



Asociación Interamericana de la Propiedad Intelectual  
Interamerican Association of Intellectual Property  
Associação Interamericana de Propriedade Intelectual

## Consultation on standardised packaging of tobacco products

### 1. Which option do you favour?

We favor do nothing about tobacco packaging. That is, it should maintain the status quo for tobacco packaging due to our knowledge there is no direct evidence that can demonstrate the standardised packaging of tobacco products, will reduce the consumption of tobacco.

ASIPI position is oriented that it is always convenient to improve public health, but its concern is that plain packaging will not reduce the smoking and will affect or encroach on the rights of trademark owners, restrict creativity, impose costs to the producers, but also will contribute to deceive consumers or even increase its consumption by trying to identify the cigarette of their preference, without a sign that can help them to select them or clearly identify the cigarettes that they do not want to consume or even they might consider the harmful to their health.

Although ASIPI is not an association specialized on issues of public health, we consider that the standardised packaging is not a manner to reduce the use of tobacco, or prevent that young people start smoking. There are other psychological considerations that should be considered.

There are other drugs that are illegally trade without packaging, brands or designs that are highly consumed with stronger health problems.

ASIPI recognizes the efforts to improve public health worldwide, but the rights of trademark owners and the ability to use their trademarks should be seen as a means to contribute to solve the issue by orienting the consumer, preventing him of being deceived of counterfeits, as well as to straighten his conscious of consumption or even to not acquire them.

### 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?

If standardised tobacco packaging were to be introduced, ASIPI does not agree, with the approach set out in paragraph 4.6 and 4.7 of the consultation due to:

- a. The standardised packaging restricts trademark owners of the exclusive right to use their different trademarks (figurative, combination of word & designs, three-dimensional trademarks) and expose them to be subject of non use cancellation actions.
- b. It would be a violation of article 15(4)<sup>1</sup> of TRIPs that sets forth, "*the nature of the goods or services to which a trademark is to be applied, shall in no case form an obstacle to the*

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1 Article 15. Protectable Subject Matter: 4) The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.



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*registration of the trademark*". Likewise, article 20<sup>2</sup> provides that *"the use of a trademark: shall not be unjustifiably encumbered by special requirements, such as... use in the manner detrimental to its capability to distinguish goods and services..."*

- c. As the standardised packaging is proposed, it goes beyond the principals contained in article 8<sup>3</sup> of TRIPs. It provides, that some measures in the interest of the public health might be taken but only if they are consistent with the TRIPs agreement.
  - d. From the ASIPI perspective the approach of 4.6 and 4.7 does not fall within the exception of article 8 of TRIPs.
  - e. It will restrict creativity and innovation, would prevent the registration and use of the traddress and in some cases, the development and protection of well-known trademarks.
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?

ASIPI considers that standardised tobacco packaging would not necessarily contribute to improving public health, over above existing tobacco control measures. It is believed that any of the four issues mentioned will occur happen by standardised packaging, due to:

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- 2 Article 20. Other Requirements. 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. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.
- 3 Article 8. Principles. 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement; 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.



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There are medical, psychological and social considerations that the experts should seriously considered, to prevent young people became smokers, or smokers reduce or quit it, rather than the standardised packaging of tobacco products.

The addiction to tobacco or any other type of drug, will be hardly reduced by affecting the Intellectual Property legal system of a country and the rights of the manufacturers, based on marketing considerations

The proposal of standardised of tobacco packaging will encourage new markets, such as the production of cigar cases, stickers to be stamped over the photographs of the standardised packaging, the commercialization of individual cigarette and the use of Hookah or Shisha.

Patients with addiction problems to tobacco or nicotine will not be encouraged to give up smoking because of standardised packaging.

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

- Reduce the appeal of tobacco products to consumers?
- Increase the effectiveness of health warnings on the packaging of tobacco products?
- Reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking?
- Affect the tobacco-related attitudes, beliefs, intentions and behaviours of children and young people?

ASIPI believes standardised packaging of tobacco products will not achieve any of the four items mentioned, because as it has been stated, if the consumer has already the addiction to tobacco, the appearance of the packaging will not necessarily discourage him to smoke.

Likewise, Asipi, considers, that standardised packaging, will not affect or change, the tobacco attitudes, beliefs, intentions and behaviours of children and young people. It will be affected or oriented against smoking, based on what they live and learn at home, school and his social environment.

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

ASIPI considers that the requirement of standardised tobacco packaging, certainly would have trade or competition implications, due to:

- a. It could promote the development of illicit market of low quality products



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- b. Consumer could be easily deceived or confused by purchasing illicit products, as they cannot identify the goods through the trademark, or by other distinctive elements that could appear in the package
  - c. It might create an unfair competition issue, due to other countries might not follow this plain packaging initiative and cigarettes exported to, and commercialized in the UK, would gain market affecting the national production.
  - d. Plain packaging strategy could create new ways of branding and advertise the product. Consumer (mainly young people non smokers and smokers) would develop new conducts or patterns in respect to tobacco.
  - e. Plain packaging might foster the consumption of tobacco due to the consumers might be forced to identify the cigarettes of their preference by consuming different types of cigarettes, as long as they can identify their favorite. One of the main principle of trademarks, is being a source of origin and help to the consumer to easily identify the good he wants to acquire or those they don't want to.
6. Do you believe that requiring standardised tobacco packaging would have legal implications?

ASIPI considers that required standardised tobacco plain packaging will have legal implications due to:

- a. As it was mentioned in answer 2d, paragraphs 4.6 and 4.7 of the Consultation, violates articles 7<sup>4</sup> and 15(4)<sup>5</sup> of TRIP's
- b. It is against article 20 of TRIPs, requiring *standardised tobacco packaging* will impose unjustified borders or special requirements to the trademark owners and could constitute an expropriation of brands
- c. Likewise, it will promote unfair competition conducts by illicit producers of tobacco who might take advantage of the goods will of the producers who maintain the high quality standards and comply with the Health warnings that already exist

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<sup>4</sup> Article 7. *The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*

<sup>5</sup> Article 15. Protectable Subject Matter: 4) The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.



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- d. It will prevent to the trademark owners, to comply with the obligations to use their trademarks and they might be involved in non use cancellation actions or litigation prosecutions in the UK and other countries
  - e. Important brands that already exist in the UK could be subject of illegal appropriations by third parties in different countries, considering that the plain packaging could deprive manufacturers of their rights
  - f. Plain packaging will affect one the most important traditional principles of trademarks, that is the Source of Origin by which the consumer can identify the manufacturer or the origin of the products
7. Do you believe that requiring standardised tobacco packaging would have costs or benefits for manufacturers, including tobacco and packaging manufacturers?

Requiring standardised packaging of tobacco would have costs for manufacturers (including tobacco and package manufacturers)

It is believed that the requiring standardize tobacco packaging would have more cost than benefits for manufacturing including tobacco and package manufacturing, due to:

- a. It will require to design and introduce new packages according to the requirements (propose paragraphs 4.6 and 4.7 of the consultation).
  - b. It might have an impact on the financial situation of the manufacturers that will be forced to cut employments by virtue of the consequences in the market of this standardization
8. Do you believe that requiring standardised tobacco packaging would have costs or benefits for retailers?

It would also have costs for retailers as a consequence of the possible costs to the manufacturers, but mainly of the commercialization and distribution of the products and the competition the retailer would face with the importation of cigarettes that might displace him of the market.

They would face the increase of the commercialization of illicit tobacco or non duty paid tobacco, affecting the retailers as the manufacturers as well.

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



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Yes, it is considered that requiring standardised tobacco packaging would increase the supply of, or demand for illicit tobacco or non duty paid tobacco in the United Kingdom or in any other country where is implemented. Furthermore, it would be more difficult to identify the legitimate from the illicit tobacco. The latter would be cheaper and consequently will increase the consumption

10. People travelling from abroad may bring tobacco bought in another country back into the United Kingdom for their own consumption, subject to United Kingdom 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, it is believed that cross border shopping would have an important impact if the standardised tobacco packaging is required. This will encourage that importation of legal and illicit tobacco. Under the cross-border shopping would be an important and attractive market within the UK or in those countries where the standardization packaging is required and would be a very good scenario for the consumption of cheaper and illicit tobacco, creating more health problems.

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

The required standardize tobacco packaging will represent a symbol of weakness of the legal regime of intellectual property system that has characterized the developed countries. The Intellectual Property System, mainly trademarks, designs, copyrights, should be seen as a mean that can contribute to orient the consumer and streighten public health.

The fact that the standardize tobacco packaging will constitute an encouragement of the trademarks systems, it would have an impact in other industries, and could increase the counterfeit of merchandise that are not within the scope of public health.

The required standardize tobacco packaging might have an impact to the younger smokers or non-smokers that they might find more attractive to consume other type of drugs .

It can be possible that if the standardised tobacco packaging is launched, could raise new reactions or patterns by young people (smokers or non smokers), who might not want to be socially identified as a Standardised Packaging Consumers or be called something like, "The SPG" (STANDARIZED PACKAGING GENERATION)



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

It seems that what is convenient not to apply required standardised tobacco packaging, either to cigarettes or hand rolling tobacco.

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

We cannot respond such question, due to we are unaware of the duties under the Equality ACT 2010.

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 this consultation document and provide further information and evidence to answer these questions if you can.

We do not have information to answer the specific impact assessment questions at Appendix B.

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.

ASIPI strongly believes on public policies to promote public health, but considers that standardised tobacco packaging, is not a solution to prevent non-smokers; or convince smokers to quit smoking; or to stop using them. Rather than to affect the rights of trademark owners, by the standardised tobacco packaging, trademarks, and the Intellectual Property System as well could be used as a means to protect consumers and strengthen public health.