International Chamber of Commerce
Policy and Business Practices

ICC DISCUSSION PAPER ON LABELLING AND PACKAGING MEASURES IMPACTING ON BRAND ASSETS

DISCUSSION PAPER

Prepared by the ICC Joint Task Force on Labelling and Packaging Measures

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Executive Summary

ICC fully supports national and international policy objectives to improve public health and consumer safety, and is committed to collaborative approaches to achieve these goals. In parallel with industry initiatives supporting these goals, international organizations and a growing number of countries are considering or implementing labelling and packaging measures which directly or indirectly restrict the use of branding features for a broad range of products and sectors.

Direct restrictions can range from partial to total bans on the use of logos, brand names, designs, colours, images or words, and may proscribe the use of specific colours or font sizes. Indirect restrictions obscure or restrict the use of branding by requiring the inclusion of mandatory elements in a specified size and/or style, reducing the visibility or available space for branding and other product information.

Often predicated on specific policy objectives, such measures also have a potentially broad impact in areas such as international trade, competition, consumer protection, intellectual property and innovation, and can:

- **Decrease consumer choice and confidence** by reducing consumers' ability to make informed purchasing decisions, and by facilitating the entry of imitation or counterfeit products with resulting health and safety risks.

- **Undermine incentives for investments in innovation and product quality** by reducing manufacturers' ability to communicate innovative features, thereby driving competition based on price rather than on innovation and quality, and by undermining intellectual property (IP) rights which provide the legal guarantees on which investments in innovation and brand value are based.

- **Reduce and distort competition** by decreasing the ability of producers to use branding to distinguish between products and services in the marketplace and by creating barriers for new market entrants.

- **Restrict cross-border trade** by adversely affecting competitive opportunities, making market entry more difficult for imported products, and discouraging exports into smaller markets due to country specific labelling costs.

To ensure balanced, targeted and proportionate regulatory outcomes whose benefits outweigh their costs, ICC recommends that policy makers take into account the following recognised international principles of good regulation:

1. **Clearly identify policy goals, base policy decisions on scientific data and research, and consider less costly or more effective alternatives to regulation**

2. **Ensure transparency and participation in the regulatory process by all stakeholders and government authorities interested in and affected by regulation**

3. **Analyse impacts on all stakeholders, minimise costs and market distortions, and incentivise investment and innovation**

4. **Adhere to relevant domestic and international regulations, standards and best practices.**

Businesses stand willing to continue to work with governments to share scientific and operational expertise and to develop collaborative approaches reflecting common interests and shared responsibility for achieving public policy goals.

I. Background and aims of paper

The International Chamber of Commerce (ICC) represents businesses of all sizes from diverse sectors in more than 130 countries, and aims to promote international trade and responsible business conduct.

ICC's global membership fully supports national and international policy objectives to improve public health and consumer safety and is committed to collaborative approaches reflecting common interests and shared responsibility for these goals. In many cases, businesses are already working individually and in coalitions with governments, academia, civil society, and directly with consumers to achieve these aims.

In parallel, various countries and international organizations are considering or implementing regulatory intervention, including through measures mandating the form and content of labelling and packaging.

ICC has noted an increasing tendency for such measures to restrict the use of brand assets and product information in a number of sectors and countries. It also notes that some of the labelling and packaging measures introduced or being considered in this context have far–reaching consequences going beyond their specified objectives.

Given their potential effects on many policy areas affecting business, ICC would like to bring to the attention of policy makers the broader potential impact of such measures in areas such as international trade, competition, consumer protection, intellectual property and innovation.
ICC also recommends good regulation principles to be taken into account when considering whether to introduce such measures and urges policy makers to work with businesses to find the most effective means to achieve policy goals.

The aim of this paper is not to address specific regulatory measures at the national, regional or international level, but to take a horizontal approach in identifying types of measures, their potential impacts on relevant policy areas and in providing guiding principles and recommendations.

II. The value of branding, packaging and labelling

Branding, packaging, and labelling are inter-related elements that play a central role in providing consumers the information that enables them to make purchases that most closely align with their needs.

Brands:

- Identify and differentiate products;
- Serve as an indicator of quality and origin, protect against counterfeiting and unfair competition, and enhance consumer confidence and protection;
- Increase accountability by brand owners to both consumers and regulatory authorities;
- Encourage competition in product appeal, innovation, and pricing, thereby ensuring that consumers receive innovative and differentiated products and services at competitive prices;
- Often comprise elements legally protected by national and international law (e.g. through agreements protecting intellectual property rights[1]) such as trademarks, copyright, and designs;
- Represent substantial and sustained market investments and can constitute a significant share of a company's total value as well as help support both domestic and international trade and investment.

[1] World Trade Organization agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); various agreements concluded under the auspices of the World Intellectual Property Organization (WIPO); several regional and bilateral trade agreements.

Packaging and labelling further identify the source or origin of products and provide critical information to consumers, particularly at the point of sale, including when sales take place on-line. Product packaging typically includes brand names and logos, as well as information on the identity of the manufacturer or distributor whereas labelling provides information on product contents, quality, quantity, etc. (for example, eco-labeling and ingredient or nutritional information).

In short, the branding, design, packaging, and labelling of a product are essential elements of information-transfer to consumers. They collectively provide consumers with the information and assurances they need to make informed purchasing decisions. Brands play an important role in the economy and society by informing consumers, stimulating trade, and promoting innovation and competitiveness and are the result of significant investments by companies.

III. Labelling and packaging measures

ICC observes that measures directly or indirectly restricting the use of branding elements are being applied to a broad range of products and sectors in a growing number of countries around the world, often predicated on achieving specific public policy objectives.

These measures can be categorized as follows:

1. Measures specifically restricting the use of particular branding features, such as certain designs, images, colours, brand names, logos or other packaging or product design elements

These measures introduce restrictions which can range from partial to total bans on the use of logos, brand names, designs, colours, images or words, and may proscribe the use of specific colours or font sizes.

Examples of such types of measures include:

- Restrictions or bans on the use of certain kinds of images (e.g. those of particular appeal to certain categories of consumers; images not naturally associated with a product)
- Restrictions or bans on the use of certain terms (e.g. prohibition on the use of language that directly or indirectly persuades consumption or makes claims on product benefits or qualities; personal names)
- Limitations on the size of the brand name in relation to other information (e.g. obligation for the brand to be no larger than mandatory elements)
- Bans on brands or distinguishing signs associated with certain types of products being used on other types of products.

At the extreme end of the spectrum, some countries have introduced a total prohibition on the use of all branding elements except the trademark name in plain font (often referred to as “plain packaging”).

Some forms of such measures severely limit, and in certain cases completely remove, the ability of producers to use branding to communicate with customers.

2. Measures indirectly restricting the use of branding features and product information (e.g. by requiring mandatory designs, colours, graphics, images and/or text, warning notices and/or a specific size for mandatory elements which limit the space for branding features and other product information)

These types of measures obscure or restrict use of branding features by requiring the inclusion of mandatory elements in a specified size and/or style which reduce the visibility or available space for branding.

Examples of such types of measures include:

- Requirements for mandatory text to be disproportionately large or dominant in relation to the brand name (e.g. excessive font size for mandatory information)
- Requirement to include specific and visually dominant design features (e.g. standard coloured borders or stripes with specified minimum sizes on packaging)
- Requirements for warning notices, symbols or images which are disproportionately large or visually dominant in relation to the brand name and/or the overall space available for branding.

IV. The impact of the measures

ICC recognizes the important role of labelling and packaging regulation in protecting the health and safety of consumers. However, reducing the ability of manufacturers to distinguish their products through the use of branding and to provide other product information has broad implications for other important public policy objectives. Unnecessarily restrictive measures, particularly when they relate to front packaging and labelling, broadly distort competition and can have the following negative consequences for consumer protection, innovation, intellectual property rights, and trade.

1. Decrease consumer choice and confidence

Limiting branding and the communication of key product information detracts from consumers' ability to easily identify, compare, and differentiate between products from different manufacturers, making it more difficult for consumers to make informed purchasing decisions and identify the product most appropriate to their needs. When consumers cannot recognize trusted brands by their distinctive logos, packaging, and design elements, imitation or counterfeit products may enter the market more easily, introducing health and safety risks.
For some types of products, the risk of confusion between products in the marketplace due to lack of distinctive branding can also have serious consequences for consumer health and safety. A reduced ability to distinguish goods and services through branding features may also facilitate unfair competitive practices which aim to deliberately mislead consumers.

The association of a product with a particular brand puts responsibility on the manufacturer to ensure that the product has consistent quality and characteristics, and creates a relationship of trust between the consumer and the brand. Restrictions on the use of branding features may undermine a critical element of accountability and responsibility on which consumers depend to identify the product most appropriate to their needs and make the best choices in the marketplace.

The right to communicate information about goods and services offered to consumers is an extension of the right to freedom of expression which is subject to constitutional or legal protection in many jurisdictions and recognized internationally.

2. Undermine innovation and investment

Manufacturers innovate to offer better quality and new features to improve their products and attract consumers. These innovative features are generally communicated to consumers in the marketplace through branding and product information on labels and packaging and in marketing, which allow the product to differentiate itself from competing products.

Reducing manufacturers' ability to differentiate their products from those of competitors through branding and product information will also reduce their incentive to invest in innovation and product quality, as their ability to communicate innovative features in the marketplace will be reduced.

In addition, when the capacity to distinguish goods in the market through branding and other product information is diminished, price becomes the primary basis for competition rather than quality and

innovation. This forces manufacturers to focus on lowering the price of their goods to compete, rather than investing in innovation or improving quality. Such effects lower the overall value of products to consumers, which can harm economic growth and employment. Reduced innovation in turn deprives consumers of the improved choice and quality stimulated by active innovation in a product sector.

Branding features such as words and terms, colours, images, logos, and designs can be subject to trademark or other types of intellectual property (IP) rights, which provide the legal guarantees on which investments in innovation and brand value are based. IP rights are provided for by national legislation in recognition of the important role they play in stimulating innovation, competition and investment, and in protecting the consumer. Directly or indirectly restricting the IP owner's ability to use brand-related IP assets undermines this critical role.

3. Reduce and distort competition

Decreasing the ability of producers to use branding to distinguish between products and services in the marketplace has a broad impact on the competitive process that is crucial to well-functioning markets. Increasing limitations on branding reduces competition, and distorts market dynamics by inciting price-based competition and creating barriers for new market entrants, which have a greater need than incumbents to establish their brand identity.

4. Restrict cross-border trade

While labelling and packaging requirements are permitted under WTO rules, measures that restrict or prohibit the use of trademarks on packaging can be highly trade-restrictive by adversely impacting on competitive opportunities for the products to which they apply. The trade-restrictive impact of some measures can fall disproportionately on imported products, which may have a greater need than domestic brands to establish brand identity, potentially rendering their effect discriminatory in favour of domestic production[2]. When measures are disproportionately restrictive when weighed against their effectiveness, and their costs for the consumer, the producer and the competitive process, manufacturers may forego selling in some markets to avoid detriment to their brand or prohibitively high costs for manufacturing country-specific packaging, especially in smaller markets.

V. Recommended principles for consideration

In view of the broad societal and economic impact of measures regulating labelling and packaging, ICC urges policy makers to base their consideration of such measures on recognised international principles of good regulation. This will help ensure balanced, targeted and proportionate regulatory outcomes whose benefits outweigh their costs.

ICC recommends that policy makers should:

1. Clearly identify policy goals, base policy decisions on scientific data and research, and consider less costly or more effective alternatives to regulation.

OECD principles, echoed by other internationally recognised good practice, urge governments to "*clearly identify policy goals, and evaluate if regulation is necessary"* as well as to *"ensure that the benefits of the regulation outweigh the costs, and that alternative arrangements cannot equally meet the objectives of the regulation with less effect on competition."*[3]

[2] Potentially trade restrictive labelling and packaging measures implemented by a number of countries on a broad range of products have been reviewed at the WTO during the last years, including at meetings of the WTO Committee on Technical Barriers to Trade (TBT). For a detailed analysis of the specific measures, views expressed by WTO members on the consistency of these measures with international trade rules, and the range of industries and products to which these measures apply see the Minutes of the TBT Committee meetings, for example 4-6 November 2015 and 9-10 March 2016, at https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

[3] OECD Guiding Principles for Regulatory Quality and Performance (2005).

Policy choices should be based on sound evidence that the measures envisaged are justified, likely to be effective, and proportionate to their social and economic costs and objectives. A broad range of scientific and technical evidence should be analysed to ensure that any assumptions and conclusions determining the adoption or design of regulations are properly informed and that any chosen policy options are likely to achieve their stated objectives.

Alternative methods to regulation such as voluntary approaches or educational initiatives should also be considered. ICC has developed widely recognized International Marketing Codes which form the basis of many national marketing codes and best practices, and voluntary initiatives also exist at the sectoral and national levels.

2. Ensure transparency and participation in the regulatory process by all stakeholders interested in and affected by regulation.

Transparency is one of the central pillars of good regulation. Public consultation is one of the key regulatory tools employed to improve transparency, efficiency and effectiveness of regulation. An effective public consultation improves the quality of regulation, increases the likelihood of compliance by building legitimacy of regulatory proposals and could reduce enforcement costs for governments and society.

The OECD 2012 Recommendation calls on governments to "*adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis".*[4]

ICC urges governments to consult stakeholders, including business, at all stages of pre-regulation and during regulatory rule-making processes. Businesses can offer operational expertise and insights concerning the pertinence, practicality and effectiveness of measures under consideration.

All relevant government authorities responsible for areas which might also be affected by the regulation (e.g. health, trade, industry, competition, consumer protection, intellectual property) should also be consulted to ensure coherence and a holistic consideration of the costs and benefits of regulation.

3. Analyse impacts on all stakeholders, minimise costs and market distortions, and incentivise investment and innovation

The OECD exhorts governments to "*ensure that regulatory restrictions on competition are limited and proportionate*"[5] and to use Regulatory Impact Assessment (RIA) in the early stages of the policy process to analyse potential costs and benefits of new regulatory proposals.[6]

Regulations should be designed to achieve their aims without incurring unnecessary costs for businesses, regulators or consumers. The impact of labelling and packaging measures on all stakeholders should be analysed before their adoption to ensure that resulting costs for the consumer, the competitive process, the producer and the economy as a whole will be proportionate to the likely benefits in relation to the intended objective. Ensuring that regulations are practical to implement on the ground will also help reduce the costs of compliance, which particularly affect SMEs.

[4] OECD Recommendation of the Council on Regulatory Policy and Governance (2012).
[5] OECD Guiding Principles for Regulatory Quality and Performance (2005).
[6] See http://www.oecd.org/gov/regulatory-policy/ria.htm .

Labelling and packaging restrictions may also have dampening effects on investment and innovation, with resulting negative impacts on economic development. Governments should consider approaches using market incentives which would promote rather than discourage innovation and investment, as alternatives to restrictive regulatory measures.

A fair competitive process benefits consumers and the economy as a whole. Competition assessment[7] - a screening process used to identify regulatory proposals which are likely to raise major competition issues - can be used to improve the quality, effectiveness and transparency of new regulations.

4. **Adhere to relevant domestic and international regulations, standards and best practices**

The 2005 OECD Principles recommend that governments "*identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform*" and "*apply principles of good regulation when reviewing and adapting policies in areas such as reliability, safety, health, consumer protection, and energy security so that they remain effective, and as efficient as possible within competitive market environments.*"[8]

Labelling and packaging measures have repercussions on a wide range of policy areas, which are governed by national regulation as well as a large web of different international agreements, standards, codes, principles and best practices.

Coordination among different government departments, and a holistic approach, are crucial to ensure policy coherence, and also to avoid potential problems due to the multiplicity of different labelling and packaging measures on the same product.

Labelling and packaging measures should also be compatible with relevant international agreements and standards. These include multilateral agreements in the areas of international trade (e.g. the WTO Agreement, including agreements on Technical Barriers to Trade[9] and on the Application of Sanitary and Phytosanitary Measures), intellectual property (e.g. WTO TRIPS[10]; several WIPO treaties[11]), food standards (e.g. WHO and FAO CODEX Alimentarius) and many others.

Regulatory approaches should be consistent with competition-, trade- and investment-facilitating principles and not restrict trade, intellectual property rights, competition or investment more than necessary to achieve a legitimate public policy objective.

VI. Conclusion

In view of the potential impacts of labelling and packaging measures set out above, ICC urges governments to follow internationally recognised principles of good regulation when considering regulatory intervention to ensure balanced, targeted and proportionate regulatory outcomes whose benefits outweigh their costs. Businesses stand willing to work with governments to inform policy making processes and to develop collaborative approaches reflecting common interests and shared responsibility for achieving public policy goals.

[7] E.g. OECD Competition Assessment Toolkit (2007).
[8] OECD Guiding Principles for Regulatory Quality and Performance (2005).
[9] E.g. Agreement on Technical Barriers to Trade (1995), Article 2.2
[10] Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) (1995), e.g. Articles 8 and 20.
[11] E.g. Paris Convention for the Protection of Industrial Property (1883, amended most recently in 1979), Article 10bis

INTERNATIONAL CHAMBER OF COMMERCE

The world business organization

The International Chamber of Commerce (ICC)

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy.

With interests spanning every sector of private enterprise, ICC's global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the G20 and other intergovernmental forums.

Close to 3,000 experts drawn from ICC member companies feed their knowledge and experience into crafting the ICC stance on specific business issues.

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