

May 18, 2019

To the attention of the Dutch Ministry of Health, Welfare and Sport  
P.O. Box 20350  
2500 EJ, The Hague  
The Netherlands

By online submission to the online public consultation:  
<https://www.internetconsultatie.nl/standaardverpakking>

**Re: INTA comments on the Dutch proposal to amend the Tobacco and Related Products Decree in connection with the introduction of plain packaging for cigarettes and RYO tobacco**

Dear Madam/Sir,

The International Trademark Association (INTA) appreciates the opportunity to provide input on the Dutch proposal to amend the Tobacco and Related Products Decree in connection with the introduction of plain packaging for cigarettes and RYO tobacco (thereafter referred as the plain packaging proposal).

INTA is a global association of brand owners and professionals dedicated to supporting trademarks and related intellectual property to foster consumer trust, economic growth, and innovation. INTA's members are from 191 countries and more than 7,200 organizations, including 85 in the Netherlands. The Association's member organizations represent some 31,000 trademark professionals and include brand owners from major corporations as well as small and medium-sized enterprises, law firms and nonprofits. There are also government agency members as well as individual professor and student members. Further information about our Association can be found at [www.inta.org](http://www.inta.org)

INTA makes this submission on behalf of all its members and speaks only on the potential implications for trademark rights, taking no position on the public health issues with regard to tobacco consumption.

**I. Summary remarks**

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Trademarks are a vital aspect of the global economy and serve an important function in the European marketplace. Trademarks are used on virtually every type of product to indicate a product's origin and to guarantee the consistency of its quality to consumers. In addition to being an important aspect of the daily life of consumers, trademarks are economically crucial as they facilitate trade and promote innovation and competition. **According to the [EUIPO's 2016 study on IPR intensive industries and economic performance in the EU](#), trademark-intensive industries account for nearly 21.1% of all direct jobs in the Netherlands and for 29.4% of**

**Dutch GDP.** An efficient protection of trademarks is therefore crucial to protect consumers and the business community.

INTA cautions against legislation that prohibits or severely restricts the use of trademarks and prevents them from fulfilling their functions in the marketplace to the detriment of consumers, trademark owners, and competition as such.

Accordingly, INTA is opposed to prohibiting the use of trademarks through full standardization of packaging (i.e. plain packaging).

While plain packaging legislation would still allow the use of word marks on packages, the restriction of the use of marks a prescribed unitary form, not corresponding to their intended registered graphic representation, and the prevention of the rights holders from using any of their other registered trademarks as well as other design elements, which in turn could cause consumer confusion, are non-compliant with the European trademark law and the international treaties signed by the Netherlands.

INTA offers the following further specific observations to the conclusion of the Review and the potential adoption of plain packaging in the Netherlands:

1. Plain packaging infringes the European Union Trade Mark Regulation and Community Design Regulation. It also impairs the different functions of trademarks in the Netherlands and Benelux Union, and undermines the EU's internal market principles.
2. The Dutch proposal for plain packaging violates fundamental rights of trademark owners and consumers under European Law. Plain packaging constitutes an impairment of property rights under the Charter of Fundamental Rights of the European Union (Charter)<sup>1</sup>, the jurisprudence of the European Court of Human Rights (ECtHR) under the European Convention of Human Rights (European Convention)<sup>2</sup> and the Benelux IP Law. The Dutch proposal of plain packaging also impairs commercial free speech rights.
3. The adoption of plain packaging in the Netherlands would set a dangerous precedent for adoption of similar measures to other products and industries, including for Dutch branded products exported abroad, such as beer and cheese. Indeed, some countries are considering the adoption of plain packaging measures for other products deemed too fat, too sweet, unhealthy or too attractive.
4. The implementation of plain packaging in the Netherlands risks increasing illicit trade.
5. The adaption of plain packaging in the Netherlands is contrary to international trade agreements that the Netherlands signed, such as the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property<sup>3</sup>.

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<sup>1</sup> See Article 17(2) of the Charter of Fundamental Rights of the European Union.

<sup>2</sup> ECtHR, *Anheuser-Busch v. Portugal*, of 11 January 2007, paragraph 72: "In the light of the above-mentioned decisions, the Grand Chamber agrees with the Chamber's conclusion that Article 1 of Protocol No. 1 is applicable to intellectual property as such."

<sup>3</sup> Note: The WTO Dispute Resolution Panel decision of July 2018 is under appeal.

## II. Specific observations

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### ***1. The introduction of plain packaging for tobacco products in the Netherlands does not comply with the European Union Trade Mark and the Community Design Regulations and would impair the functions of trademarks in the Netherlands***

The adoption of plain packaging in the Netherlands would directly infringe the European Union Trade Mark Regulation (EUTMR)<sup>4</sup> and the Regulation on the Community Design (CDR)<sup>5</sup> and would undermine the internal market principles that those regulations pursue.

According to Article 1(2) EUTMR, a European Union (EU) trademark has a unitary character. This means that the EU trademark shall have equal effect throughout the EU and its use may not be prohibited save in respect of the whole EU. Article 1(2) of CDR provides the same for Community designs. The adoption of plain packaging for tobacco products would prohibit the use of numerous EU and national trademarks as well as Community designs in a single Member State, namely the Netherlands. Such provisions would be directly violating Article 1(2) of the above-mentioned Regulations.

EU trademarks and Community designs are important internal market instruments. Recital 3 EUTMR describes the purpose of the EU trademark as follows: “... *to promote throughout the Union a harmonious development of economic activities and a continuous and balanced expansion by completing an internal market which functions properly and offers conditions which are similar to those obtaining in a national market. ... trade marks enabling the products and services of undertakings to be distinguished by identical means throughout the entire Union, regardless of frontiers, should feature amongst the legal instruments which undertakings have at their disposal.*”

Recital 4 further explains: “... *In order to open up unrestricted economic activity in the whole of the internal market for the benefit of undertakings, trademarks should be created which are governed by a uniform Union law directly applicable in all Member States.*”

The introduction of plain packaging by the Netherlands would therefore directly undermine the internal market purpose that the EU trademark system is designed to serve. The plain packaging proposal in the Netherlands would create the need for trademark owners to provide different packaging in the Netherlands than elsewhere in the EU, as well as within the Benelux Union, thereby creating a specific national requirement that substantially impacts upon the free movement of goods within the EU as a whole.

Plain packaging implemented at national level will distort inter-brand competition within the Internal Market by removing or restricting many of the elements that manufacturers use to differentiate their products from other manufacturers. Plain packaging would reduce package, product and brand differentiation, and would restrict manufacturers’ ability to innovate across either the product or the packaging. This will lead to reduced competition and increased barriers to entry, as it is increasingly difficult for new brands to enter the market without an ability to differentiate their offering from existing brands. Both the reduction of brand differentiation and the

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<sup>4</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1001&from=DE>).

<sup>5</sup> Council Regulation (EC) No 6/2002 on Community designs (<http://ow.ly/zUObT>).

difficulty for new brands to enter a market were mentioned as expected consequences of plain packaging in the Commission's Impact Assessment<sup>6</sup>. INTA believes that manufacturers should benefit from the use of all aspects of their trademark rights in order to compete with one another, and that there should be the same freedom to do so across all EU Member States.

Reduction of brand differentiation also impacts consumers. Trademarks are not only words, names and logos, but can also be colours or the very shape or design of the package itself (trade dress). Any graphical component that adds to the distinctiveness of a product can be registered as a trademark, thereby playing an integral role in facilitating consumer choice by distinguishing one product they know and trust from products of another entity. The adoption of plain packaging in the Netherlands would make it extremely difficult to distinguish one brand from another, thereby seriously limiting consumers' ability to buy the product of their choice.

Furthermore, trademarks indicate the source of goods and/or services and assure consumers of the consistency of a product's quality and proper accountability. This fundamental function could not be effectively fulfilled if registered trademarks were banned from packaging, or if such trademarks were only permitted in a prescribed, standardized form that does not correspond to the intended registered graphic representation of such trademarks.

A deprivation of this function constitutes a violation of the EU's internal market principles and law. The Court of Justice of the European Union (CJEU) has frequently held that trademarks are "*an essential element in the system of undistorted competition which the Treaty seeks to establish and maintain. Under such a system, an undertaking must be in a position to keep its customers by virtue of the quality of its products and services, something that is possible only if there are distinctive marks, which enable customers to identify those products and services. For the trademark to be able to fulfil this role, it must offer a guarantee that all goods bearing it have been produced under the control of a single undertaking which is accountable for their quality.*"<sup>7</sup>

As the CJEU has recognized, trademarks also perform other functions such as those of communication<sup>8</sup> designed to inform consumers<sup>9</sup>, and of investment<sup>10</sup>. All these functions are, in the words of the Advocate General Jacobs, "*values which deserve protection as such*"<sup>11</sup>, but are disregarded by any proposals for plain packaging.

The Explanatory Memorandum to the draft decree acknowledges that brands form an important means by which companies can distinguish their products from those from other manufacturers, and that brands have an advertising and marketing purpose. It concludes that introducing uniform standard packaging restricted the advertising and marketing function.<sup>12</sup> INTA believes this conclusion not to be entirely accurate, because in fact plain packaging would restrict not only the

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<sup>6</sup> Commission's impact assessment accompanying the document proposal for a directive of the European Parliament and of the Council: SWD(2012) 452 final, pages 92 and 93 (<http://ow.ly/10duN3>).

<sup>7</sup> See, *inter alia*, CJEU Case C-10/89, *SA CNL-SUCAL NV v HAG GF AG*, [1990] ECR I-03711, paragraph 13.

<sup>8</sup> See, for example, Case C-487/07, *L'Oreal v. Bellure*, [2009] ECR I-05185, paragraph 58.

<sup>9</sup> Joined Cases C-236/08 to C-238/08, *Google et. al.*, [2010] ECR I-02417, paragraph 91.

<sup>10</sup> See, for example, Case C-487/07, *L'Oreal v. Bellure*, paragraph 58; Joined Cases C-236/08 to C-238/08, *Google et. al.*, paragraph 91; Case C-323/09, *Interflora*, [2011] ECR I-08625, paragraph 39.

<sup>11</sup> Opinion of the Advocate General Jacobs delivered on 29 April 1997, Case C-337/95, *Christian Dior*, [1997] ECR I-06013, paragraph 41.

<sup>12</sup> Explanatory Memorandum, Section 3 (p. 3).

advertising and marketing functions but all functions of the trademark, including its origin function, in a mark that is word-and-figurative mark or a figurative mark.

In a recent case, the CJEU stated that the Member States “*may introduce further requirements in relation to aspects of the packaging of tobacco products which are not harmonised by that directive*” (Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco)<sup>13</sup>. However, such measures may not exceed the limits of what is necessary in order to achieve those objectives and must not be disproportionate to the aims pursued. While, from this perspective, prominent health warnings, as introduced by the said directive, are acceptable for the CJEU (since they “still allow for adequate opportunities for product differentiation” and “for a sufficient space for [communicating information about the product concerned to consumers] on the unit packets”), the same could not be definitely stated in respect of such an extreme measure as plain packaging (which, as such, was not the subject of the CJEU examination in the case at issue). In case of the Netherlands, plain packaging would be a disproportionate measure, depriving trademark owners of the right to use their trademarks in perpetuity (i.e. to differentiate their products from those of other entrepreneurs and to communicate information about their products to consumers), in absence of concrete evidence that this is the only measure to curb tobacco consumption and before other measures are implemented and given time to show results.

## ***2. The plain packaging proposal would violate fundamental rights of trademark owners and consumers under European Law***

Firstly, the adoption of plain packaging would effectively deprive trademark owners of their property rights.

The European Court of Human Rights (ECtHR) has confirmed that intellectual property, including trademarks, is covered by the right of property<sup>14</sup>, and the Lisbon Treaty proclaims that the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (ECHR) shall constitute the general principles of the Union’s law<sup>15</sup>.

Plain packaging would deprive trademark owners of the use of their property in their established trademark rights. Accordingly, plain packaging also infringes the right to property protected by Article 17 of the Charter of Fundamental Rights of the European Union and by Article 1 Protocol 1 of the ECHR. Therefore, failure to protect intellectual property would constitute a breach of EU Treaty principles.

As Advocate General Capotorti explained in the famous *Hauer* case as early as 1979,<sup>16</sup> considerations in assessing whether an interference with property amounts to a deprivation are: “the extent to which the prohibitions have ... precluded ... enjoyment of [the] right” and the “scale of the economic sacrifice of the person to whom the measure is addressed” and whether the property “is deprived of any appreciable economic value.” The ECtHR has similarly held that an interference with property rights amounts to a deprivation where the measure takes away “all meaningful use of the propert[y] in question”<sup>17</sup>.

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<sup>13</sup> See Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health*.

<sup>14</sup> See ECHR case law “*Anheuser Bush vs. Portugal*, GC 73049/01, judgement of 11 January 2007.

<sup>15</sup> Article 6(3) TEU.

<sup>16</sup> Opinion of the Advocate General Capotorti delivered on 8 November 1979, Case 44/79, *Hauer*, paragraph 8.

<sup>17</sup> ECtHR *Fredin v. Sweden* (No 1), of 18 February 1991, paragraph 45.

Thus, the adoption of plain packaging would render the affected trademarks meaningless. It would deprive trademarks for tobacco products of all their accepted functions, including guaranteeing the identity of origin of the marked goods or services to the consumer or end user, which constitutes the essential function of trademarks.<sup>18</sup> The affected trademarks could not carry out any of their functions, as they could no longer be *used*.

Article 19(1) of the EU Trade Marks Directive explicitly requires: “*A trademark shall be liable to revocation if, within a continuous period of five years, it has not been put to genuine use in the Member State in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use.*”<sup>19</sup>

Should plain packaging be adopted, trademark owners will not be allowed to use their trademarks on tobacco products, making tobacco trademarks susceptible for cancellation for non-use as trademark owners will lose their trademark rights on tobacco products due to the proposed legislation. This would mean that tobacco brands cease to exist and become public domain, which could be seen as indirect nationalisation. The nationalisation of foreign-owned property “*shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.*”<sup>20</sup>

At the renewal date, should the trademark owners decide to pay the renewal fees, they would be in possession of registered trademarks, which they cannot use and is doubtful they could enforce. In this scenario, an obvious commercial decision would be not to renew the impacted trademarks, and such a decision may be qualified as forceful divesting of property, indirectly equal to voluntary expropriation.

Plain packaging in the Netherlands would also interfere with trademark owners’ freedom of expression and consumers’ corresponding right to receive information. Article 10 of the ECHR and Article 11 of the Charter protect the freedom of expression. Trademarks serve a communication function in allowing trademark owners to communicate the qualities of their products by means of their trademarks. Such differentiation between the tobacco brands, however, would be prevented in a plain packaging environment, and thus would be in violation of fundamental rights of consumers. Additionally, in view of existing advertising and display bans, the only possibility of expression remains the packaging of the tobacco products, where the space available on the pack has already shrunk due to the Tobacco Product Directive and the increase graphical health warnings.

The European Court of Human Rights (ECtHR) has held that the right to freedom of expression also protects commercial free speech. In *Germany v European Parliament* (Case C-376/98), Advocate General Fennelly noted that the effect of the ECtHR’s jurisprudence<sup>21</sup> was that freedom of speech protected “*the provision of information, expression of ideas or communication of images*

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<sup>18</sup> See for example: CJEU Case C-206/01, *Arsenal Football Club*, [2003] ECR I-10273, paragraph 48.

<sup>19</sup> Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (<http://ow.ly/10dWoh>).

<sup>20</sup> UN General Assembly Resolution 1803 (XVII) on *Permanent Sovereignty over Natural Resources* (1962).

<sup>21</sup> E.g., *Casado Coca v Spain* [1994] ECHR 8 and *Markt-Intern*.

*as part of the promotion of a commercial activity and the concomitant right to receive such communications”.*

Trademark owners’ freedom of expression would be denied in a plain packaging environment, as it compels them to carry a message against their will that would entirely supplant the trade dress, logos and other brand imagery, and is intended to be detrimental to the sales of their goods. Plain packaging is not a mere health or safety warning; nor is it intended to prevent false advertising. Instead, plain packaging would completely cover the entire surface area of the package but for one small mention of the brand name. Much less restrictive requirements have been rejected in the United States on freedom of speech grounds in the case of *RJ Reynolds Tobacco Co. v. Food and Drug Administration*, 696 F.3d 1205, 1208 (D.C. Cir, 2012)<sup>22</sup>.

### ***3. The plain packaging proposal in the Netherlands sets a dangerous precedent for other products and industries***

Intellectual property rights such as trademarks contribute significantly to economic growth. According to the second edition of the extensive study jointly conducted by the European Patent Office and the Office for Harmonisation in the Internal Market, more than 42% of total economic activity in the EU (some EUR 5.7 trillion annually) is generated by IPR-intensive industries, and approximately 38% of all employment in the EU (82 million jobs) stems from businesses that have a higher than average use of IP rights.<sup>23</sup> This is consistent with the results of the first edition of the study, to which the former Internal Market and Services Commissioner Michel Barnier stated: “I am convinced that intellectual property rights play a hugely important role in stimulating innovation and creativity, and I welcome the publication of this study which confirms that the promotion of IPR is a matter of growth and jobs.”<sup>24</sup>

The plain packaging proposal unduly restricts trademark rights and thereby endangers economic growth and jobs. INTA is concerned that prohibiting the use of trademarks for tobacco products sets a dangerous legislative precedent, including for Dutch branded products exported abroad. It is also likely to trigger calls for further regulations restricting or banning the use of trademarks on other products. There are already indications that the Australian plain packaging law has led other countries to consider similar regulations for other industries. South Africa, for example, has already restricted the use of certain trademarks for infant milk.<sup>25</sup>

There is a real danger that plain packaging requirements on tobacco products may be the harbinger for the global erosion of trademark rights across other industries in violation of fundamental rights of trademark owners and to the detriment of consumers.

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<sup>22</sup> [http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/\\$file/11-5332-1391191.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/$file/11-5332-1391191.pdf)

<sup>23</sup> European Patent Office and European Union Intellectual Property Office, Intellectual property rights intensive industries and economic performance in the European Union, Industry-Level Analysis Report, October 2016, Second edition ([https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/performance\\_in\\_the\\_European\\_Union/performance\\_in\\_the\\_European\\_Union\\_full.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/performance_in_the_European_Union/performance_in_the_European_Union_full.pdf))

<sup>24</sup> Press Release of the European Commission of 30 September 2013, Intellectual Property Rights: study indicates that roughly 35% of jobs in the EU rely on IPR-intensive industries, available at [http://europa.eu/rapid/press-release\\_IP-13-889\\_en.htm](http://europa.eu/rapid/press-release_IP-13-889_en.htm).

<sup>25</sup> South Africa Department of Health, Regulation relating to foodstuff for infants and young children, No. R. 991, of 6 December 2012.

#### **4. Plain packaging in the Netherlands risks increasing illicit trade**

As an intellectual property organisation, INTA is very concerned by the issue of illicit trade regardless of the industry affected. INTA is concerned that overly standardizing or restricting the labelling or packaging of products will facilitate the spread of counterfeit products by making them easier to produce and more difficult to detect.

The illicit trade in tobacco is a major problem in Europe. The EU customs enforcement of IPR Report in 2017, from 27 September 2018, stresses that customs authorities in the EU detained more than 31 million items suspected of violating intellectual property rights in 2017. Figures on tobacco smuggling (number of cases, articles and retail value of original goods) are included in this report.<sup>26</sup>

Illicit trade affects not only rights holders and the IP community but also society at large. Indeed, many of the protagonists involved in illicit trade in Europe also commit other IP crime offences and serious non-IP related crime such as smuggling drugs and money laundering. This makes it an issue of much broader societal concern. There is evidence that, following the introduction of plain packaging in Australia in October 2012, illicit trade in cigarettes in Australia has increased by almost 20% between 2012 and 2013.<sup>27</sup>

#### **6. The plain packaging proposal in the Netherlands is contrary to international trade agreements**

The plain packaging proposal would violate the trademark provisions of the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") and the Paris Convention<sup>28</sup>.

Plain packaging is an unjustifiable encumbrance on the use of trademarks. Article 20 of TRIPS provides that there shall not be an unjustifiable encumbrance "by special requirement" in the use of a trademark. Plain packaging would constitute an encumbrance on the use of the trademark and the issue is, therefore, whether it is justifiable or not. In this respect, Article 8.1 of TRIPS provides some guidance, allowing measures, which are "necessary to protect public health... provided that such measures are consistent with the provisions of [TRIPS]". However, this proposal does not appear to qualify for this exception, as it seems that none of the TRIPS member states was able to date to demonstrate that plain packaging meets the test under Article 8.

Consequently, plain packaging would be inconsistent with TRIPS and would constitute an unjustified encumbrance in breach of Article 20. Moreover, the effectiveness of plain packaging on tobacco consumption does not seem to be supported by real-life evidence.<sup>29</sup>

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<sup>26</sup>[https://ec.europa.eu/taxation\\_customs/sites/taxation/files/report\\_on\\_eu\\_customs\\_enforcement\\_of\\_ipr\\_2017\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/report_on_eu_customs_enforcement_of_ipr_2017_en.pdf)

<sup>27</sup> KPMG (2014), Illicit tobacco in Australia, Full Year Report.

<sup>28</sup> See the Opinion of the Committee on Legal Affairs of the European Parliament ( <http://ow.ly/10dvIE> )

<sup>29</sup> See for instance, the Commission's impact assessment accompanying the document proposal for a directive of the European Parliament and of the Council: SWD (2012) 452 final, pages 92 and 93 ( <http://ow.ly/10duN3> ).



Indeed, the Explanatory Memorandum to the Dutch draft decree acknowledges that it was not possible to measure the absolute effect of solely introducing neutral packaging in Australia.<sup>30</sup> Additionally, the Explanatory Memorandum mentions the implementation of other measures in the Netherlands, which may lead to a reduction of the smoking incidence, especially among young people, such as advertising bans, raising the minimum age to 18 years in 2014, introducing additional packaging requirements to prevent “glitter and glamour” packaging only in 2018 and introducing smoke-free school yards in 2020.<sup>31</sup> Therefore, the intended effects of these measures cannot possibly be fully appreciated at this stage. The introduction of further far-reaching<sup>32</sup> requirements such as plain packaging should be postponed at least until the effects of the measures that have been introduced can be assessed.

Plain packaging would defeat the purpose of registering or maintaining the registration for tobacco trademarks, as there is little value for trademark proprietors to register a trademark they will be unable to use or enforce. Plain packaging could also result in the invalidation of existing tobacco trademarks, in breach of Article 7 of the Paris Convention and Article 15(4) of TRIPS. Article 7 of the Paris Convention and its equivalent Article 15(4) of TRIPs provide that “the nature of the goods” shall not form an obstacle to the registration of trademarks. Both the Paris Convention and TRIPS regulate the registration of trademarks not for the sake of registration itself, but taking into account that these registered trademarks would be used by their owners. However, plain packaging requirements on tobacco products would mean that tobacco trademark owners would be unable to use non-word marks due solely to the nature of the goods, i.e. tobacco products.

This would also run contrary to the Article 6*quinquies*(B) of the Paris Convention which prohibits trademarks from being either denied registration or invalidated, the key ingredients of this provision being that trademarks which are duly registered in the country of origin shall be accepted for filing and protected as is in other member countries.<sup>33</sup>

Plain packaging leads to a failure to provide effective protection to trademark rights, in breach of the Paris Convention. Plain packaging would shrink to a bare minimum the differentiation between products thus failing to comply with Article 10*bis* of the Paris Convention, which asks for the assurance against unfair competition by prohibiting acts of nature to create confusion by any means with the goods of a competitor. This poses a risk not only to trademark owners but also to consumers.

Among other factors that would impede effective national-level enforcement of plain packaging legislation is the existence of massive counterfeit, black market, and grey market trade of consumer goods, including tobacco products.

INTA is concerned that the legislator selectively takes away IP rights and ignores the strong protection they are given under the law regardless of the economic sector to which the proprietor belongs. Any regulation must be proportionate and must respect the basic, fundamental legal principles and rights that apply to all legal products.

This approach is echoed by the international community, as following the implementation of plain packaging in Australia, five countries commenced dispute settlement proceedings before the

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<sup>30</sup> Explanatory Memorandum, Section 5 (p. 6).

<sup>31</sup> Explanatory Memorandum, Section 2 (p. 2).

<sup>32</sup> Explanatory Memorandum, Section 6(e) (p. 9).

<sup>33</sup> Except for a definite number of very narrow exceptions, none of which apply here.

WTO over this measure. The proceedings are currently ongoing before the Appellate Body and many other WTO members have echoed the concerns raised by the complainants.<sup>34</sup>

## Conclusions

In conclusion, the implementation of plain packaging by the Netherlands would set an unsound legislative precedent, which would fundamentally change the Netherlands – including within the Benelux Union, EU and global frameworks for trademarks, which have been developed over hundreds of years to encourage the creation, protection and use of trademarks, for the benefit of the business community, consumers and the society at large.

INTA submits that adaption of plain packaging would severely impair the function of trademarks, create a dangerous precedent for other sectors, increase the risk of consumer confusion, violate several international treaty obligations as well as EU laws, and significantly increase the risk of counterfeit products being made available on the market.

Therefore, INTA respectfully opposes the proposal for the prohibition of the use of trademarks through plain packaging as considered by the Dutch draft decree to amend the Tobacco and Related Products Decree in connection with the introduction of plain packaging for cigarettes and RYO tobacco.

INTA would be happy to answer any questions you may have on these issues. Should you require further information, please contact Ms. H el ene Nicora, Representative Officer - Europe at [hnicora@inta.org](mailto:hnicora@inta.org).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Etienne Sanz de Acedo', with a stylized, cursive script.

Etienne Sanz de Acedo  
Chief Executive Officer

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<sup>34</sup> <http://ow.ly/10dvXd>