



Mr John Dalli
Commissioner for Health and Consumer Policy
European Commission
200, rue de la Loi
1049 – Bruxelles

16 December 2010

Dear Commissioner,

BUSINESSEUROPE has taken note of the ongoing consultation by DG SANCO regarding a possible revision of the Tobacco Products Directive 2001/37/EC. A detailed response to this consultation will be provided by the concerned industry. However, we consider it necessary to comment on the proposed option to introduce plain packaging for tobacco products, taking into account its potentially negative implications for other industry sectors.

We firmly believe that strong and effective protection and enforcement of intellectual property rights is key to boost Europe's innovation. BUSINESSEUROPE has also consistently opposed any unjustified restrictions to intellectual property rights.

The envisaged policy option of plain packaging in the Commission consultation document would eliminate one of the main functions of a trademark, to have a product distinguished from its competing ones. It would therefore undermine the intellectual property protection system by depriving trademark owners from their right to fully use and exploit their intellectual property. Such an indirect expropriation of intellectual property is unacceptable. It goes against European and international trademark protection rules (EC Regulation 40/94, Trade Mark Directive 89/104/EC, World Trade Organisation's agreement on Trade Related Aspects of Intellectual Property Rights–TRIPs-, Paris Convention, European Convention on Human Rights), would contradict the general policy objective of the Commission to strengthen intellectual property protection. It would also set a dangerous and alarming precedent.

Under the TRIPS Agreement, states may restrict the right of trademark owners only in limited circumstances and only taking into account the interests of such trademark owners and the public interest. Even if governments are allowed to take measures necessary to protect key goals (for e.g. public health, as might be assumed in this context), a measure cannot be deemed "necessary" when there is no evidence that it would effectively support those objectives. On the contrary, a number of other measures that do not violate the rights of trademark owners are often available and should be utilized in pursuing public health goals before moving on to clearly disproportionate measures such as plain packaging.



Additionally, plain packaging is bound to open the door to illicit trade, including counterfeit products as well as restrict fair competition. When regulatory measures make it more difficult to visually distinguish one brand from another, it is easier to manufacture and sell counterfeit products. Stripping brands of their distinctive character has also been shown to disrupt the market by increasing the demand for products that are illegally imported and sold to consumers.

According to the latest Commission statistics, in terms of number of counterfeit articles detained at EU borders in 2009, tobacco products (cigarettes) came first (35 million pieces). Plain packaging would risk further exacerbating this flow of counterfeit products with a possible spill-over effect to other sectors and increasing health risks for consumers.

In light of the above remarks, BUSINESSEUROPE would oppose any future introduction of a plain packaging provision that might have effects and consequences beyond the intentions of the Commission.

In addition, the consultation, in part 5, also refers to the concept of attractiveness as a possible future basis for legislation. We consider this concept (as defined by the Commission, as well as the World Health Organisation) a subjective notion that could not serve as an appropriate regulatory standard in any consumer product area (including tobacco products). Measures and regulations based on this subjective concept might disturb market relations in an unpredictable and unscientific way as well as the proper functioning of the internal market without fulfilling their underlying goal (e.g. reduce overall consumption of specific products). Such measures though symbolic in nature might be ineffective and even counterproductive, as they might increase the risk of illicit and/or counterfeit products. The introduction of this concept could also create an unacceptable precedent for regulations in other areas of consumer products, such as food products and alcoholic beverages.

We remain at your disposal to discuss our position further.

Yours sincerely,

Best regards,

Philippe de Buck