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Ministry of Health, Welfare and Sport
P.O. Box 20350
2500 EJ The Hague

Object: heaters and standard packs of e-cigarettes and cigars

Dear Members of the Government,

The Property Rights Alliance is dedicated to the protection of intellectual property rights and innovation around the world. We write this comment to express our significant concerns about the draft Executive Order, which would introduce plain packaging (PP) for tobacco products beginning January 1st, 2022. This measure will have a negative impact on innovation and on the intellectual property rights environment. Intellectual property rights are human rights and should never be infringed, weakened, or diluted to meet other political objectives.

Uniquely, trademarks convey important information to consumers regarding product quality and safety, especially vital information for products such as tobacco. Unsurprisingly, plain packaging, which removes trademarks and reduces this flow of information, has not only failed to reach its intended goal to reduce smoking prevalence everywhere it has been tried, it has often been followed by more harmful unintended consequences.

Intellectual Property Rights Boost Economies

Protecting intellectual property allows innovators to respond to consumer demands for reduced-harm products as well as the incentive to earn a positive reputation in the market. These innovations literally save lives, create jobs, and move science forward. According to the recent edition of the International Property Rights Index, which is the world's only index entirely dedicated to the measurement of intellectual and physical property rights, Netherlands ranked 10th out of 129 countries, with a score of

8.273.¹ Regulations such as plain packaging that reduce the ability of owners to use their trademarks might seriously undermines such a positive ranking.

We note that scores on the IPRI have robust correlations with Global Biotech Innovation (.92), Global Entrepreneurship (.90), and with Institutional Quality (.91).² Indicating that countries with weak protections fail to achieve their full potential. The strongest correlations with the IPRI is with the Corruption Perception Index (.93), and specifically with Illicit trade (.89), choosing to protect property rights will aid in combatting related crimes.

In Europe, according to the EU Intellectual Property Office,³ trademark intensive sectors employ 30 percent of the workforce directly and indirectly, the most of all IP-intensive sectors. Instituting plain packaging for tobacco normalizes the otherwise unprecedented measure and jeopardizes jobs in the next targeted industries such as alcohol and sugary beverages. Brand Finance,⁴ a brand consultancy firm, estimates that plain packaging on beverages would result in an implied loss across the entire beverage industry is \$430.8 billion. Yet, extending the policy to drinks containing alcohol has already been proposed by World Health Organization officials using the Framework Convention to Control Tobacco as a template.⁵

Intellectual Property Rights Provide Incentive for Product Safety and Innovation

Trademarks allow innovators to earn reputations based on the quality of their products and prevent consumers from being confused by materially different, and potentially inferior, products which improperly bear a logo identical to, or confusingly similar to, the company logo. The brand itself, and its reputation built over years in the market is often the most valuable asset a company has. Replacing brands with standard packages do not reduce smoking prevalence. Rather it robs consumers of vital reputational information while ceding ground to criminal syndicates that enjoy their newfound ease to reach anonymity to traffic illicit products.

As a testament to the power of brands and the market system has been the industry's response to the demand for less harmful products by releasing innovative electronic cigarette vaping products. According to the Public Health England⁶ (the English Government Public Health agency) and the Tobacco Advisory Committee of the UK Royal College of Physicians, vaping is at least 95 per cent less harmful than smoking.⁷ They have emerged as the most popular, and successful, quitting method in

¹ Levy, Sary. "Netherlands International Property Rights Index." Accessed September 16, 2020.

<http://www.internationalpropertyrightsindex.org/country/netherlands>.

² "The 2019 IPRI." Accessed September 16, 2020. <https://internationalpropertyrightsindex.org/full-report>.

³ European Union Intellectual Property Office. "IP Contribution." Accessed September 16, 2020.

https://euipo.europa.eu/ohimportal/en/web/observatory/ip-contribution#ip-contribution_1

⁴ Brand Finance. "Plain Packaging 2019," September 2019. https://brandfinance.com/images/upload/plain_packaging_2019_final.pdf.

⁵ McArdle, Helen. "Graphic Cancer Warnings on Alcohol 'could Cut Drinking' Says Public Health Expert | HeraldScotland." The Herald, June 7, 2017. <https://www.heraldscotland.com/news/15333584.graphic-cancer-warnings-on-alcohol-could-cut-drinking-says-public-health-expert/>.

⁶ Public Health England. "E-Cigarettes around 95% Less Harmful than Tobacco Estimates Landmark Review." GOV.UK, August 19, 2015. <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review>.

⁷ Australian Tobacco Harm Reduction Association. "Vaping Is 95% Safer than Smoking. Fact or Factoid?" *ATHRA* (blog), December 23, 2019. <https://www.athra.org.au/blog/2019/12/23/vaping-is-95-safer-than-smoking-fact-or-factoid/>.

countries where it is available, such as in the UK, US, EU⁸ and Canada. One of the main findings of the Public Health England² (PHE) evidence review is that e-cigarettes could be contributing to at least 20,000 successful new quits per year.

Sadly, due to confusing and misleading messaging this is not the case. Rather, it is much more dangerous that there has been an increase in the number of people that believe vaping is more harmful or just as harmful as tobacco cigarettes.¹⁰ Government regulators that apply the same rules to vaping products, including plain packaging, as they do to tobacco products reinforce the inaccurate message that they are just as harmful or more so. Honoring the right of manufacturers to brand their packages would aid in communicating correct information that can save lives.

IP rights like trademarks for branding should be protected for consumer welfare, not prohibited. The introduction of the proposed legislation constitutes a breach of the IP rights and right of expression of the manufacturers.

Plain Packaging is Ineffective

Across the world, very few countries have adopted Plain Packaging (PP). Research performed by the Luiss Guido Carli University in Rome and the international community of Deloitte¹¹ found that the introduction of plain packaging regulation in Australia did not result in a significant reduction of smoking or authorized tobacco consumption within the interval between 2012 to 2017. In particular, recent data from National Drug Strategy Household Survey (NDSHS) in Australia (2016) report no statistically significant decline in the overall daily smoking rate between 2013 (12.8%) and 2016 (12.2%).¹² This is the first instance of no downturn in 23 years.

In addition, independent research on the impact of plain packaging in Australia, using data paid for by the Commonwealth government, found “no statistically significant difference in effectiveness of the graphic health warning as a result of the policy being introduced—if anything that effectiveness declined.”¹³

Published data from France, where plain packaging has been in force for over three years (implemented on January 1, 2017), confirms the policy’s dismal record. The French Customs Office (L’administration des Douanes) reported in the course of 2017, a 4% increase in the number of cigarettes purchased compared to the same period of the previous year.¹⁴

⁸ Australian Tobacco Harm Reduction Association. “Vaping Is Helping More Smokers Quit, New Study Finds.” *ATHRA* (blog), October 18, 2019. <https://www.athra.org.au/blog/2019/10/18/vaping-is-helping-more-smokers-quit-new-study/>

⁹ GOV.UK. “PHE Publishes Independent Expert E-Cigarettes Evidence Review.” Accessed September 16, 2020. <https://www.gov.uk/government/news/phe-publishes-independent-expert-e-cigarettes-evidence-review>.

¹⁰ IBID

¹¹ “Study Finds That Plain Packaging Really Boosted Tobacco Consumption in Australia.” *Post of Asia*, May 30, 2020. <https://postofasia.com/study-finds-that-plain-packaging-really-boosted-tobacco-consumption-in-australia/>.

¹² Australian Institute of Health and Welfare. “National Drug Strategy Household Survey 2016 Detailed Findings.” Canberra, ACT: Australian Institute of Health and Welfare, 2017. <https://www.aihw.gov.au/reports/illicit-use-of-drugs/ndshs-2016-detailed>

¹³ Davidson Sinclair and Ashton De Silva, “What the Government Demanded As Proof for Plain Packaging Efficacy: An Analysis the Public Health Lobby Did Not Perform” (RMIT University, May 3, 2017), <https://ssrn.com/abstract=2962216>.

¹⁴ “Smoking on the Rise in France despite Rollout of Plain Packaging,” May 2, 2017. <https://www.thelocal.fr/20170502/the-french-smoke-more-since-the-introduction-of-plain-packaged-cigarettes-in-france>.

The only “evidence” cited by the World Health Organization that plain packaging does in fact result in reduced smoking prevalence is greatly flawed. The WHO cites only one source “Who Report On The Global Tobacco Epidemic, 2019”¹⁵ to back this claim. That source is a meta study summarizing conclusions from 51 different reports of tobacco related research. Of those 51 studies only one looked at the relationship between smoking prevalence and plain packaging, the authors concluded “confidence in this finding is limited, due to the nature of the evidence available, and is therefore rated low by GRADE standards.” It has been taken off the internet.

Unintended Consequences

Tobacco products are the most illicitly trafficked products in the world. Removing trademarks on packaging allows illicit markets, including counterfeiting, easier access to unwilling consumers and retailers. Consumers use branding to identify differences between products, including between legal and illegal brands. Plain packaging would lead to a dramatic rise in the illegal e-cigarette and combustible cigarette markets. The illicit tobacco trade can copy plain-packaged cigarettes much more quickly than the branded packs.

The risk of a growing illicit market for electronic cigarettes is particularly concerning. When the United States experienced an outbreak of e-cigarette, or vaping, product use-associated lung injury (EVALI) the Center for Disease Control conducted several studies to pinpoint the cause of the injury. They concluded that Vitamin E acetate found in illicit THC containing e-cigarettes as the primary cause of EVALI injuries which resulted in 68 deaths.^{16, 17}

In Australia, it is estimated that the level of illegal tobacco consumption has increased over recent years, reaching 13.9% of total consumption in 2016 and representing an excise loss of 1.6 billion AUS.¹⁸ Illicit tobacco is linked to the funding of terrorist groups and criminal syndicates.¹⁹ In France, the largest consumer of contraband and counterfeit cigarettes in Europe, the estimated excise loss to the French Government was approximately 2 billion Euros in 2016.²⁰ This illicit trade has been linked to a large proportion of jihadists travelling to Syria and Iraq, as well as terrorist attacks in France.²¹ Counterfeit cigarettes remain the most investigated IP-crime in the UK and are linked directly to criminal organizations.²² Authorities there identified counterfeit plain-packaged packs.²³

¹⁵ “Who Report On The Global Tobacco Epidemic 2019” https://www.who.int/tobacco/global_report/en/

¹⁶ Health, CDC’s Office on Smoking and. “Smoking and Tobacco Use; Electronic Cigarettes.” Centers for Disease Control and Prevention, February 25, 2020. https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html.

¹⁷ Navon, Livia. “Risk Factors for E-Cigarette, or Vaping, Product Use–Associated Lung Injury (EVALI) Among Adults Who Use E-Cigarette, or Vaping, Products — Illinois, July–October 2019.” *MMWR. Morbidity and Mortality Weekly Report* 68 (2019). <https://doi.org/10.15585/mmwr.mm6845e1>.

¹⁸ “Illicit Tobacco in Australia” (KPMG, March 20, 2017), <https://home.kpmg.com/content/dam/kpmg/uk/pdf/2017/04/Australia-illicit-tobacco-Report-2016.pdf>.

¹⁹ Louise Shelley, “The Diverse Facilitators of Counterfeiting: A Regional Perspective,” *Journal of International Affairs, Transnational Organized Crime*, 66, no. 1 (2012), <http://www.jstor.org/stable/24388249>.

²⁰ “Project Sun: A Study of the Illicit Cigarette Market in the European Union, Norway and Switzerland” (KPMG, 2017), <https://assets.kpmg.com/content/dam/kpmg/uk/pdf/2017/07/project-sun-2017-report.pdf>.

²¹ “Illicit Trade and Terrorism Financing” (Center for the Analysis of Terrorism, December 2016), <http://cat-int.org/wp-content/uploads/2017/03/Interim-note-illicit-trade-and-terrorism-financing-Dec-2016.pdf>.

²² OIP Crime Group, “IP Crime and Enforcement Report 2016/2017” (Intellectual Property Office, 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/642324/IP_Crime_Report_2016_-_2017.pdf.

In summary, intellectual property rights that allow branding and freedom of expression from manufacturers are natural rights and allow the exchange of crucial information in the market. Measures that restrict or prevent branding water down the incentive to innovate and ability to earn a positive reputation. Even though the standardized packaging has been conceived as means to aid in the reduction of smoking prevalence, no evidence supports this claim. Instead of providing a public benefit, it is illicit actors that prefer anonymity to traffic counterfeit, substandard, and other illicit tobacco products that benefit the most. Due to the standard packaging they are able to more easily hide their illicit products and confuse consumers that have a weakened ability to discern qualitative and less harmful products from others.

Thank you for taking into consideration our comments. We remain at your disposal for any questions or comments.

Respectfully submitted,

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²³ Jack Courtez, "EXCLUSIVE: First Fake Plain Packs Discovered, Rogue Retailers Making 'Small Fortune,'" BetterRetailing.com, November 10, 2017, <https://www.betterretailing.com/first-fake-plain-packs-discovered>.