

# Position Paper on Plain Packaging

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*Zagreb, September 2014*



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American Chamber of Commerce in Croatia *Američka gospodarska komora u Hrvatskoj*

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# Introduction

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*AmCham Croatia is concerned about Plain Packaging as a precedent impairing Intellectual Property Rights and distorting the functioning of the internal market*

The American Chamber of Commerce of Croatia (AmCham Croatia) has consistently and strongly opposed any unjustified restrictions to intellectual property rights (IPR) and the free movement of goods within any sector, as it represents a potential precedent for other sectors, types of consumer goods or services. Protecting and enforcing intellectual property rights and the free movement of goods is key to the future of the innovation-based economy.<sup>1</sup> AmCham Croatia consistently encourages governments to create a transparent business environment with evidence-based rules, which are not more restrictive than necessary.

AmCham Croatia notes that in June 2014 the Irish Government approved the publication and presentation to Parliament of the Public Health (Standardised Packaging of Tobacco) Bill 2014 and that the UK Department of Health published draft regulations and launched a short public consultation on the introduction of regulations for plain packaging, which runs until August 7, 2014 (in the following both regulations are referred to together as the “PP Regulations”).

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<sup>1</sup> See for the importance of Intellectual Property Rights intensive industries in the EU: Office for Harmonization in the internal market (2013), *Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union* ([here](#)).

# Position

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*AmCham Croatia understands and fully supports the aim of the Irish and UK government to improve public health. Its institutions play a crucial role in public health and the Irish and UK government have a legitimate interest in proposing measures to address public health. However, AmCham is of the opinion that improving public health does not have to infringe intellectual property and does not have to distort the internal market.*

The PP Regulation would ban any branding information on packaging of tobacco products, including logos, and other distinctive elements (with the exception of a single brand name in a standardized typeface, size and color), which are protected under trademark law.

AmCham Croatia is concerned by the potential implications of such measures on the trademark system and the internal market and respectfully calls upon the Irish and UK Government to consider its strong concerns associated with plain packaging:

- The PP Regulations would deprive trademarks of their essential functions to distinguish products and guarantee the origin of products since the affected trademarks could not be used vis-à-vis consumers. Not only does this infringe on property rights of the affected trademark owners (under Article 1 Protocol 1 of the European Convention of Human Rights as well as under Article 17 of the Charter of Fundamental Rights). It also sets a concerning precedent for other products or services.
- The PP Regulations contradict the Community Trademark Regulation (CTMR) and its internal market purpose: Whereas the CTMR intends to ensure that trademarks can be used in an identical fashion throughout the entire European Union, the PP Regulations ban the use of trademarks in individual countries.
- The PP Regulations distort the internal market. PP Regulation effectively prohibits importing tobacco products that are lawfully manufactured and marketed in another Member State. Furthermore, the PP Regulations are anti-competitive since they make it impossible to use trademarks to enter a market or to gain market shares.

The PP Regulations violate obligations under international trade agreements: Contrary to Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the PP Regulations unjustifiably encumber the use of trademarks and create an unnecessary obstacle to trade in violation of Art. 2. 2. of the Technical barriers to trade (TBT) Agreement. In the view of all these concerns, it cannot surprise that the European Parliament and Council did not only reject mandatory plain packaging when revising the Tobacco Products Directive (TPD). In Article 24(2) TPD they have set very strict requirements for Member States to adopt plain packaging. Furthermore, Recital 59 explicitly states that the application of the TPD has to respect the law of the European Union and relevant international

obligations. The PP Regulations do not meet any of these requirements. Finally, it should not be ignored that the PP Regulations might lead to a further rise of illicit trade, which already represents a huge problem across the EU. Since smokers will still seek branded products, the PP Regulations give illegal manufacturers a competitive advantage over legal manufacturers. As reports from Australia suggest, illicit trade has significantly increased following the introduction of plain packaging.

**RECOMMENDATION:**

AmCham Croatia therefore respectfully calls upon the Irish and UK Government to give due consideration to the intellectual property rights, the distortion of the internal market and the illicit trade implications in its future analysis of the legal issues and the evidence base for the impact of standardized packaging.

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