



Brand Briefing

20th February 2009

PLAIN PACKAGING – A THREAT TO BRANDS

In its consultation on the future of tobacco control, the Department of Health sought 'general feedback' on plain packaging as "*an initiative to reduce smoking uptake by young people*". The Government did not take action, with the Secretary of State for Health noting "*there is no evidence base that it actually reduces the number of young people smoking*"¹. The introduction of plain packaging would pose a direct threat to brands in the UK, breach the harmonised regime of intellectual property rights, and contravene the UK's international treaty obligations. A breach of those principles would reverberate across the world and industry, calling into doubt the UK's commitment to an effective IP regime.

The context

The Health Bill received its Second Reading in the House of Lords on 4th February. During the debate several Peers indicated their wish to table and/or support amendments which would give the Secretary of State for Health powers to remove branding from tobacco products. Amendments have now been tabled by Lord Patel and Baroness O'Cathain (see attached).

A threat to brands

In its response to the Department of Health, the British Brands Group with the Anti-Counterfeiting Group raised significant concerns over the impact of plain packaging on legitimate intellectual property rights and on markets. Specifically plain packaging would:

- Inhibit the function of branding to inform, reassure and protect **consumers**, making it more difficult for them to exercise choice;
- Make it more difficult for **manufacturers** to distinguish their products, reducing incentives to invest in quality and new products, and leading to a prevalence of price-based competition;
- Reduced competition, leading to market sclerosis, a more conducive environment for counterfeiters and free riders, and increased risk of illicit trade from other countries.

We noted that plain packaging would push a market in the opposite direction to which the Government currently aspires, such as helping consumers make informed purchasing decisions, providing high levels of consumer protection, empowering consumers, promoting innovation and promoting competitive markets. It will also increase rather than decrease the burden on already over-stretched enforcement organisations, faced with a growing counterfeiting problem.

¹ House of Commons, 16th December 2008

Are brands important?

Branding is crucial, to consumers, to companies, to the efficient working of markets and to the UK economy. As the Prime Minister noted in his speech to the CBI in November 2008:

“Investment in intangible and knowledge assets – in ideas, brands, and research and development – will be a vital force in building Britain's future high value-added competitiveness in the global economy.”

A recent study by Westminster Business School identified that around 1 million people are employed in the creation and management of brands in the UK (4% of all those employed), around £32.55 billion is spent annually by companies on branding (2.3% of GDP), and this represents an investment in the UK economy of some £15.85 billion (12% of all intangible investment and 6% of ALL investment in the UK).

Interference with trade mark rights

IP rights are "a cornerstone of economic activity"² and are protected at domestic and international level. Removing brand imagery from packaging would in effect remove registered trade marks. However the Government may not interfere with IP rights in respect of lawful products as this would be contrary to the harmonised EU and international system of trade mark protection with which it is obliged to comply. Plain packaging is contrary to this harmonised regime because:

- it would preclude the continued registration (in the UK but not in other member states) of trade marks in respect of tobacco products;
- it would be inconsistent with the UK's obligations under TRIPS, which stipulates that the nature of the goods shall in no case form an obstacle to trade mark registration³ and the use of a trade mark should not be unjustifiably encumbered⁴.

The legal constraints imposed by the international regime for the protection of IP rights reflect their commercial significance. A breach of the principles relating to IP rights would reverberate throughout the world and across industry, calling into doubt the UK's commitment to an IP regime which promotes innovation and value creation and provides the foundation for economic growth in the modern world. If the principle of discrimination by reference to the goods themselves were established, logically its application would not be limited to tobacco products. Alcohol and food are just two further areas where IP rights may come under threat in the same way.

A barrier to trade

The introduction of plain packaging in the UK would, by imposing additional restrictions on products in the UK and interfering with manufacturers' ability to communicate with consumers, unlawfully restrict the free movement of goods and the ability of manufacturers from other member states to enter the UK market. As such, any such regulation would be contrary to EU law. It would also constitute an unjustified barrier to international trade in contravention of the UK's international obligations under the General Agreement on Tariffs and Trade 1994 (GATT) and the Technical Barriers to Trade Agreement (TBT).

For more information on this Brand Briefing, please contact John Noble on 01730 821212 or by email: jn@britishbrandsgroup.org.uk.

² *Gowers Review* (December 2006)

³ TRIPS, article 15(4)

⁴ TRIPS, article 20

Lords amendment to introduce plain packaging tabled to the Health Bill

The following amendment was tabled to the Health Bill by Lord Patel and Baroness O’Cathain.

After Clause 22

Insert the following new Clause—

"Plain Packaging

- (1) The Secretary of State may make regulations imposing such requirements as he considers necessary prohibiting or restricting the sale or supply of tobacco products otherwise than in packages or packaging which comply with the regulations.
- (2) The regulations made by the Secretary of State under subsection (1) may impose such requirements as the Secretary of State considers necessary or expedient with respect to any one or more of the following particulars—
 - (a) the colour of the packages or packaging;
 - (b) the shape and material of the packages or packaging;
 - (c) distinctive marks displayed on the packages or packaging;
 - (d) trade marks or registered trade marks displayed on the packages or packaging;
 - (e) the labelling in any respect of packages, packaging or tobacco products, or associated with packages, packaging or tobacco products;
 - (f) the contents inside the packages or packaging, in addition to tobacco products; and
 - (g) any other particulars as may be prescribed by the Secretary of State.
- (3) Regulations made under this section may provide that packages or packaging of any such description, or falling within any such class, as may be specified in the regulations shall not, except in such circumstances (if any) as may be so specified, be of any such colour or shape, or display any such mark or trade mark, or any other particulars as may be so specified.
- (4) No person shall, in the course of a business carried on by him, sell or supply, or have in his possession for the sale or supply any tobacco product, package, or packaging in such circumstances as to contravene any requirements imposed by regulations under this section which are applicable to that tobacco product, package, or packaging.
- (5) Any regulations made under this section may provide that any person who contravenes the regulations shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding a level on the standard scale specified in regulations made by the Secretary of State.
- (6) Before making any regulations under this section, the Secretary of State shall consult such persons as are likely to him to be substantially affected by those regulations.