

December 2, 2013

Richard Bruton
Minister for Jobs, Enterprise & Innovation
Department of Jobs, Enterprise & Innovation
23 Kildare Street
Dublin 2
IRELAND

Dear Mr. Bruton,

Please accept this letter of concern from the Institute for Policy Innovation (IPI), a twenty-five year old public policy NGO that works in the areas of trade policy, intellectual property policy, health policy and economic growth.

In addition to being an accredited NGO with the World Intellectual Property Organization (WIPO), over the past several years IPI has participated in a number of discussions related to the intersection of public health and intellectual property at the World Health Organization (WHO).

IPI's focus in these policy areas has led us to participate as a stakeholder in the current Trans-Pacific Partnership (TPP) trade negotiations and, more likely of interest to you, in the Transatlantic Trade and Investment Partnership (TTIP). During the July TTIP negotiation session in Washington DC, IPI was pleased to make a stakeholder presentation on the importance of protecting intellectual property protections through trade agreements.

Our focus thus also leads us to be very concerned about the news that Ireland plans to move ahead with misguided "plain packaging" requirements for tobacco.

Plainly, governments have an interest in the protection of public health, and this most certainly includes encouraging cessation from smoking--the leading cause of preventable disease and death in most countries. But it's important that governments pursue proven means of reducing smoking that do not infringe on individual rights, and especially important that governments not adopt policies that, while unproven at discouraging smoking, will almost certainly cause other unintentional harms.

Recent data suggests that smoking rates in the United States have dropped below 18 percent, an all-time low. Smoking rates in the United States have consistently dropped year-over-year since 1965, when the U.S. smoking rate was 42.4 percent. These encouraging gains have been made through a combination of public educational campaigns, warning messages, taxation and regulation. But the United States never negated the intellectual property rights of tobacco companies by effectively seizing their trademarks through any sort of plain packaging requirement.

www.ipi.org

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tomg@ipi.org

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1660 South Stemmons,
Suite 245
Lewisville, TX 75067
(972) 874-5139 voice
(972) 874-5144 fax

email ipi@ipi.org

In Ireland, while the smoking rate is somewhat higher than in the U.S., according to Ireland's National Office of Tobacco Control, "rates of smoking have declined in all social class groups."

Clearly, Ireland has an interest in seeing this encouraging trend continue, but we believe a plain packaging requirement for tobacco products is a major policy mistake, for several reasons:

1. A plain packaging requirement would represent government destruction of intellectual property, and reflects an incomplete understanding of the function of trademarks in an economy

Beyond any question, a plain packaging requirement eliminates the functions of the holder's trademark, and represents the destruction of significant economic value for the holder of the mark.

It is not a small thing to pass a law that sweeps aside the trademark rights of a trademark holder, regardless of what someone thinks of their products. Those who advocate doing so have, at best, an incomplete understanding of the function of trademarks in an economy.

Protection of the branding of legal products goes beyond the specific product to protection of the image of the company itself. To quote *economiesuisse*:

Proposed regulations that limit or prohibit the use of words, figurative elements, colors or other terms that are intended to differentiate one product from its competitors, obviously preclude the ability of the trademark to fulfill its main functions. Furthermore, they reduce manufacturer's incentives to invest in quality and new products and *lead to a price-based competition*.

2. A plain packaging requirement is a clear violation of not one but several international agreements to which Ireland is a signatory.

A plain packaging requirement is in clear violation of Ireland's obligations under Article 20 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and the Paris Convention for the Protection of Industrial Property (Paris Convention). Additionally, plain packaging of tobacco is NOT required under the World Health Organization (WHO) Framework Convention on Tobacco Control.

It is also interesting to note that plain packaging of tobacco is NOT required under the World Health Organization's Framework Convention on Tobacco Control (FCTC).

3. The Proposed Plain Packaging Regulation Sets a Harmful and Misguided Precedent Which Would Inevitably Be Extended to Other Types of Products

This is the "thin end of the wedge" or the slippery slope" argument—namely, that today it's tobacco, but tomorrow it will be something else—other products deemed harmful to public health, or to public morals, or other products for other reasons.

Alcohol is also harmful to public health—arguably, more harmful than tobacco. It’s difficult to conclusively prove the impact of “secondhand” smoke, but it’s not difficult to identify the victims in a drunk driving accident. Shall we force alcohol products, perhaps produced in Ireland, into plain packaging?

How about products containing trans fats? Processed sugar? It’s even possible that these products have a more harmful impact on public health than tobacco, especially in light of the burden on the public health system imposed by Type II diabetes. Shall we take away the trademark rights of fast food products and chocolate bar producers?

4. The Proposed Plain Packaging Regulation Will Inevitably Lead to an Increase in Counterfeit Tobacco Products Which by Their Very Nature Escape Regulatory Compliance

With the ability to protect and distinguish brands, comes the ability to differentiate by price. The proposed regulation eliminates a company’s incentive to promote and protect their brands, so it is logical to assume that companies will put less effort into protecting brands, resulting in easy to counterfeit commoditized products.

There is already an enormous amount of counterfeiting in the cigarette marketplace, even with all of the proactive policing of counterfeits that is driven by brand holders. What is likely to happen to the level of counterfeiting of cigarettes when a) package design is simplified and mandated by government regulation, and b) the right to use color, logos and other branding elements is expropriated by the Irish government?

The answer is obviously that inferior counterfeit tobacco products will explode in Ireland, and counterfeit products by their very nature ignore safety and other regulatory compliance issues. We have seen clear evidence of this playing out in Australia, where, according to a study conducted by KPMG, plain packaging requirements (currently the subject of a WTO case) have led to a 154% increase in combined contraband and counterfeit tobacco products since 2012. In addition, the loss to the Australian government through the rise of these unregulated, untaxed illicit tobacco products is estimated to be \$1 billion (USD).

Counterfeiting is not only a crime, but it is also increasingly a source of income for highly organized crime syndicates.

And what incentive will brand holders have to fight counterfeiting under the proposed regulation? Certainly less than they do today.

Other Implications

Other implications of the proposed plain packaging regulation that concern IPI are a) whether a society that values free speech should be restricting the rights of companies that sell a legal product from communicating freely in the marketplace with their consumers; and b) the likelihood that resulting lower tobacco prices will actually result in more, rather than less, smoking. One of the

best indications of a free society is whether or not the society trusts its ability to process information freely communicated within the marketplace.

Additionally, our survey of the literature and research suggests that there is little or no evidence that the proposed plain packaging regulation will actually accomplish its goals of reducing smoking. We have focused our comments on the harm done to Ireland's international obligations, and the likelihood of economic harm to consumers and producers. In light of the lack of evidence that the proposed regulation would actually accomplish its goal, these would seem to be high prices to pay for little or no benefit.

Finally, Ireland has been the beneficiary of significant foreign direct investment (FDI) in the past decade—investment which, in many cases, has been related to intellectual property protection. It would seem that pioneering the destruction of trademark value through plain packaging regulation is likely not in the best interests of continued foreign direct investment for Ireland—again, especially when there is no evidence that plain packaging contributes to reduced tobacco consumption.

Conclusion

The Institute for Policy Innovation (IPI) appreciates the opportunity to share our views with you. We urge stakeholders to intervene with the Irish government to reject the proposed plain packaging regulation and find other methods and means for achieving the desired health outcomes that will not violate Ireland's international obligations and agreements, and that will not encourage widespread counterfeiting of tobacco products. We would be delighted to work further with you toward this goal.

Sincerely,

A handwritten signature in blue ink that reads "Tom".

Tom Giovanetti
President
Institute for Policy Innovation (IPI)