

Protection of intellectual property rights across sectors

AmCham EU concerned about plain packaging measure as precedent to impair intellectual property rights

Executive summary

The imposition of restrictions to intellectual property rights (IPR) in one sector, or on any particular goods or services, represents a potential precedent for other sectors and consumer goods or services. Under plain packaging measures, the primary way for products to be differentiated will be limited and negatively affected, with brand owners also being deprived of IPRs that would otherwise be available. The American Chamber of Commerce to the European Union (AmCham EU) is concerned by the potential implications of such measures for the trademark system as a whole. If a Member State considers introducing plain packaging measures, due consideration should be given to IPRs, without prejudice to public health objectives, taking into account evidence based impact and consequences on the functioning of the internal market. AmCham EU understands and fully supports the aim of the EU and the Member States to improve public health and to propose balanced measures to address the public health challenges.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.

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Introduction

The American Chamber of Commerce to the European Union (AmCham EU) supports the protection of intellectual property rights (IPR) across all sectors. The imposition of restrictions to IPR in one sector, or on any particular goods or services, represents a potential precedent for other sectors and types of consumer goods or services. Protecting and enforcing intellectual property rights is a key to the future of the innovation-based economy.

AmCham EU has followed the discussions at the EU level on the so-called plain packaging (also known as standardised packing or generic packaging) for tobacco products in the framework of the revision of the Tobacco Products Directive, which was adopted by the Council and European Parliament on 14 March 2014. AmCham EU has already issued a statement, in May 2010, addressing the plain packaging issue.

AmCham EU understands and fully supports the aim of the EU and the Member States to improve public health and to propose balanced measures to address the public health challenges. AmCham EU wishes to emphasise that the following comments are strictly limited to the potential implications for IPRs (trademark-related issues). This paper does not prejudice the position that AmCham EU or any of its members might take on any public health-related issue.

Comments on trademark-related issues

Under plain packaging measures, branding information, including logos, and other distinctive elements that are protected under IP laws, will be banned from the packaging of products (with the exception of a single brand name in a small standardised typeface, size and colour). As a result, the means for product differentiation as between products from different trade sources will be limited, and a considerable number of IPRs, such as trademarks, will be negatively affected. Plain packaging measures would also deprive brand owners of all IPRs that would otherwise be available.

The European Parliament and the Council rejected proposals of introducing mandatory plain packaging into the revised Tobacco Products Directive, leaving to Member States to decide whether to introduce further measures for the standardisation of the packaging of tobacco products *‘where it is justified on grounds of public health, taking into account the high level of protection of human health achieved through this Directive. Such measures shall be proportionate and may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States’*¹.

AmCham EU is concerned by the potential implications of such measures for the trademark system as a whole. Consequently, AmCham EU respectfully calls on Member States to consider very carefully the legal issues associated with plain packaging laws, especially as regards the following EU and international obligations:

¹ Article 23 of the Directive 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 and repealing Directive 2001/37/EC in connection to recital 53 of the Directive

- **TRIPs Agreement²** which clearly recognises the right to use of trademarks;
- **Relevant provisions of Paris Convention³**;
- **Relevant EU legislation⁴** that stresses that the implementation of plain packaging by any Member State of the EU would need to be accompanied by compensation for breach of intellectual property rights; and
- **TBT Agreement.⁵**

Summarising the measures mentioned above, it is clear that trademarks are universally recognised as rights of property, conferring also the right to use such a property, and the right to registration is not to be dependent in any way on the nature of the product. Trademarks are also not to be subjected to unjustified restrictions on their use.

Conclusion

If any Member State considers introducing plain packaging measures, AmCham EU respectfully calls on them to give due consideration to IPRs during the transposition phase of the Directive, taking into account evidence based on the impact and the consequences of these on the functioning of the internal market.

** This position paper does not represent the views of all members of AmCham EU*

² Article 2 (Intellectual Property conventions), Article 8 (1) (General Principles), Article 15 (4) (Registration not to be dependent on nature of goods), and Article 20 (Unjustifiable encumbrances)

³ Article 6 *quinquies* (Protection of marks registered), Article 7 (Nature of the good to which the mark is applied), and 10 *bis* (Unfair competition)

⁴ Article 17 (2) of the Charter of Fundamental Rights of the European Union, which states that intellectual property shall be protected, and expressly provides a right to use property as well as Article 41 of the Charter, which provides for a right to an effective remedy; Article 118 of the Treaty of Lisbon which provides a new legal basis to establish measures for the creation of IPRs; ECHR First Protocol Art 1, protecting property rights as well as Art 41, which provides for just satisfaction; Community Trade Mark Regulation and EU Harmonization Directive, which contain provisions clearly recognising registered trademarks as rights of property

⁵ Art 2.2, which requires Members to ‘ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade’.