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15 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

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.

While Ukrainian Economic Freedoms Foundation has no direct or indirect link with the tobacco industry and believes that appropriate and proportionate regulation of tobacco products is both necessary and right in order to protect public health, we write to share our views and concerns in respect of the MoH's public consultation, and in particular on its proposal to mandate standardised packaging and the ensuing consequences that would inevitably result from any implementation of such a regulation.

Plain packaging does not work

Plain packaging is in fact a ban on branding: it removes trademarks, logos, non-prescribed colours and graphics and only permits the use of a brand name in a standard font/size. It deprives legitimate businesses of the value of their brands, impedes investments and creates ample opportunities for criminal activities.

The available evidence, including the studies that were considered by the MoH, clearly demonstrates that plain packaging does not change smoking behaviour and, accordingly, does not cause a reduction in tobacco consumption.

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[i] are amongst the countries that remain opposed to plain packaging.

- The Netherlands, Taiwan, Brazil and Belgium[ii] 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[iii] are amongst them.

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

Plain packaging in Australia has simply failed

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[v] 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)"*.[vi]

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",*[vii] 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.[viii] 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.[ix]

- 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.[x]

The impact of plain packaging is questionable in other countries that have implemented it

While the Australian experience remains the key indicator of the effects of plain packaging, the data emerging from the early stages of the plain packaging implementation in the UK and France is pointing in the same direction:

- Data published by the French public authorities[xi] and quoted by the French health minister[xii] demonstrates that the combination of plain packaging and the requirements of the revised Tobacco Products Directive 2014/40/EU's (TPD2) has not had any discernible effect on tobacco sales in France.

- The first counterfeit 'plain' packs have been officially discovered in the UK: *"Following a tip-off, Retail Express was sold a plain pack counterfeit of a premium brand by a London newsagent for £10.50. The retailer took a legitimate pack out of the gantry and swapped it out with a fake pack, while processing the card transaction"*.[xiii]

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"*.[xiv]

Plain packaging would infringe intellectual property rights

Plain packaging would worsen illegal trade in Singapore

Plain packaging would have a serious and widespread negative impact on retailers and on consumers

The experience in Australia shows that plain packaging creates burdensome conditions for retailers in view of additional costs associated with increased transaction times, customer frustration, inventory management delays and, finally, the increased opportunities for criminal activities.[xv] These concerns were also echoed by retailers in countries that considered the introduction of the measure.[xvi]

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.

Thank you for your attention to UEFF's business concerns.

Respectfully,
Maryan Zablotskyy,
Head of Ukrainian Economic Freedoms Foundation

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[i] Indonesia, Dominican Republic, Cuba and Honduras are challenging the Australian legislation at the World Trade Organization (WTO). Malawi, Nicaragua, Zambia and Zimbabwe are amongst the countries that consistently raised concerns on Australia's measure at various meetings of the WTO. See via: www.wto.org. Denmark and Switzerland questioned the introduction of the measure in their national legislations as it goes beyond what is necessary in terms of public health, and Italy strongly opposed the measure as it breaches the IP rights. Germany stated its clear position on not introducing plain packaging. See more at: https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20143993; http://www.ft.dk/samling/20161/spoergsmaal/s56/index.htm#tale224; http://www.eunews.it/2015/09/08/governo-pacchetto-di-sigarette-generico-danneggia-made-italy-e-qualita/41274 and

http://www.genios.de/fachzeitschriften/artikel/LMZ/20140718/keine-plain-packs-in-deutschland-sc/20140718272159.html. The Swedish government faced a strong opposition from the law community on introducing plain packaging as it will breaches the principles for free competition and freedom of speech that are safeguarded by the Swedish constitution. Consequently, plain packaging was not included in the list of proposals that the government submitted to the Council of Legislation in June 2017. See at: http://www.regeringen.se/pressmeddelanden/2017/06/regeringen-foreslar-andringar-i-mediegrundlagarna/. Spain, Portugal, Bulgaria and Czech Republic are amongst those EU member states that have opposed plain packaging proposals by separate EU countries, issuing detailed opinions under the EU Technical Standards Directive (TSD). See more at: http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/tris/index_en.htm.

[ii] Pain packaging was considered by Dutch and Taiwanese regulators on few occasions but was dropped in light of recent regulatory initiatives that these countries have chosen to pursue. See more on the Netherlands at: http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=339. See more on Taiwan at: http://www.taipeitimes.com/News/taiwan/archives/2017/10/08/2003679946.
The Brazilian health minister decided to keep his distance on the measure due to a lack of evidence to demonstrate its health benefits. See more at: http://istoe.com.br/fumo-ministro-evita-embalagem-padrao/. The Belgian and Singaporean health ministers put forward clear conditions (e.g. a wider public consultation, the assessment of the impact of the measure in other countries, local and international law implications) before progressing the measure further. See more on Belgium and Singapore at: http://www.maggiedeblock.be/2016/11/07/stand-van-zaken-antitabaksmaatregelen-in-parlementaire-commissie-volksgezondheid/ and https://www.moh.gov.sg/content/moh_web/home/pressRoom/speeches_d/2017/closing-speech-by-mr-amrin-amin--parliamentary-secretary-for-hea.html.

[iii] See, for example, INTA's May 2015 Board Resolution on *"Restrictions on Trademark Use through Plain and Standardized Product Packaging"* at: https://www.inta.org/Advocacy/Pages/RestrictionsonTrademarkUsethroughPlainandStandardizedProductPackaging.aspx. See, further the joint statement from APRAM, BMM, ICC-BASCAP, ECTA, MARQUES, UNION DES FABRICANTS and UNION-IP of March 28, 2014 in relation to plain packaging, at: http://www.marques.org/positionpapers/default.asp. See also, *"the ICC Discussion Paper on Labelling and Packaging Measures Impacting on Brand Assets"*, February 2017, available at: http://www.iccwbo.be/wp-content/uploads/2017/03/20170302-ICC-paper_LabellingPackaging-measures.pdf, and *"The ICC Intellectual Property Roadmap - Current and emerging issues for business and policymakers"*, 2017, at: https://iccwbo.org/publication/icc-intellectual-property-roadmap-current-emerging-issues-business-policymakers/.

[iv] 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.

[v] See the Post-Implementation Review, Tobacco Plain Packaging, 2016, available at: http://ris.dpmc.gov.au/2016/02/26/tobacco-plain-packaging/.

[vi] See the National Drug Strategy Household Survey (NDSHS) at: https://www.aihw.gov.au/reports/illicit-use-of-drugs/ndshs-2016-key-findings/contents/summary.

[vii] 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.

[viii] See KPMG 2016 Full-Year Report "Illicit Tobacco in Australia", March 2017, page 6. Available at: https://home.kpmg.com/content/dam/kpmg/uk/pdf/2017/04/Australia-illict-tobacco-Report-2016.pdf.

[ix] See more at: http://www.abc.net.au/news/2017-02-20/illegal-tobacco-cigarettes-smuggled-into-australia-fluffy-toys/8285470. In relation to lost government revenues, see also at: http://www.dailytelegraph.com.au/news/nsw/illicit-tobacco-imports-ripping-off-aussie-taxpayers-of-at-least-640-million/news-story/e8c1ff8ad04a466c94f4cba17c38e273.

[x] See, for example, KPMG 2016 Full Year Report, page 11.

[xi] See data published by OFDT (Observatoire français des drogues et des toxicomanies) regarding the volumes of tobacco products distributed to retailers. The data indicates that the number of cigarettes shipped to retailers remained largely unchanged (-0.7%) in 2017, while the amount of roll-your-own and make-your-own tobacco decreased by 5.1%, following excise tax increases in February and November 2017. Available at: https://www.ofdt.fr/statistiques-et-infographie/tableau-de-bord-tabac/.

[xii] See at: http://www.assemblee-nationale.fr/15/cri/2017-2018/20180075.asp.

[xiii] *"Following a tip-off, Retail Express was sold a plain pack counterfeit of a premium brand by a London newsagent for £10.50. The retailer took a legitimate pack out of the gantry and swapped it out with a fake pack, while processing the card transaction."* See at: https://www.betterretailing.com/first-fake-plain-packs-discovered.

[xiv] See the statement by the Head of the Secretariat of the WHO Framework Convention on Tobacco Control (FCTC) during the Seventh session of the Conference of the Parties to the FCTC in November 2016 at: http://www.who.int/fctc/secretariat/head/statements/2016/cop7-head-secretariat-speech/en/.

[xv] See via: Australian retailers also claim that their revenues are being *"devastated"* by more than 600 organized crime-backed illegal cigarette and tobacco shops costing up to USD 4 billion a year in lost profits and taxes. See at: http://www.afr.com/news/policy/tax/600-illegal-tobacco-shops-are-devastating-retailers-industry-warns-20170831-gy7w7a.

[xvi] See at: http://www.cbc.ca/news/canada/prince-edward-island/acsa-cigarette-plain-packs-1.4087287.