



Monika Maeland
Minister of Trade and Industry
POB 8090, Dep. 0032 Oslo
Norway

Bratislava, May 14, 2015

Dear Ms Maeland,

The Branded Goods' Association welcomes your initiative to ensure a high level of consumer and health protection. Brand-oriented industries in Europe regard the protection of health as a primary responsibility.

A crucial question is how best to achieve this common goal with the greatest positive effects for consumers and citizens while minimizing the risk of unintended consequences.

In your future legislation you intend to standardize all tobacco packaging by specifying a mandatory dark green color. The manufacturer's logo and other design elements such as colors, signs or symbols would neither be allowed on the packaging nor the products. In addition, the proposed regulations would standardize brand names and variant names in a mandatory font, size, color and location on the packaging and on tobacco products.

In this context we need to express our strong concerns related to the abovementioned standardization and commoditization which prohibits of the inclusion of packaging designs and three-dimensional elements which currently exist or may be developed in the future on the packaging of tobacco products.

It is of utmost importance to regulate the access of minors to tobacco products as well as smoking in public places and places which children and minors visit. And it is also very important to inform smokers about the negative consequences related to smoking and about all possibilities to seek help while trying to quit. However while doing so, the measures should not lead to boasting illicit market and access to potentially unsafe products.

Norway as a Party to the Paris Convention for the Protection of Industrial Property should respect the fundamentals of trademarks. It is clear, that as a consequence to standard packaging, the trademarks will lose their basic functions granted in the Paris Convention; distinguishing a product from one another, granting the consumer the quality, and competing.

Consequently consumers will lose the protection provided by branded products.

- Brands enable consumers to identify readily products they can trust. They give consumers guidance and information, allowing them to make informed choices and to select their desired product from a large range of alternatives. It is not in the interests of health or consumer protection if the consumer buys the wrong product due to insufficient distinguishing features. This is true whatever the product category;

- The distinguishing features of brands also save retailers time when looking for the desired product and support accuracy of sale. If retailing the product is made more difficult, unreliable and/or prolonged by products that are harder to distinguish, confidence and trust in the legitimate retailer (which enforces age controls) is likely to fall;
- Brands have the particularly important function of assuring quality to the consumer. This means that in the case of branded products, the consumer may come to rely on their quality, signaled by the brand. By making it harder to distinguish between products and brands, quality may become a less important factor in the buying decision (after all, products will all look essentially the same). Reducing the role of quality in this way is likely to act against the policy objective;
- Brands have a strong incentive to invest in innovation as this boosts their reputational asset. The policy as proposed may however stall investment in innovation as any new performance could not be communicated to consumers. Where distinction is absent, such high risk investments are futile;
- Brand producers are concerned not only with the quality of their products but the way in which they are produced (such as social or ecological conduct) as this matters to their consumers. Brands therefore empower consumers to influence producers in this way, by rewarding or penalizing them according to their actions. These forces will be weakened if consumers are less able to tell reputable products apart from no-name products which have made no reputational investment;
- Related to this is the leading role brands play in environmental protection and sustainable production, including the adoption of new production methods, new product formulations and new corporate procedures. In this way brand owners meet their responsibility proactively to supply consumers in a way that reflects the demands of European civil society. The incentive to do so however is reduced if those products that make such investments are largely indistinguishable from those that do not;
- The reduced ability for products to differentiate themselves, inherent in the proposed policy, is likely to have other detrimental effects which must be taken into account for policy to be optimum. Competition in the marketplace is likely to undergo a significant change, shifting from competition on the basis of quality, innovation, reputation and price to price alone. This is because products will look essentially the same. Stronger price competition, as well as being a force for further reductions in investment in quality, innovation and reputation, may increase product usage, contrary to the policy goal.



Were Members States to increase duty to compensate, the sector would become even more attractive to the counterfeiter.

- The nature of competition is likely to disadvantage new market entrants, potentially small and medium sized enterprises. This is because standardization of packaging increases barriers to entry. Any new entrant with a new proposition for consumers would be unable to differentiate their offer from others and convey their unique values to the marketplace;
- A crucial consideration is to adopt a policy that does not fuel the already significant trade in counterfeit products. Currently, the wide range of differentiated packaging designs, the sophisticated printing machinery employed, the nature of the materials and the frequency with which packaging designs change all help to discourage counterfeiting. These obstacles to counterfeiting would be weaker or no longer exist were packaging largely standardized. Increased standardization will reduce the costs of counterfeiting, making it more attractive, while a market in which all products look essentially similar may be one in which consumers find it harder to spot fakes. Counterfeit products tend to use the black market, avoiding regulated retailers, and therefore increase the access of underage people to tobacco. They also expose all consumers to risk from potentially unsafe products from unregulated sources. Such effects are contrary to the health goals of the policy.

Norway as a member to the WTO needs to respect the obligations under the WTO agreements. Plain packaging violates the Article 20 of the TRIPS Agreement as it provides for the use of trademarks.

Moreover, plain packaging violates the TBT Agreement as the TBT provides of such provisions that are not more restrictive than necessary in order to achieve a certain goal.

The proposed Norwegian legislation needs to be notified under the EEA Agreement as well as under TRIS procedure. Similar legislative proposals have been notified in the EU (UK and IRL and France) and more than 10 Member States have issued detailed opinions to express their concerns and negative opinions.

The Branded Goods' Association believe that it is important to take account of the positive effects of brands for consumers, innovation, competition, the economy and enterprises when defining any kind of regulatory intervention, irrespective of the product market concerned. This is as important in areas involving health as in other areas in order to avoid unintended consequences.

Very best wishes,
Lubomir Tuchscher, Executive Director of the SZZV

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