



Ms. Monica Maeland
Minister of Trade and Industry
PO Box 8090 Dep.
N - 0032 Oslo

Mr. Borge Brende
Minister of Foreign Affairs
PO Box 8114 Dep
N - 0032 Oslo

Mr. Anders Anundsen
Minister of Justice and Public Security
PO Box 8005 Dep.
N - 0030 Oslo

Mr. Vidar Helgesen
Minister of EEA and EU Affairs
PO Box 8001 Dep.
N - 0030 Oslo

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Draft regulation on standardised packaging for tobacco products

Dear Sir/Madam

economieuisse is the largest umbrella organisation representing the Swiss economy. We represent 100'000 companies in Switzerland. Our members are associations from all sectors, chambers of Commerce and major individual companies. We participate in the shaping of the economic policy from a general point of view. Our goal is to create an optimal economic environment for the Swiss economy as a whole. We, therefore, work towards preserving entrepreneurial freedom for all businesses, improving continuously global competitiveness in manufacturing, services and research, as well as promoting sustained growth as a prerequisite for a high level of employment. We are convinced that a reliable protection of intellectual property is crucial for a favourable business environment. We are in this respect in line with all major business organisations.

We deem that these principles serve Norwegian businesses as well. Therefore, we take the liberty of expressing our concerns regarding standardised packaging of tobacco products. We shall be grateful if you take our inputs into consideration.

1 Summary

economiesuisse supports legislative measures which effectively reduce the negative impact of smoking on health. However, new regulations limiting entrepreneurial freedom are only to be implemented if they are evidence-based, respect the principle of proportionality and are scientifically proven to benefit public health directly. Before introducing new regulations, possible adverse and unintended consequences must be systematically studied and carefully taken into account. It must also be assured that any such regulation respects legally protected intellectual property rights. An introduction of standardised packaging for tobacco or any other legally sold product would not meet these principles.

Beyond that, the introduction of standardised packaging would put in question well-established principles of the free market, such as commercial promotion of legitimate products and the distribution of information about such products to consumers. Above all the introduction of standardised packaging would severely violate internationally recognised intellectual property rights. Finally, it would impair the free movement of goods within the EFTA and EEA zones and create unjustified barriers to trade, thereby violating Norway's obligations under WTO and regional agreements. This would lead to a negative prejudice for all trademark owners, even beyond the tobacco sector. For all these reasons, economiesuisse strongly disapproves the implementation of standardised packaging for tobacco products or other consumer goods.

2 Considerations in detail

The implementation of standardised packaging would be disproportionate and needs to be clearly rejected for the following reasons:

Interference with trademarks' main functions: Trademarks play a number of roles, including distinguishing one's goods from those of another¹; symbolizing the quality, the goodwill and the reputation associated with the product and its manufacturer; promoting innovation by facilitating the introduction of new products within brand families and informing, reassuring and protecting consumers. Proposed regulations that limit or prohibit the use of words, figurative elements, colours or other terms that are intended to differentiate one product from its competitors, obviously preclude the ability of the trademark to fulfil its main functions. Furthermore, they reduce manufacturers' incentives to invest in quality and new products and lead to a simple price-based competition.

The possibility to show and use a trademark on the packaging of a product constitutes the very essence of a trademark right. Standardised packaging would severely limit the use of intellectual property rights, including very valuable Swiss-registered trademarks, protected under Norwegian national law and international treaties.

Unjustifiable encumbrance on the use of trademarks: Standardised packaging would severely limit, or even prohibit outright, the use of trademarks and trade dresses in which a substantive investment

¹ Article 15(1) of the TRIPS Agreement reads as follows: "**any sign**, or any combination of signs, **capable of distinguishing** the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks." [emphasis added]

has been made, categorically violating the provisions of TRIPS Article 20². This may constitute a form of indirect expropriation of intellectual property.

Under the TRIPS Agreement, states may restrict the right of trademark owners only in limited circumstances³ and only taking into equitable account the interests of such trademark owners and the public interest. Even if governments are allowed to take measures necessary to protect key goals such as public health, a measure cannot be deemed “necessary” when there is no evidence that the measure would effectively support those objectives.

On the contrary, a number of other measures that do not blatantly violate the rights of trademark owners are available and should be utilised in pursuing public health goals prior to unproven and controversial initiatives. Such measures include tougher enforcement of existing laws on underage sales, countering the illicit trade in a more robust manner, and of course education to ensure that children are informed of the risks associated with the consumption of cigarettes.

Unjustifiable barrier to the free movement of goods within the EEA: Standardised packaging violates Art. 11 EEA, which prohibits “quantitative restrictions on imports and all measures having equivalent effect”. Standardised packaging creates barriers in that it prohibits the imports of products that are lawfully manufactured and marketed in other parties to the EEA/EFTA; it prevents producers from other parties to the EEA from using their brand equity to retain customers and gain market shares and discriminates against new market entrants and smaller players in the market who rely on their brands to gain market share against established players.

Standardised packaging is subject to legal proceedings: Dispute settlement proceedings initiated by five countries are currently pending before the WTO over Australia’s standardised packaging legislation. In addition, a procedure is currently pending before the Court of Justice of the European Union (CJEU) challenging, among other aspects, the reference in the European Tobacco Products Directive (TPD) to the possibility for Member States to implement standardised packaging. In fact, upon Ireland’s and UK’s notifications of draft standardised packaging proposals, ten, respectively eleven EU member states issued detailed opinions raising concerns that such regulation might create obstacles to the free movement of goods within the internal market.

Increased risk of illicit trade: Standardised packaging would open the door to illicit trade by stimulating both the demand and supply of illicit trade products. When regulatory measures make it more difficult to visually distinguish one brand from another, it becomes simpler to manufacture and sell counterfeit products. Stripping brands of their trademarks will also disrupt the market by increasing the demand for products that are illegally imported and sold to consumers. These can be contraband or counterfeit articles and may even imply an increased health risk for consumers.

3 Conclusion

Standardised or plain packaging prevents trademark owners from using trademarks and trade dress and, therefore, opposes to basic legal obligations arising from international treaties, including the WTO

² Article 20 of the TRIPS Agreement provides that “[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form, or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings”.

³ Article 17 of the TRIPS Agreement states: „Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.“

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property (Paris Convention), as well as the European Economic Area (EEA) Agreement. This would establish a negative prejudice for all trademark owners, even beyond the tobacco sector targeted by the new regulations.

Standardised packaging of tobacco products diminishes the overall respect accorded to trademark rights and therefore undermines generally accepted national and international principles of intellectual property law. The implementation of standardised packaging not only infringes trademark rights and the ability of manufacturers to compete legally and to inform consumers, but it also opens the door to illicit trade, which is already a major problem worldwide.

Furthermore, an initiative asking for standardised packaging for tobacco products or other consumer goods is not based on solid scientific evidence showing that it would contribute to the legitimate public health objective. It would, on the contrary, constitute an expropriation of some of the world's most valuable trademarks and therefore entitle manufacturers to receive adequate compensation. Given that, there are many other means available to governments to support legitimate public health objectives. We, therefore, encourage the Norwegian Government not to take any measures that constitute a disproportionate limitation to manufacturers' property rights and set a dangerous precedent for a number of consumer goods industries.

Given the considerations above, economiesuisse respectfully encourages the Government of Norway to reject any policy initiative that would require the packaging of any tobacco products to be standardised.

Yours sincerely,
economiesuisse



Atteslander Jan
Member of the Executive Board



Herzog Erich
Deputy Head Dpt. Competition & Regulation