Written submissions on the Public Health (Standardised Packaging of Tobacco) Bill 2013

Philip Morris International
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Introduction – Philip Morris International’s experience and expertise

Philip Morris International ("PMI"),¹ as a tobacco manufacturer, supports effective evidence-based regulation of tobacco products based on the principle of harm reduction. In particular, we support measures that are effective in preventing children from smoking.

PMI has direct experience of the effectiveness of plain packaging as a measure to reduce the appeal of tobacco products and to increase the effectiveness of health warnings from its experience in the Australian market.

Executive summary of submission and list of recommendations

Executive summary

(i) There is no objective evidence which demonstrates that introducing plain packaging will reduce the appeal of tobacco and tobacco products, that it will increase the effectiveness of health warnings on tobacco products or reduce the ability of packaging of tobacco and tobacco products to mislead consumers about the harmful effects of smoking.

(ii) Ireland should carefully consider the impact of and perception created by the proposed plain packaging legislation internationally. Enacting legislation that completely undermines trade mark rights is not consistent with an aim to provide a robust IP protection regime in order to support foreign direct investment. Would Ireland Inc. be happy if other countries required plain packaging for alcohol in circumstances that in many countries alcohol has been identified as the number one public health risk?

(iii) Australia is the only country to have introduced plain packaging and has since the introduction of plain packaging experienced a sharp increase in the illicit trade and no decrease in the prevalence of smoking:

(a) An October 2013 study by KPMG, Illicit Tobacco in Australia, found that Australia’s illegal tobacco market rose from 11.8% to around 13% after plain packaging was introduced;

(b) An analysis conducted by London Economics in 2013 concluded that there has been no statistically significant change in smoking prevalence among the Australian adult population since plain packaging was implemented.

(iv) The proposed plain packaging legislation, in effect, deprives tobacco companies of their intellectual property rights, which are protected by the Constitution, in circumstances where there is no objective evidence which supports this complete and disproportionate deprivation of these rights.

¹. Philip Morris Limited is PMI’s affiliate in the United Kingdom and Ireland.
(v) The proposed plain packaging legislation is contrary to the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. It is also contrary to the principle of the free movements of goods as guaranteed by the Treaty on the Functioning of the European Union.

(vi) Furthermore, the proposed plain packaging legislation violates Ireland’s obligations under the Community Trademark Regulation, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Paris Convention for the Protection of Industrial Property and the Agreement on Technical Barriers to Trade.

**List of recommendations**

PMI is clear that children should not smoke; tobacco should not be available to children, and children should be discouraged from smoking. However, there is no evidence that plain packaging will deter children from starting to smoke. Indeed it could be counterproductive. Three better ways to reduce the incidence of youth smoking would be to:

(i) **Reduce youth access to tobacco.** We have long supported introducing legislation to ban proxy purchasing in order to prohibit adults buying tobacco on behalf of children;

(ii) **Invest more resources in proven peer and educational programmes.** Much could be learnt from countries such as Germany, which have proved how youth smoking initiation can be reduced; and

(iii) **Tackle the illicit trade more effectively** (for the reasons outlined in our submission).

**Head 3: Purpose of Legislation**

PMI does not believe that the proposed scheme on plain packaging will achieve the stated purpose of the legislation. To be effective, the proposed plain packaging legislation must either reduce smoking initiation or make people quit smoking. The evidence to date indicates that it will achieve neither objective. However, it is likely to have unintended consequences that negatively impact both public health and the economy. The emerging data from Australia, the only country in the world to have implemented plain packaging legislation to date, indicates that these unintended consequences will occur (discussed further below).

**Why Philip Morris opposes the proposed plain packaging legislation**

The proposed plain packaging legislation is not evidence-based and will not be effective in attaining the stated purpose of the legislation, namely reducing the appeal of tobacco and tobacco products, increasing the effectiveness of health warnings on tobacco products and reducing the ability of packaging of tobacco and tobacco products to mislead consumers about the harmful effects of smoking. The available evidence indicates that the proposed plain packaging legislation could harm public health by commoditising the tobacco market and encouraging illicit trade. It will also divert resources from more effective youth prevention measures.
As a premium brand tobacco company, we oppose the proposed plain packaging legislation because it will impair free competition, transform the industry into a low price commodity business, and encourage illicit trade to the detriment of the legal supply chain, without any corresponding health benefit. Advocates of the proposed plain packaging legislation presume it will benefit public health. There is no evidence which supports this hypothesis. As an international company, PMI would urge the Irish Government, which markets itself to international companies looking to invest in Ireland, to consider the impact of such legislation on international companies who want to protect and use their trademarks in Ireland. A country which enacts legislation that completely undermines trademark rights, which plain packaging would do, is not an attractive place for foreign international investment.

Furthermore, the Irish Government should give due consideration to how it might react if other countries were to adopt similar legislation governing potentially harmful products that Ireland exports. For example, in many countries, alcohol has been identified as the number one threat to public health. Would Ireland and its sizeable alcohol industry sit by if a country were to enact legislation which requires plain packaging for alcoholic drinks? If the Irish Government were to adopt plain packaging for cigarettes, how could it then make the case that the packaging of alcohol should be treated any differently to the packaging of tobacco, when the public health impacts of alcohol consumption are as severe as cigarette smoking?

The more cautious approach taken elsewhere has demonstrated the complexity of the issues involved and the need for governments to carry out a thorough regulatory impact analysis prior to implementation of such legislation. New Zealand, like Ireland, is a small, open and trade dependent economy, and it continues to delay its own plans to introduce plain packaging legislation pending the outcome of international trade litigation against Australia. The European Commission, following a public consultation and impact assessment, decided not to introduce Union-wide plain packaging. Similarly, the European Parliament and its Committees explicitly rejected a standardised packaging measure; the Council of Ministers did not pursue the measure either.

A thorough and balanced impact assessment in line with the Department of Taoiseach’s Revised RIA Guidelines and Regulating Better White Paper would need to assess whether the proposed plain packaging legislation will reduce smoking rates, deter young people from smoking, or otherwise benefit public health. The importance of having effective tobacco control measures does not exempt the Department of Health from conducting a rigorous regulatory impact assessment.

**Smokers don’t start smoking because of tobacco packaging**

The proposed plain packaging legislation will not work because the evidence is clear that branding does not influence either children or adults to smoke. James J. Heckman, a Nobel Prize-winning economist specialising in early childhood development, and who is current Professor of Science and Society at University College Dublin, and the Henry Schultz Distinguished Service Professor of Economics at the University of Chicago, reviewed a vast amount of literature on the causes of youth smoking and concluded that:

"The economics and public health literatures have extensively investigated the causes of smoking behaviou[r]. These literatures have identified multiple causal factors
affecting youth smoking behaviou, such as prices, parental and peer smoking, early family environments and investments in children.²

Young people start smoking because of social circle interactions and peer pressure, not because of brands on packaging. Irish data confirms this. When asked to cite up to three reasons for starting to smoke, a 2012 Eurobarometer report found that just 3% of Irish smokers said packaging played any role. This low single digit figure was a recurrent pattern across EU Member States, including in eight EU Member States where it was cited by just 1% of smokers.³

Conversely, 89% of people in Ireland said they started to smoke because of friends.⁴ Ireland’s Minister for Health acknowledged the role of peer pressure and smoking when debating the Protection of Children’s Health from Tobacco Smoke Bill 2012:

“Children learn by imitating their parents and other adults. We are all aware that in the early teenage years, peer pressure is a far greater influence than parental pressure... Peer pressure does count.”⁵

Another significant factor in Ireland was parents smoking (23%), a common response across Europe.⁶ The study analysed results by demographic sub-group, and found responses did not vary significantly across socio-economic class or by educational attainment levels.⁷

The statistics above are acknowledged in the Department of Health’s recent policy paper Tobacco Free Ireland (“TFI”). TFI did not seek to quantify the role of packaging in initiation, presumably because it is immaterial. Indeed, the irrelevance of branding is obvious from the popularity of unbranded illicit tobacco and other unbranded illicit substances (e.g., cannabis). More than one in three Irish aged 15-34 reported using cannabis in a 2010/11 survey.⁸ In fact cannabis use has grown rapidly among young Irish people over the last decade despite no branding.⁹ Similarly, in Canada, children smoke ‘baggies’ (illicit unbranded tobacco sold in clear plastic bags).¹⁰

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⁴ Ibid.

⁵ http://debates.oireachtas.ie/Scanad/2012/05/09/00009.asp

⁶ Attitudes of Europeans towards Tobacco op cit.

⁷ Ibid at p.69.


⁹ Fewer than one in four reported having used it in 2002/03. Ibid at page 60.

¹⁰ Baggies are smoked by 43% of high school aged daily smokers in the province of Ontario. See, for example, Centre for Addiction and Mental Health, Contraband cigarettes main source of supply for Ontario youth, 2010, available at
Australian evidence to date shows plain packaging does not impact existing smokers

Plain packaging does not reduce smoking prevalence. A recent analysis conducted by ‘London Economics’ in 2013,\(^{11}\) has found no statistically significant change in smoking prevalence among the Australian adult population since plain packaging legislation was implemented.

Before the London Economics report was released, in the absence of robust and empirical evidence, advocates of plain packaging have had to rely upon consumer survey findings describing plain packaging as less attractive or appealing to support their case.\(^{12}\) However, such polling has limited probative value, because the intentions and perceptions that consumers report are not accurate indicators of future behaviour (and for this reason have been heavily discounted in other countries).\(^{13}\) The only reliable means of analysing the impact of plain packaging legislation on existing smokers is to measure smoking prevalence after such legislation has been introduced. Emerging evidence from Australia indicates that plain packaging legislation had no discernible impact on smoking prevalence. An October 2013 study by KPMG, *Illicit Tobacco in Australia*,\(^{14}\) found that consumption of tobacco did not decrease after plain packaging legislation took effect. This was the first time since 2009 that aggregate consumption did not decline year on year.

Ireland has failed to cut smoking among certain parts of the population in particular. As TF1 revealed, smoking prevalence is highest among adults aged 25-34 (of whom 30% smoke, compared to 11.6% of those over 65, and 12% of 15-17 year olds) and lower income groups (37% in Social Class 5-6 compared to 14.8% in higher socio-economic groups).\(^{15}\) Advocates do not appear to suggest (let alone offer supporting evidence) that the proposed plain packaging legislation will target these high risk groups more effectively. However, it is some of these groups that could be most affected by the unintended consequences, such as an increase in illicit trade.\(^{16}\)

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According to a 2013 inquiry by the UK All Party Parliamentary Group on Smoking and Health (the secretariat of which is provided by ASH UK) “Illicit tobacco causes damage both to its consumers and to the wider society. It makes tobacco more available to poorer people and to children. It helps to widen health inequalities”. See http://www.ash.org.uk/APPGIllicit2013 at p.5.
Plain packaging undermines public health by boosting illicit trade

PMI considers that the proposed plain packaging legislation will not reduce the ability of packaging of tobacco and tobacco products to mislead consumers about the harmful effects of smoking, but will rather exacerbate the likelihood of illicit tobacco products penetrating the market, as has occurred in Australia.

Illicit trade is hugely problematic, both due to the public health threat it poses and the collateral damage it inflicts on the economy. First and foremost, illicit trade is a health issue, and for children especially. Secondly, if there is a dramatic increase in illicit trade, it necessarily will result in a corresponding and significant reduction in tax revenue, whilst having no discernible impact on the number of people smoking and the health of the population.

The effects of illicit trade on children are widely acknowledged. In particular:

- It helps circumvent age restrictions. Suppliers of illicit products operate in a completely unregulated network and do not check age identification or care who they sell to.

- It makes tobacco more affordable. The effect of this on younger people in particular is a concern among the public health community, scientists and governments around the world.

- It increases smoking intensity. For the same reasons that illicit trade works to increase smoking prevalence (i.e., low price and greater accessibility), there is evidence to suggest that illicit trade may contribute to higher smoking intensity, (i.e., the increased amount of cigarettes an individual smokes, and lower cessation rates).

- While all cigarettes are harmful and cause disease, it is also well documented that, due to the lack of regulatory oversight, many counterfeit products are more risky to health. UK HM Revenue and Customs has reported that counterfeit cigarettes

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18 Dr Ross Morgan, Chairman of ASH Ireland acknowledged this link when he responded to the Government’s 2014 Budget by warning that “tobacco smuggling must be tackled before the market is flooded with cheap cigarettes and a consequent increase in smoking and tobacco related illness”. See [http://www.ash.ie/ash-ireland-response-to-budget-2014/](http://www.ash.ie/ash-ireland-response-to-budget-2014/).

19 According to a 2013 inquiry by the UK All Party Parliamentary Group on Smoking and Health (the secretariat of which is provided by ASH UK) “research...shows that the low price and easy availability of illicit tobacco in many communities keeps people smoking and smoking more”. See [http://www.ash.org.uk/APPGillicit2013](http://www.ash.org.uk/APPGillicit2013) at p. 8.

20 UK health and other authorities frequently warn of the greater health risks from smoking illicit tobacco. For example Lancashire Care NHS Foundation Trust states that “Counterfeit cigarettes contain 75% more tar, 28% more nicotine and 36% more carbon monoxide” (http://www.lancashirecare.nhs.uk/Services/Children-Families/Health-Improvement-Service/Tobacco-Harm-Reduction/Illegal-Niche/Illegal.php#hash.4.low2iicc.dpdf). HM Revenue and Customs in the UK have found counterfeit cigarettes to contain “rat droppings, camel dung, sawdust and tobacco beetles” available at [http://www.4ni.co.uk/northern_ireland_news.asp?id=36152](http://www.4ni.co.uk/northern_ireland_news.asp?id=36152) and “[m]any are
can contain three times the levels of arsenic, five times the level of cadmium and 6 times the level of lead found in genuine cigarettes.\(^{21}\)

- **It increases children’s exposure to other illicit and dangerous products and people.** Suppliers of illicit tobacco are frequently organised criminals selling other contraband.\(^{22}\)

Recent reports by the Joint Research Centre on Transnational Crime of the Università Cattolica del Sacro Cuore of Milan and the University of Trento ("Transcrime") on illicit trade in Ireland\(^{23}\) and the UK\(^{24}\) found that plain packaging would boost the illicit trade for three reasons.

- First, by commoditising the market, it encourages consumers to select tobacco based upon price, and untaxed unregulated tobacco (particularly ‘illicit whites’)\(^{25}\) will always be cheaper. Transcrime report that in 2011, the Revenue Commissioners already estimated illicit whites represent 7% of all illicit cigarettes in Ireland.\(^{26}\)

- Second, any tax increases a government introduces to counteract downward pricing pressure will increase the profit margins for smugglers and make Ireland a more attractive target for international gangs.\(^{27}\)

- Finally, plain packaging will facilitate counterfeiting. Transcrime report that the removal of branding and other features may reduce consumers’ capacity to spot counterfeits and consumers’ differentiation between genuine.\(^{28}\) Currently tobacco packaging and products include a number of unique and sophisticated design features such as embossing and special inks and varnishes, which are specifically manufactured in underground factories using contaminated tobacco leaves, substantially increasing the health risks associated with smoking, with much higher levels of tar, nicotine, carbon monoxide, lead, cadmium, and arsenic than genuine brand-name cigarettes’ (http://www.theore.com/ccsf/wp-content/uploads/2011/06/counterfeit-cigarette-information-sheet.pdf).


\(^{22}\) On 12 September, 2013 Chris Macey of The Irish Heart Foundation testified before the Oireachtas Finance Committee that "The illicit trade is... money which is being diverted by criminal gangs from vital programmes in areas such as health and education to fund the trafficking of guns, drugs and even people." http://www.irisheheart.ie/open24/call-strategy-reduce-tobacco-smuggling-n-423.html

\(^{23}\) http://transcrime.cs.unin.it/tc/fso/pubblicazioni/AP/Factbook-Ireland%20v.5.pdf

\(^{24}\) http://www.transcrime.unin.it/tc/fso/pubblicazioni/AP/Factbook_on_the_ITTF_P-1-UK.pdf


\(^{26}\) http://transcrime.cs.unin.it/tc/fso/pubblicazioni/AP/Factbook-Ireland%20v.5.pdf at p.66

\(^{27}\) Ireland (and the UK) is already particularly attractive for organised criminal gangs smuggling ‘illicit white’ cigarettes as a pack sells for £4.50-£5. Illicit whites cannot command a comparable price in markets such as Austria, Italy and Spain where a premium international brand costs the same when bought in legitimate retail channels (fully taxed).

\(^{28}\) http://transcrime.cs.unin.it/tc/fso/pubblicazioni/AP/Factbook-Ireland%20v.5.pdf at p.83
designed to be hard to copy. Saueressig\textsuperscript{29}, a leading specialist in printing and packaging, supports this concern and conducted an experiment testing differences of counterfeiting regular cigarette packs vs. Australian-style plain cigarette packs. Saueressig concluded that it is easier, cheaper, quicker and less risky to counterfeit plain cigarette packs. The proposed plain packaging legislation for standardised packaging would eliminate these techniques and give counterfeiters a standard template for all tobacco products they wished to copy.

The only country to have introduced plain packaging is experiencing a sharp increase in the illicit trade. An October 2013 study by KPMG, \textit{Illicit Tobacco in Australia}\textsuperscript{30} found that Australia’s illegal tobacco market rose from 11.8\% to around 13\% months after plain packaging.

\textbf{Other costs that plain packaging and the illicit trade will impose on society}\

The consequences of illicit trade in tobacco are not confined to health. It costs the Irish taxpayer up to €569 million each year,\textsuperscript{31} and according to the Office of Revenue Commissioners \textit{"is one of the most serious threats to the Irish Exchequer"}.\textsuperscript{32} Illicit tobacco trade costs the taxpayer twice over since the money flows to organised criminal gangs, making them more powerful and further straining the resources of law enforcement.\textsuperscript{33}

The illicit trade also threatens the livelihood of small shopkeepers, many of whom are dependent on smokers’ custom because of the non-tobacco purchases they make when visiting a convenience store to buy tobacco. The proposed plain packaging legislation threatens to hit small retailers twice; first from a decrease in custom as more consumers switch to illicit trade, and secondly from an increase in the costs of doing business.

Research by Roy Morgan analysing retailers in Australia found that nine months after its introduction, plain packaging had increased labour and inventory management costs and product handling errors (as well as the illicit trade).\textsuperscript{34} If plain packaging legislation is introduced in Ireland, Roland Berger Strategy Consultants has estimated that it will cost 1,900 jobs and €125m in tax revenue.\textsuperscript{35}

\textsuperscript{29}http://www.rolandberger.com/media/pdf/Roland_Berger_Impact_of_plain_packaging_for_cigarettes_20131202.pdf


\textsuperscript{31}http://www.grantthornton.ie/db/Attachments/Illlicit-Trade-in-Ireland-report.pdf

\textsuperscript{32}http://www.revenue.ie/en/tax/excise/tobacco/tobacco-strategy.html

\textsuperscript{33}According to Austin Rowan, an adviser at OLAF (the EU’s anti-fraud arm) and head of the investigation unit working on tobacco smuggling, \"[t]his trade is financing organizations that are involved in other activities, including drugs smuggling\" (quoted in ‘Downturn creates unlikely smugglers’, \textit{The New York Times}, 11 July 2012, available at http://www.nytimes.com/2012/07/12/world/europe/europes-downturn-creates-unlikely-cigarette-smugglers.html?pagewanted=all).


\textsuperscript{35}The Roland Berger Study is attached separately.
Finally, plain packaging will hit Ireland’s global competitiveness at a time when the country can least afford it. International investors across all industries depend upon business certainty, respect for property rights, and the rule of law. Stripping companies of their intellectual property for political rather than objective policy reasons (in breach of Irish, EU and international law) will be viewed negatively, as indicated by the comments to date from the US business community reported in the Irish Times.  

*Reducing the appeal of tobacco and tobacco products – alternative measures to reduce youth smoking*

We are clear that children should not smoke; tobacco should not be available to children, and children should be discouraged from smoking. There is no evidence that plain packaging legislation will reduce children smoking; indeed, it could be counterproductive. Instead, tobacco control policies should focus on what actually influences children to smoke – peer and parental influence and create effective initiatives (such as educational programmes) designed to tackle those influences. Better ways to cut youth smoking would be to:

* Reduce youth access to tobacco. TFI admits that the refusal rate to sell cigarettes to those aged under 18 is just 73% in retail premises, compared to 97% compliance with legislation on display of cigarettes in store and with smoke free workplace legislation. TFI omits any strategy for dealing with this. England is considering introducing a law to prohibit proxy purchasing (whereby adults purchase tobacco on children’s behalf), and Scotland has already done so. We have long supported such a measure, and would support its introduction in Ireland, together with other efforts to increase compliance with existing regulation.

* Tackle illicit trade more effectively. The illicit market for tobacco in Ireland is (proportionately) the largest in Western Europe comprising almost 20% of the Irish total. As a result, illicit tobacco is anything but ‘de-normalised’. As discussed above, this poses obvious dangers to children.

* Invest more resources in proven peer and educational programmes. Instead of pursuing experimental policies such as plain packaging legislation, Ireland should learn from best practice elsewhere. Evidence from the US, Sweden, and Germany provide roadmaps for policies that are proven to improve public health by reducing youth smoking initiation and overall consumption. For example, Germany has demonstrated very substantial progress in reducing youth smoking within their current regulatory environments. The Federal Centre for Health Education (BzgA) reported that the:

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Germany has 30/40 textual health warnings; vending machines must be equipped with age-control verification technology; display of products as well as advertising at retail is allowed; and, with restrictions, tobacco companies can still use billboards and cinema commercials to compete for market share.
"percentage of smokers among young people aged between 12 and 17 years has dropped to a new all-time low: 11.7 per cent in 2011 from 27.5 per cent in 2001."\textsuperscript{38}

The Federal Drug Commissioner explained this success as follows:

"Alongside regulatory measures such as the Youth Protection Bill’s smoking restriction for under-age persons, tobacco tax increases and regulations aimed to provide protection from passive smoking in Germany, the Federal Office for Health Education’s (BZGA) ‘Smoke Free’ youth campaign has contributed significantly to the success of tobacco policies in the target group of under-aged and young adults."\textsuperscript{39}

\textit{Reduced Risk Products}

For adult consumers who choose to smoke, we believe that reduced risk products have the potential to benefit public health significantly. This wide group of consumers are likely to find these products more acceptable substitutes for conventional cigarettes than current alternatives (as they come closer to replicating the sensory experience and ritual of conventional cigarettes without generating many of the harmful compounds found in cigarette smoke).

The reduced risk market is dominated by e-cigarettes which have shown that there is a growing market for alternatives. There is scope, therefore, to develop products that are more acceptable to smokers and to the extent they offer reduced-risk, reduce harm. The health benefits of switching to a reduced risk product can be significant and can provide a real solution for those smokers who are unable or unwilling to quit.

As a company, PMI has always been of the opinion that there is space in the market for a variety of tobacco and nicotine-containing products to address the varied preferences of adult consumers. We believe that our candidate reduced-risk products will be superior alternatives to conventional cigarettes for consumers looking for alternatives, especially compared to the current generation of e-cigarettes. However, we have also been monitoring the e-cigarette category and, as we announced in December 2013, have decided to enter this market pending the next generation of alternative products.

This is just the start of what is an innovative and potentially transformative trend in the tobacco sector, as the rapid growth of this market demonstrates. A science-based regulatory framework for assessing and commercialising less harmful alternatives to conventional cigarettes (including tobacco containing products) should complement strategies aimed at reducing initiation and encouraging cessation.

\textit{Heads 5, 7, 8, 10 and 11}

Standardised packaging constitutes an illegal deprivation of property and raises a variety of complex legal issues. Michael Collins Senior Counsel has highlighted these issues in a

\textsuperscript{38} \url{http://drogenbeauftragte.de/presse/pressemitteilungen/2012-01/pm-drogenaffinitaet.html}

\textsuperscript{39} \url{http://drogenbeauftragte.de/fileadmin/dateien-dba/Presse/Downloads/12-02-08_Nationale_Strategie_final_Druckvorlage.pdf}, p.33.
document he prepared at the request of Philip Morris Ltd. which document is enclosed as Annex 1.

Notably, five countries have already initiated international trade dispute proceedings against Australia before the World Trade Organization for violation of the Technical Barriers to Trade Agreement.\textsuperscript{40} At a Committee on Technical Barriers to Trade meeting in June 2013, several more raised concerns on the lack of scientific basis, uncertainty about the means of attaining the objective, the possible adverse effects, and the negative effect on the competitiveness of least developed countries. They urged Ireland to pursue alternative policies to achieve the same health objective, and some members asked Ireland to suspend the proposal until the ongoing disputes against Australia’s plain packaging law had been concluded.\textsuperscript{41}

The complete restriction on the use of lawfully registered trademarks on tobacco products as proposed under Heads 5, 7, 8, 10 and 11 of the proposed legislation deprives tobacco companies of their constitutionally protected property rights; violates their freedom of expression; interferes with their right to engage in commerce; breaches the principle of the free movements of goods and violates Ireland’s obligations under the Community Trademark Regulation, the TRIPs Agreement, the Paris Convention and the TBT Agreement.

\textbf{Plain Packaging Legislation Would Constitute an Unlawful Deprivation of PMI’s Property Rights}

The proposed plain packaging legislation would deprive tobacco companies of their lawfully registered trademarks – both because it would deprive them of their ability to use their trademarks in the form in which they are registered – and because it would deprive them of their very function. This deprivation, which attacks the very essence of the tobacco companies’ trademark rights, is clearly unlawful under the Irish Constitution, the European Convention on Human Rights (the “\textit{Convention}”) and the Charter of Fundamental Rights of the European Union (the “\textit{Charter}”).

Trademarks are specifically recognised as a legally protected property right under Irish, EU and Convention law for good reason.\textsuperscript{42} Trademarks, which consists of words or designs (or a combination of the two), serve a very important function. They allow trademark owners to differentiate their products from competitor products, communicate their source, and signal that they have a certain quality, origin or attribute that separates them from the rest. They also enable consumers to quickly identify their favoured products without the risk of confusion. As can be expected, this function has enormous value; it allows the owner to develop an identity for its product that might otherwise be lacking, i.e., a “brand”, which enables the owner to generate goodwill and to charge a premium for its products. Indeed, given the importance of this function, a company’s trademarks are often listed amongst its most valuable assets.

The proposed legislation clearly aims to deprive tobacco companies from recognising this value. And its rationale for doing so is remarkably simplistic, i.e., since the measure claims

\textsuperscript{40} DS434, DS 435, DS441, DS458 and DS467.

\textsuperscript{41} www.wto.org/english/news_e/news13_e/tbt_17jun13_e.htm

\textsuperscript{42} See, \textit{e.g.}, Article 17(2) of the Charter (“intellectual property shall be protected”).
to benefit public health (which it does not), the State is therefore free to disregard the tobacco companies’ property rights without any compensation. However, the law clearly requires more. Indeed, the mere absence of compensation alone suggests that the proposed measure is disproportionate. As the Irish Supreme Court recognised in In re Article 26 and the Health Amendment (No.2) Bill 2004 Reference:

Where an Act of the Oireachtas interferes with a property right, the presence or absence of compensation is generally a material consideration when deciding whether that interference is justified pursuant to Article 43 or whether it constitutes an “unjust attack” on those rights. In practice, substantial encroachment on rights, without compensation, will rarely be justified.43

This principle is also firmly recognised under both the Convention and the Charter. Indeed, as the European Court of Human Rights has recognised:

The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under [Article 1 Protocol 1] only in exceptional circumstances.44

This principle is also made explicit in Article 17(1) of the Charter, which has been incorporated into national law since the ratification of the Lisbon Treaty in 2009:

No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss.

But even if the Irish Government were to provide compensation, that fact alone would not save the measure. Indeed, as recognised by leading Irish authorities:

Compensation cannot validate an interference with property rights that is not justified by the exigencies of the common good. Any other view would mean that Article 43 [the constitutional guarantee of property rights] merely guarantees a right to compensation rather than a right to property per se.45

For that reason, the Irish Government must also show that: (i) the measure is rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right and is not arbitrary, unfair or based on irrational considerations; (ii) the impairment of the tobacco companies’ property rights is as minimal as possible; and (iii) that the effects on these rights are proportionate to the objectives sought to be obtained.46

But the Irish Government cannot meet this standard:

43 [2005] IESC 7 at paragraph 118.
45 Hogan and Whyte, Kelly "The Irish Constitution" (4th edition) (2003) page 2014, emphasis added. The authors also point out that this point is also accepted by the German constitutional court.
While the measure purports to be for the benefit the public health, it is clearly unsuitable with regard to that objective and will only skew consumption towards to cheaper non-premium and illicit brands. Currently tobacco packaging and products include a number of unique and sophisticated design features such as embossing and special inks and varnishes, which are specifically designed to be hard to copy. The proposed legislation would eliminate these techniques and give counterfeiters a standard template for all tobacco products they wished to copy;

The measures are based on arbitrary, unfair and irrational considerations, namely, a desire to harm tobacco companies and to specifically exempt them from the protections afforded by the rule of law;

Depriving tobacco companies of the essence of their intellectual property is clearly far more onerous an impairment than is necessary to achieve Ireland’s public health goals. As outlined above, the Irish Government has a number of far less severe and more effective measures at its disposal to accomplish its stated objectives instead of engaging in such a wholesale attack on intellectual property rights;

The measure is clearly disproportionate in the strict sense in that it fails to strike a fair balance between its stated objectives and its effect on the tobacco companies’ intellectual property, which will be completely deprived of its function. While the measure claims to increase public awareness on the harms of tobacco use (which is already universally known in Ireland) and decrease its appeal (based on the unsubstantiated claim that packaging increases its appeal), these objectives cannot justify the measure’s devastating impact on the tobacco companies’ intellectual property rights, especially given the existence of other less burdensome means in which they can be accomplished.

The Proposed Plain Packaging Legislation Would Violate PMI’s Freedom of Expression and the Public’s Corresponding Right to Receive Consumer Information

The proposed legislation would severely infringe PMI’s freedom of expression (which encompasses the right to communicate) as well as the public’s corresponding right to receive consumer information, by prohibiting tobacco companies from communicating the most basic information about the existence, availability and features of their products, including information about how the products may be different from competitor products. The effect of such a measure would be particularly acute in light of Ireland’s existing advertising and point of sale display bans, which already prohibit tobacco companies from conveying such basic information at the point of sale, and thus relegates the pack face as the sole remaining means of communicating this information.

There is no valid justification to prohibit the communication of any such truthful, non-misleading information on a lawful consumer product, and for that reason, it is unlikely in any legal challenge to be sustained as a proportionate limitation.

It is also particularly egregious to the extent it extends to electronic cigarettes and other products that have the prospect of significantly reducing the harmful effects associated with
tobacco smoking.\(^{47}\) So, even if tobacco companies were to commercialise such products which have the potential to dramatically reduce the known harmful effects of smoking, they would be prohibited from communicating this basic information to their consumers, to the detriment of the public’s health and its right to receive such essential information.

**The Proposed Plain Packaging Legislation Would Violate PMI’s Right to Engage in Commerce and/or Right to Compete**

The proposed plain packaging legislation would fundamentally violate PMI’s right to compete in the marketplace by depriving it of its ability to use its trademarks in the normal course of trade, which would operate to the clear detriment of PMI’s premium-brand products. By removing all non-price elements of competition, PMI would be unfairly deprived its branding power and forced to compete on price alone, which would unfairly benefit cheaper non-premium and illicit brands. It may also create a “race to the bottom” in terms of pricing, which is clearly unsuitable from a public health perspective. If the Irish Government then reacted by increasing excise taxes (particularly the minimum rate of excise tax) it could lead to price convergence and effectively eliminate all meaningful competition in tobacco products in Ireland. The measure is therefore clearly unlikely to be sustained in any subsequent legal challenge as a proportionate limitation on PMI’s rights.

**The Proposed Plain Packaging Legislation Would Violate the Principle of the Free Movement of Goods**

The proposed plain packaging legislation would constitute a clear violation of Article 34 of the Treaty on the Functioning of the European Union ("TFEU"), which prohibits quantitative restrictions on imports between Member States and all measures having equivalent effect. As the European Court of Justice has repeatedly held:

\[\text{[I]n the absence of harmonisation of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 34. This is so even if those rules apply without distinction to all products unless their application can be justified by a public interest objective taking precedence over the free movement of goods.}\]

\(^{48}\)

In order to justify such a trade restriction under Article 36 of the TFEU, Ireland would be required to show that the limitation strictly complies with the principle of proportionality. However, as set out above, it will plainly be unable to satisfy this test.

**The Proposed Plain Packaging Legislation Would Violate the Community Trademark Regulation**

The proposed legislation would also violate Article 1(2) of the Community Trademark Regulation (Regulation 207/2009), which requires that all EU Member States give equal effect to Community trademarks. Under this Regulation, Ireland is strictly forbidden from prohibiting the use of Community trademarks in Ireland. This proposed legislation would appear to render this measure illegal on its face.

\(^{47}\) See Heads of Bill, p.4 (defining tobacco products).

The Proposed Plain Packaging Legislation Would Violate Ireland’s International Treaty Obligations

The proposed legislation would also violate several agreements to which Ireland is a party, including the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), the Paris Convention for the Protection of Industrial Property ("Paris Convention"), which is incorporated into the TRIPS Agreement and the Agreement on Technical Barriers to Trade ("TBT Agreement").

For example, it plainly breaches Article 20 of the TRIPS Agreement, which provides that ‘the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as...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.” It also violate Article 15 (4) of TRIPS, expressly provides that "The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the trademark". The proposed plain packaging legislation would clearly create such an obstacle for tobacco products, in clear contravention of this provision.

These violations would result not only in the invalidation of the plain packaging legislation, but also in potential sanctions against Ireland and retaliation from trade partners. As discussed above, five countries have already initiated proceedings against Australia and several more have raised serious concerns about Ireland’s the proposed plain packaging legislation.

5. Declaration of interest

Philip Morris Limited is PMI’s affiliate in the United Kingdom and Ireland and we sell and distribute Marlboro and L&M cigarettes via a local distribution agreement.

6. Publication of submission

PMI is agreeable to publication of this submission

Martin Inkster,
Managing Director, UK and Ireland.

PHILIP MORRIS INTERNATIONAL