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INDICAM

Istituto di Centromarca
per la lotta alla contraffazione

Milan. 14 March, 2018

Ministry of Health
College of Medicine Building
16 College Road
Singapore 169854
Attn.: Director, Epidemiology and Disease Control Division

Re: Response to the Ministry of Health's Public Consultation on the potential adoption of Standardised Packaging

Estimated Sirs
We refer to the release by the Ministry of Health (MoH) on 5 February 2018 of its "Public Consultation on Standardised Packaging and Enlarged Graphic Health Warnings for Tobacco Products".
We are the leading association in Italy, one of the most credited in the European Union (EU) in the protection of Intellectual Property Rights (IPR) and against counterfeiting and IPRs violation. We have more than 130 members, representing 2.5% of the Italian GDP. Among our members some of the industrial excellence not just of our country, but all over the World.
We seriously take in consideration each aspect of the human life. IPRs are a consistent part of it, as the development and the competitiveness of our governments, and of our social systems, are more and more based on the production of the industries investing a high amount of their resources in the IPRs. According to the EUIPO study[1] "Intellectual property rights intensive industries and economic performance in the European Union", the 44% of the EU GDP, one of the largest in the Economic world, is made by businesses having intensive investments in the IPRs.
The Intellectual Property is a guarantee for consumers. The responsibility and the sustainability in the businesses highly investing in IPRs are part of the industrial culture, as well the respect for the human rights, the labor rights and the environment. The IPRs are a set of values, visible to the public through the brand. The latter is not just, for this reason, an advertising vehicle, but the most powerful way to let the consumer make its own responsible and conscious choice.
As citizens, we are of course also committed to any measures impacting the human health, and we recognize that smoking is one of the threats to the public health. We recognize that all the efforts made by the Governments must be addressed to protect the citizens, mostly preventing all harmful habits. As well, we are strongly monitoring all the measures that, even if introduced for a general health protection improvement, are also impacting the IPRs. This is the goal of our submission to the public consultation.

We would like to hereunder reiterate our views and concerns over plain packaging as a formal response to the MoH's "Public Consultation on Standardised Packaging and Enlarged Graphic Health Warnings for Tobacco Products" and take this opportunity to again encourage the Singapore Government to take these into account before making any decision on the potential introduction of standardised packaging in Singapore.

We refer to the press release by the Ministry of Health (MoH) on 5 February 2018 of its "Public Consultation on Standardised Packaging and Enlarged Graphic Health Warnings for Tobacco Products" which announce, among other things, that the Ministry of Health will be seeking the public's views up until 16 March 2018 on the potential adoption of standardised packaging (also known as "plain packaging") in Singapore. This follows on from a similar exercise undertaken by the MoH in early 2016.

[1] https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/performance_in_the_European_Union/performance_in_the_European_Union_full.pdf

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Firstly, the goal of the Consultation. We think that, as well as in other countries, the instruction of a plain package depriving the Tobacco packs of the most recognizable distinctiveness based on visible brands, is not definitely a measure impacting the reduction of smoking.
We deeply analyzed both the results right now collected in Countries already adopting such kind of measures and the document published by the Ministry of Health of Singapore [2].
We are quite surprised by the very small space dedicated in the document "Public Consultation Paper on Proposed Tobacco - Control Measures in Singapore" to some key aspects related to the measure of plain package, directly impacting the IPRs.
Firstly, the theme of counterfeit items. This is based also on a misunderstanding, or bad wording, as the paragraph begins with a very imprecise, and seriously mistaken, declaration. Please note that counterfeited cigarettes are NOT "*…cigarettes which were manufactured without the consent of the authorised owner but appear to be genuine products".* This is exactly the opposite what is the real definition of Counterfeit. A counterfeited good is a good bearing a distinctive IPR not authorized by the right holder, and for this reason an illegal product. Moreover, the good infringing the IPR is a potentially harmful and dangerous product. In fact, only the legitimate manufacturer is in the position to guarantee the respect of standards, of GMP, of work legislation, of safety, of environment, of certification and so on.
The counterfeiting is a social alarm: ICC estimates that in the world around 1 Billion Euros are fake goods produced each year. OECD, and EUIPO, calculated for 2016[3] a total value of half a trillion USD for the volume of fake goods exchanged in the World. This is what we call a "social alarm", and for sure not based on "appearing genuine products". So, please, be careful and more specific taking into account the danger and the impact of the public safety of counterfeited goods.
As well, we are surprised by the small attention paid in the document of the Ministry of health to the IPRs. This is, again, a fundamental part of the complete reasoning over the plain package for the tobacco products. It cannot be simplified as matter of brand as advertising, as is demonstrated that the IPRs are a set of values, as above described. Considering this just a visible aspect, that at the end is the concept of "brand", means not having in full consideration the enormous effort made by manufacturers in order to comply with all different regulations. And only the IPR are the element of guarantee of such this respect.
Plain package is depriving the legitimate Right Holder to his right of distinctiveness. Not just to attract consumers, but to show them what to purchase, in an immediate and safer way. The consumer's choice is based on what they know, what they think, what they want to trust in. The IPR is the sum of all these aspects, and the plain package is *de facto* depriving the consumers of a set of their rights, normally guaranteed by the element of a trademark.
It is far from the reality the declaration that the progressive reduction of the space on a package for the trademark, would directly impact the reduction of smokers.
The experiences so far observed in the world about the plain package are not sufficient to testify that the reduction of smokers has been a concrete result. However, for what is concerning the IPRs, is demonstrated that the measure has been one of the reasons for the initial confusion for consumers, not able to recognize the product they wanted to purchase and so, for this reason, being deprived of one of their fundamental right, the information.
As well, we directly testify in France the negative effects for the tobacco shops. These shops are always family owned, with a very limited turnover and they base their activity on the own job of the owner and some relatives. The impact of the plain package has been a relevant and excessive burden. We need to consider that the sales of cigarettes are usually a very fast transaction, but in the case of France after the plain package introduction, they assisted to a significative increase in the time spent to assist consumers, having troubles and difficulties in the identification of the right product asked by the client. Moreover, they told us

[2] https://www.moh.gov.sg/content/moh_web/home/econsultation/eConsultation/topics/public-consultation-on-proposed-tobacco-control-measures-in-sing.html
[3] http://www.oecd.org/industry/global-trade-in-fake-goods-worth-nearly-half-a-trillion-dollars-a-year.htm

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that the impact in term of sales has not been significant, vice versa remaining stable. So, at the end, the only "victim" was the tobacconist, having more time spent supplying the consumer, having a bigger risk to fulfill the client not with the product requested (difficulties in the recognition of the products because of all similar packs) and finally spending more time (so, more money) in the sales cycle.

We, also, would recall the attention on the risks for counterfeiting. This is a normal consequence of the plain package, and this for evident reasons. Among them, the lowering of barriers for counterfeiters. A package with distinctive sings requires, for the criminals, an investment in machinery for the production of the package that the plain package *de facto* eliminates, being just a box perfectly able to cover different manufacturers. Also, in this case we ask, being among the biggest experts of the matter as we are recognized, to take into higher consideration this consequence, and not just considering it as a minor issue. KPMG's analysis over the recent years, the methodology of which has been acknowledged by Australian public experts as "*probably the most appropriate way of collecting that type of information and tracking it over time"*[4], demonstrates that the level of illegal tobacco consumption has grown since plain packaging was introduced in Australia, reaching 13.9% of total consumption and representing about AUD 1.61 billion excise value loss for the Australian government in 2016. And this, in a global impact of the measure that in Australia is not satisfactory at all.

Why does Singapore aim to pursue this flawed policy knowing the outcome beforehand?

Many do not:

- Indonesia, Dominican Republic, Cuba, Honduras, Malawi, Nicaragua, Zambia, Zimbabwe, Denmark, Switzerland, Germany, Italy, Sweden, Spain, Portugal, Greece, Bulgaria, Slovakia and Czech Republic are amongst the countries that remain opposed to plain packaging.

- The Netherlands, Taiwan, Brazil and Belgium[i] are amongst the countries that earlier considered plain packaging, however are exploring less restrictive regulatory measures and studying the full impact of plain packaging before proceeding.

- Other reputable IP and business organizations continue to raise concerns over plain packaging and to oppose the measure. The International Trademark Association (INTA), the International Chamber of Commerce (ICC) and MARQUES are amongst them.

- Even the French health minister[5] acknowledges the failure of plain packaging in changing smoking behaviour.

Plain packaging in Australia has simply failed

[4] See Dr. Tim Beard, the Australian Institute of Health and Welfare (AIHW), Parliamentary Joint Committee on Law Enforcement, illicit tobacco, 4 March 2016, page 33. The AIHW is in charge for the NDSHS.

[5] See the French health minister Agnès Buzyn's November 2017 statement during a parliamentary debate on the Social Security Finance Bill and in response to a Member of Parliament, who interrogated her on the efficiency of plain packaging. She acknowledged that plain packaging: *"does not lead smokers to stop smoking"* and that it did not contribute to reducing tobacco sales in France. Available at: http://www.assemblee-nationale.fr/15/cri/2017-2018/20180075.asp.

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Whereas the Consultation claims that plain packaging was a success in Australia, the official data over the last five years tells a different story:

- The results of the Post-Implementation Review that were released by the Australian Government in early 2016 are ambiguous at best. On the one hand, the Government claims that *"tobacco plain packaging is achieving its aim of improving public health in Australia and is expected to have substantial public health outcomes into the future".* On the other hand, the government acknowledges that it was impossible to analyse the full effect of plain packaging, as a number of regulatory measures (e.g. larger health warnings and tax increases) had come into force simultaneously.

- Interestingly, the most recent official data from Australia, which was dismissed by the Singaporean government, reveals that the long-term decline in smoking prevalence has come to a halt after plain packaging was introduced: *"While smoking rates have been on a long-term downward trend, for the first time in over two decades, the daily smoking rate did not significantly decline over the most recent 3 year period (2013 to 2016)[6]".*

Instead, the fundamental flaws of the plain packaging experiment in Australia are reinforced by the policy's discernible negative impact on competition, market dynamics and illegal trade:

- KPMG's analysis over the recent years, the methodology of which has been acknowledged by Australian public experts as "*probably the most appropriate way of collecting that type of information and tracking it over time",* demonstrates that the level of illegal tobacco consumption has grown since plain packaging was introduced in Australia, reaching 13.9% of total consumption and representing about AUD 1.61 billion excise value loss for the Australian government in 2016. In addition, the Australian Border Force has seized considerable volume of illegal cigarettes, many of which contain *"metal shavings and even bird droppings"* that may risk creating serious health hazards for consumers of these products[7].

- Plain packaging has largely contributed to the price becoming the most important factor of product selection, depriving premium brand-owners of the value of their brands. Down-trading has dramatically reduced the margins for all in the supply chain over the last few years.[8]

Plain packaging for tobacco products would set a precedent for a similar measure to be applied across a whole range of other consumer products

This precedent is even stressed by the representatives of the World Health Organization (WHO): *"We are also watched by sugar and alcohol products manufacturers, who see the tobacco control movement as a precursor to threats they now face from public health campaigns. These industries fear a united international community acting on behalf of consumers. In the coming days, I hope their fears will be fully justified as we take further steps to end the tobacco epidemic".*
This is what we call, again, depriving consumers of the right to be informed and to make choices based on such this information. Is not reducing the legitimate interest to show the distinctive sign of the trademark that the heath will be improved. It is needed to pursue this high goal with a more strategic approach, not targeting only the industry and the consumers themselves.

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[6] See Dr. Tim Beard, the Australian Institute of Health and Welfare (AIHW), Parliamentary Joint Committee on Law Enforcement, illicit tobacco, 4 March 2016, page 33. The AIHW is in charge for the NDSHS
[7] See, for example, KPMG 2016 Full Year Report, page 11
[8] See, for example, KPMG 2016 Full Year Report, page 11

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Conclusion

In light of the detrimental consequences of plain packaging highlighted in the foregoing paragraphs, we encourage the Singapore Government - in its capacity as a supporter of free trade and of intellectual property rights - not to implement such a far-reaching and damaging regulation.

We request at a minimum that the Singapore Government delay any consideration of plain packaging until after the final outcome of the WTO Dispute, inclusive of any appeal to the WTO Appellate Body, and strongly encourage it to carefully review the effectiveness of plain packaging in France, the United Kingdom and Ireland - as well as assess any further data emanating from Australia - before proceeding further with any plans to implement such a restrictive and detrimental policy in Singapore.
We are fully available for any further information.

Thanks
Best regards

Claudio Bergonzi