



MARQUES submission to the UK Department of Health's Consultation on standardised packaging of tobacco products

Executive summary

MARQUES wishes to respond to the UK Department of Health (DoH) "Consultation on standardised packaging of tobacco products" launched on 16 April 2012.

MARQUES is the European association representing brand owners' interests. Its mission is to be the trusted voice for brand owners.

As a business organisation of IP rights holders, notably of trade mark owners, **MARQUES** is very concerned over possible legislation demanding the removal of brands, trade marks and logos from product packaging, which the introduction of plain packaging, or standardised packaging, would require.

IP rights are a cornerstone of economic activity providing significant value to their owners and wider wholesale and retail economy. This economic impact necessitates the need for IP rights to be effectively protected at both the domestic and international levels.

The introduction of plain packaging legislation effectively deprives one industry sector of its intellectual property rights and sets a dangerous legislative precedent for other industries. Thus, such plain packaging legislation directly impacts on the interests and rights of trade mark owners across the EU. It also undermines the intellectual property protection system as a whole by dismantling the value of trade marks used by companies that operate in the European Union.

While the DoH's public health objectives are fully supported, **MARQUES** respectfully submits that stripping trade mark owners of the rights that they have gained through substantial investment is unjustified. The issue is, therefore, a matter of concern to trade mark owners across the EU and trade mark owners would rightfully expect that any public health objectives ought to be properly balanced with an appropriate protection of their proprietary rights.

MARQUES already expressed its concerns and objections about plain packaging in December 2010 before the European Commission's DG SANCO, in the framework of the public consultation on the possible revision of the Tobacco Products Directive 2001/37/EC. In April 2012, **MARQUES** and a group of sister organisations signed a joint statement to object to the adoption of restrictive legislation or policy options frequently referred to as "generic" or "plain packaging" (both documents are attached in copy).

MARQUES hereby reaffirms its position with regard to plain packaging and strongly opposes the possibility of introducing standardised packaging for tobacco products in the United Kingdom.

Standardised packaging destroys the role and value of trade marks

IP rights are a cornerstone of the European economic system and the internal market. They provide significant value to their owners and wider wholesale and retail circles. They are likewise essential to safeguard the public faith and the interests of consumers.

Specifically trade marks and trade dress are relied upon by consumers as signposts of genuine goods and services. This is true for both word marks and figurative marks (graphical devices), and for signs resulting from the combination of the two, as well as so called “non-traditional” trade marks such as packaging shapes and colours *per se*. Trade marks also indicate the source of goods and services to assure consumers of the quality of the products that they purchase or that they would consider purchasing. This fundamental function cannot be fulfilled if trade marks are not noticeable, or unavailable, to consumers when selecting a product. The inability to recognize a brand or trade mark on a product would lead to consumer confusion, and therefore diminish the goodwill acquired in that brand through considerable investment and effort over a significant period of time. In fact, the inability to call for or recognise a brand also takes away a consumer’s freedom of choice.

MARQUES has very strong concerns that any legislation that precludes – whether fully or in part – brand owners from making legitimate use of their trade marks, would amount to an indirect legislative expropriation of private intellectual property and, as a consequence, lead to the extinction of their property rights. Any such legislation would adversely affect the market, with harmful impacts on the economy as a whole. Where there is a need to achieve important public objectives, any developing legislation and/or policy options should not deviate from maintaining an appropriate balance with legitimate intellectual property and other proprietary rights.

Standardised packaging would foster illicit trade

Counterfeit and illegal tobacco products are the most seized counterfeit product by customs authorities in the European Union. In the UK alone, the illicit market for cigarettes accounted for at least 10% of the market in 2010, and five billion “black market” cigarettes were consumed in the UK in 2010. Standardised packaging will increase this counterfeit activity by making counterfeit packaging even easier to reproduce: removing figurative devices and/or stylized word marks from packaging enables lower-cost and less sophisticated printing techniques to be used.

The lack of branding on packaging will also make the task of customs authorities considerably more difficult given that it will inevitably be harder to distinguish counterfeit goods from legitimate goods. It may also remove criminal sanctions for trade mark enforcement, a key tool for manufacturers in the battle against counterfeits.

The growth of counterfeit trade will undermine legitimate distribution channels and governmental controls on sales and taxes. It will also increase the burdens on already overstretched public agencies working to enforce intellectual property protections.

A need of balance between public health objectives and private interests

MARQUES strongly supports the DoH’s public health objectives. However, account must be had to the fact that a public consultation by the DoH in 2009 on “*The future of tobacco control*” found that there was no evidence that plain packaging would reduce smoking rates given that

“no studies have shown that introducing plain packaging of tobacco would cut the number of young people smoking or enable people who want to quit, to do so”.

It is appreciated that since then, more comprehensive studies were conducted the findings of which would now provide evidence of the impacts of plain tobacco packaging. Reference is made, in particular, to the review of those studies that was conducted following the publication of the March 2011 White Paper *Healthy Lives: Healthy People* which set out a renewed Tobacco Control Plan for England.

Without entering into the specific merits of whether such evidence would in fact consistently support the propositions set out in the Framework Convention on Tobacco Control relating to the role of plain packaging in helping to reduce smoking rates, **MARQUES** respectfully submits that stripping trade mark owners of the rights that they have gained through substantial investment is unjustified. In fact, standardised packaging legislation would deny one sector of industry the benefits of its intellectual property rights, and would be a dangerous precedent for the potential loss of rights in other industries. The issue is, therefore, a matter of concern to trade mark owners across the EU and trade mark owners would rightfully expect that any public health objectives ought to be properly balanced with an appropriate protection of their proprietary rights.

Standardised packaging for tobacco products conflicts with international treaties

MARQUES considers that the proposed standardisation of packaging for tobacco products would place the UK in breach of its International treaty obligations with regard to intellectual property, including EU law.

The UK is a member of the WTO and is therefore subject to the obligations imposed by the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**). It is also a signatory of the Paris Convention for the Protection of Industrial Property (**Paris Convention**). In addition, it must follow the obligations set out by the Treaty on the European Union (**TEU**), the Treaty on the Functioning of the European Union (**TFEU**) the Charter of Fundamental Rights of the European Union (**Charter**) and the First Protocol to the European Convention on Human Rights (**ECHR**).

Standardised packaging for tobacco products will not allow the legitimate use of figurative or word trade marks, either separately or in combination, since use of figurative marks would be prohibited and use of word trade marks would be highly restricted and diminished. Such restrictions on both figurative and word trade marks would be in direct conflict with Article 20 of TRIPS. **MARQUES** therefore submits that standardised packaging conflicts with Article 20 of TRIPS which protects trade marks against being “*unjustifiably encumbered by special requirements, such as ... use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings...*”.

Furthermore, TRIPS requires that any encumbrance be demonstrably justified to protect public health and nutrition. As discussed above, there is no authoritative evidence that introducing standardised packaging would help diminish the problem of tobacco consumption. There is therefore no justification for the severe restriction or entire removal of trade marks on tobacco packaging.

MARQUES also submits that intellectual property rights (including registered trade marks and goodwill) are forms of property under EU legislation. By prohibiting an owner from use of its trade marks, standardised packaging amounts to a deprivation of a brand owners’ private intellectual property rights in breach of these property rights. It may also breach other

fundamental human rights recognised by EU law such as the right to commercial freedom of speech, the right to receive information, the right to pursue a trade or business and freedom of consumer choice. It would also violate the free movement of goods inside the European Union.

Conclusion

Intellectual property rights are vital to boost Europe's innovation and growth, as well as to create jobs and ultimately to enhance the internal market. Trade marks are a strong cornerstone of the European economic system and provide significant value to their owners. Trade marks are also an essential safeguard to the interests of consumers.

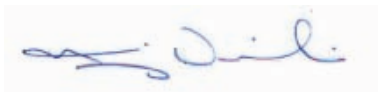
MARQUES is highly concerned with the direct impact that plain packaging for tobacco products will bring about. The implications are not limited to the tobacco industry: implementation could well have a domino effect on other products and industries, especially those subject to other regulatory constraints such as the alcohol, food, medicines, confectionary, beverage, cosmetics and automotive industries.

Standardised packaging legislation would deny one sector of industry the benefits of its intellectual property rights, and would be a dangerous precedent for the potential loss of rights in other industries. The issue is, therefore, a matter of concern to trade mark owners across the EU.

Consequently, **MARQUES** opposes the introduction of standardised packaging for tobacco products.

Respectfully submitted,

9 July 2012



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Chair of **MARQUES** Council



Lee Grosskreuz Hechtel
Chair of **MARQUES** Regulatory Team



About **MARQUES**

MARQUES is a European association of pan-industry brand owners worldwide.

Established in 1986 and later incorporated in the United Kingdom as a not-for-profit company limited by guarantee, **MARQUES** unites European and international brand owners across all product sectors to address issues associated with the use, protection and value of IP rights, as these are vital to innovation, growth and job creation, which ultimately enhance internal markets. Its membership crosses all industry lines and includes brand owners and IP professionals in more than 80 countries. The trade mark owners represented in the Association together own more than two million trade marks which are relied upon by consumers as signposts of genuine goods and services.

MARQUES is an accredited organisation before the Office for Harmonisation in the Internal Market (OHIM), appointed observer at the OHIM Administrative Board and Budget Committee, an official non-governmental observer at the World Intellectual Property Organisation and a registered interest representative organisation (ID 97131823590-44) in the Transparency Register set up by the European Parliament and the European Commission, which extends and replaces the former Register of Interest Representatives, opened by the commission in 2008.

An important objective of **MARQUES** is to safeguard the public interest by ensuring the proper protection of trade marks and to preserve the interests of trade mark proprietors with regard to the regime of trade mark protection. **MARQUES** attempts to achieve these objectives by advancing the cause of trade mark laws which protect the public from deception and confusion. Intellectual property rights are a crucial aspect of the global economy and trade marks play a significant role in free trade and competition in the marketplace.

More information about **MARQUES** and its initiatives is available at www.marques.org.