companies, the value of their brand portfolios, comprising word, figurative and device marks, will exceed the combined value of all of their other business assets, tangible or intangible. Strong brand values are the way the market rewards those companies which successfully market products that consumers purchase, and this plays an important part in the market mechanism which supports innovation and investment.

Therefore the tobacco companies will be affected by measures which have the effect of denying their ability to generate revenues from the investments made in the past in their brands.

Successful companies which can no longer use the trade marks associated with these investments will be penalised and may see reductions in their brand values, their market value and the overall value of their business.

8. Do you believe that requiring standardised tobacco packaging would have costs or benefits for retailers?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

As an Intellectual Property Association, we are not competent to answer to this question.

9. Do you believe that requiring standardised tobacco packaging would increase the supply of, or demand for, illicit tobacco/non-duty paid tobacco in the United Kingdom?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

It is relevant to mention that, amongst all counterfeit products seized by customs authorities in the European Union in 2010, cigarettes were the largest in quantity (European Commission, Taxation and Customs Union, Report on EU Customs Enforcement of Intellectual Property Rights – Results at the EU border 2010, pages 2, 15, 16 and 20). In the same year in the UK, the illicit market for cigarettes accounted for at least 10% of the market in 2010 and 5 billion illicit cigarettes were consumed (HM Revenue and Customs, Measuring Tax Gap 2011 document).

ECTA cannot predict what the future will be, but standardised packaging will inevitably make it easier and cheaper for those engaged in the supply of counterfeit products. Indeed, producing counterfeited packs will take place with low-cost printing techniques and basic print colours so standardised packaging will clearly reinforce the cost advantage that illicit suppliers already enjoy through the evasion of duty. Consequently, standardised packaging is likely to increase the supply of illicit tobacco products, since they are likely to become cheaper, which will serve to reinforce the role played by organised crime in their supply.

As an Intellectual Property Association, ECTA is not competent to comment on the possible effects of standardised packaging on consumer demand. Furthermore, ECTA does not have access to any scientific or economic data in connection with consumer behaviour in the framework of illicit and smuggling activities.

- 10. Those travelling from abroad may bring tobacco bought in another country back into the United Kingdom for their own consumption, subject to UK customs regulations. This is known as “cross-border shopping”. Do you believe that requiring standardised tobacco packaging would have an impact on cross-border shopping?**

- Yes
 No
 Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

ECTA does not have the facilities for research or other means of obtaining evidence in response to this issue. Its members are of the opinion that since standardised packaging is quite likely to result in an increase in illicit trade, there is also likely to be an increase in cross-border shopping, because people are more likely to prefer to buy elsewhere the products with which they have become familiar through knowledge of the brands they prefer.

- 11. Do you believe that requiring standardised tobacco packaging would have any other unintended consequences?**

- Yes

- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

Please refer to answer to question 7.

12. Do you believe that requiring standardised tobacco packaging should apply to cigarettes only, or to cigarettes and hand-rolling tobacco?

- Cigarettes only
- Cigarettes and hand-rolling tobacco
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

As mentioned in the joint statement of the IP Sister Organisations (including ECTA, APRAM, BMM, MARQUES, UNION, GRUR) dated 23 April 2012 (here attached), ECTA is against standardised packaging for any product or service.

13. Do you believe that requiring standardised packaging would contribute to reducing health inequalities and/or help us to fulfil our duties under the Equality Act 2010?

- Yes
- No
- Do not know or have no view

Please provide an explanation for the answer you provided and evidence if available.

ECTA does not believe that there is any conceivable way in which requiring standardised packaging would contribute to reducing health inequalities and/or help the UK to fulfil any of its duties under the Equality Act 2010. It does not appear that the PHRC "Systematic Review" has suggested otherwise.

14. Please provide any comments you have on the consultation-stage impact assessment. Also, please see the specific impact assessment questions at Appendix B of the consultation document and provide further information and evidence here to answer these questions if you can.

We do not have any specific comments to make in connection with the Impact Assessment and are not competent to respond to Appendix B questions.

15. Please include any further comments on tobacco packaging that you wish to bring to our attention. We also welcome any further evidence about tobacco packaging that you believe to be helpful.

Standardised packaging legislation would set a dangerous precedent for other industries and represent the start of a 'slippery slope'. We have a recent example of this trend in the UK.

Indeed, on 26 March 2012, the UK Government set out a number of possible measures to aim to reduce alcohol consumption in the population. Although most attention is directed at influences on the price, measures are also being considered to reduce the attractiveness of the product itself. In this framework, the Health Committee of the UK Parliament launched this year an inquiry examining the Government's proposals as they relate to health issues (deadline expired on 8 May 2012). One of the possible policy options mentioned in the consultation is plain packaging for alcohol.

Owners of brands therefore see the risk that once a precedent for interfering with the presentation of their brands is established; it could be extended to any product where a government wishes for any policy reason to affect demand. This would be a dangerous instrument with unpredictable consequences for the operation of the normal market mechanisms sending strong "anti-business" signals.

This would also put at risk not only all current intellectual property policy, but also all the intellectual property architecture which is one of the pillars of industrial growth. Indeed, current intellectual property policy aims to encourage companies to innovate and protect their intellectual property. Companies need to know that if they make the effort to invest in higher value products, that investment will not be wasted through arbitrary restrictions on how they may market those products. The "architecture" of intellectual property internationally is furthermore based on the idea that companies that invest in the development of their intellectual property should have that investment protected through protection of the intellectual property itself. Protection of such intellectual property from arbitrary state intervention is the guiding principle behind domestic and international laws governing intellectual property and of treaties to which the UK is a signatory.

Ensuring effective protection and enforcement of intellectual property rights is therefore a vital tool to support and drive sustainable economic growth. This is recognised internationally, and is one of the reasons why the European Commission has given priority to it in its growth agenda. We understand that the UK government also accepts that intellectual property should be a priority and in its policy statements it has committed to strengthen the core principles of intellectual property and take them into account in all policy options.

Thank you for participating in this consultation.

The Department of Health and Devolved Administrations will only contact you should we seek further information about your response.

How to get involved in the consultation

The consultation will run for 12 weeks, from 16 April 2012 to 10 July 2012.

Responses are invited from any interested person, business or organisation.

Respondents are encouraged to provide their views online, but responses can be made in any of the following ways:

On the Department of Health website at:

<http://consultations.dh.gov.uk>

Completed response forms:

Responses can be sent by email to:

tobacopacks@dh.gsi.gov.uk

Responses can be sent by post to:

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