Variety in cigarette packaging is under attack. A relative period of quiet in the years since Australia passed the world’s first plain-pack law ended this year when EU countries began passing laws of their own.

In March 2015 the UK and Ireland passed plain pack laws. Final approval in France is expected this autumn. It is highly likely that they will be joined by other European countries including Norway, Sweden and Turkey, which are in the midst of consultations over this issue.

Across Europe to Asia Minor, more countries are working to adopt neutral packaging legislation — something that will be supported when the EU Tobacco Products Directive (TPD) comes into effect in May 2016. The revised TPD sets minimums for pictorial health warnings to cover 65 per cent of the front and back and 50 per cent of the sides of cigarette and RYO packaging.

Branding is allowed in the remaining space, but TPD permits introduction of standardised or neutral packaging on the grounds of public health, providing it is proportionate and does not deliver hidden barriers to trade in the European Union (EU).

This sets the stage for a major legal confrontation between governments and tobacco manufacturers.

Ministerial meeting

Ministers from around the world met to discuss plain packaging in Paris on 20 July, 2015, at the invitation of French Health Minister, Marisol Touraine. Attended by health ministers from 10 countries (Australia, France, Hungary, Ireland, New Zealand, Norway, South Africa, Sweden, United Kingdom, and Uruguay), as well as the head of the WHO Framework Convention on Tobacco Control Secretariat, the conference launched “a common drive to introduce plain cigarette packaging with the aim of stubbing out high smoking rates among young people”.

In a joint statement, the attendees said, “significant scientific proof justified […] plain cigarette packaging”.

The statement said plain packaging had been shown to “reduce the attractiveness of the product for consumers, especially amongst women and young people” as well as increasing, “the effectiveness of health warnings on packets and reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking”.

All countries sending representatives to the meeting have either passed a plain packs law or are discussing the issue.

Legal challenges

Currently, the UK government is facing four lawsuits from the major tobacco companies Philip Morris International (PMI), British American Tobacco (BAT), Japan Tobacco International (JTI) and Imperial Tobacco (all filed at the High Court during May 2015).

If the courts find in favour of tobacco companies, this could cost the UK and its taxpayers some GBP 11 billion (EUR 15.4 billion) in compensation.

Daniel Torras, managing director at JTI UK said, “we have clearly and repeatedly made clear to the UK Government that plain packaging will infringe our fundamental legal rights without reducing smoking. Despite the lack of evidence that plain packaging works, the government has decided to proceed and JTI must now protect its rights in the courts.”

Rush to plain packs

Two European countries have joined Australia with laws mandating uniform branding on packaging for cigarettes and hand-rolled tobaccos. More are waiting in the wings.
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In a similar vein, Melvin Ruigrok, Imperial Tobacco’s general manager in the UK and Ireland, had this to say: “We have a legal right to differentiate our brands from those of our competitors. Our preference is always for constructive dialogue. Regrettably, however, we’ve been left with no choice than to seek to defend our rights by issuing a legal challenge.”

The legal battle over plain packaging has begun. In March, 2015, the anti-smoking charity Action on Smoking and Health (ASH) backed the government by commissioning a legal opinion that supported the right of the UK government to introduce plain packaging under EU law relating to trademarks and fundamental rights.

“The tobacco industry knows it has little or no chance of winning but by threatening legal action it is trying to stop the infection spreading to other countries. Standardised plain packaging threatens the profitability of the industry and they are desperate to prevent other countries from following the example set by Australia, the UK and Ireland,” said Deborah Arnott, chief executive of ASH.

Tobacco manufacturers say they believe plain packaging legislation erodes their right to brand identity and will reduce marketing options to differentiation over price, with subsequent loss of revenue. Tobacco company lawyers have drawn on a legal opinion by former senior Appeal Court judge Lord (Leonard) Hoffman, who said banning the use of branding on cigarette packaging altogether could be a breach of trademark law, and that rejecting a company’s right to use an internationally recognised trademark in the UK could be in breach of the principle of free movement of goods within the EU.

On 2 May 2015, the International Trademark Organisation (INTA) said plain and highly standardised packaging restrictions should be rejected or repealed. INTA recommended governments, “seek less drastic measures that do not violate international and national law.”

The World Trade Organisation (WTO) is expected to rule on plain packaging due in 2016. According to INTA, countries should await the trade body decision before proceeding. INTA said it was concerned about, “violations of international treaties and domestic laws,” as well as, “the practical implications of plain and highly standardised packaging impinging upon consumer choice, limiting competition and paving the way for increased counterfeiting and trade in diverted goods”.

Feel good politics

Nick de Bois, a former MP for Enfield North, is against smoking, but also opposed plain packaging in the House of Commons debate. He outlined his reservations about plain packaging to TJI. “This is bad legislation and the result of ‘feel good’ politics rather than rational policy based upon firm evidence.”

The reasons for his objection are threefold. Firstly, there will be no brand differentiation and this will lead to price being the only disparity. Prices of tobacco can be expected to fall, there will be fewer brands and consumers will base their purchasing decisions solely on price. Secondly, there has been no proper assessment of the effect of plain packaging on the growth in the counterfeit and illicit cigarette market where a lack of brand differentiation could actually be an advantage to counterfeit cigarette producers and the consequent sales of unregulated and dangerous tobacco products. Thirdly, there is the threat to the public purse from multiple-litigation brought by tobacco companies seeking compensation for their loss of brand identity, intellectual property and the ability to sell products in a free market.

“It might have been better to await the outcome of litigation from tobacco companies around the world before using UK tax payer’s money to fight the cause of plain packaging,” de Bois said. There would have been plenty of time to introduce plain packaging once the legal challenges had been adjudicated, he said. “During the woefully inadequate 90-minute debate and subsequent vote, Health Minister Jane Ellison gave no answer to the question about the threat to the public purse.”

Legal experts speak

Opinion on the effectiveness and legality of plain packaging in the UK is divided. TJI sought opinions from two legal experts on whether existing law supports the placing of plain packaging restrictions on manufacturers.
Michael Conway is an attorney at Haseltine Lake – a major European patent and trade mark firm.

“Once plain packaging is introduced, it is clear that the ability of tobacco manufacturers to use trademarks and pack design to distinguish their products from those of other companies will be severely diminished,” he said. “But from a trade mark registration perspective although the new plain pack regulations establish a ‘proper reason for non-use’ of any registered trademarks it will not be possible to cancel these trademarks due to non-use, so tobacco companies will be able to retain and enforce any trademark registrations they are unable to use,” Conway said.

Mark O’Halloran, a partner in the commercial team at Coffin Mew, said, “the general position is that there is insufficient evidence to support the move, not least as even the UK Government conceded in its impact assessment that it was too early to draw conclusions from Australia’s experience as the first country to mandate plain packaging. The tobacco companies also argue that the move may infringe intellectual property rights and international trade agreements,” O’Halloran said.

“As the measures affect all brands, domestic and international, they are unlikely to amount to an unfair tariff or restriction on imports under the General Agreement on Tariffs and Trade (GATT). More relevant is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) but this requires only that use of a trademark must not be unjustifiably encumbered by special measures. The public health considerations are likely to be deemed justifiable.”

O’Halloran added he does not see an argument based upon IP and competition law succeeding.

“There may be a particular argument that EU law determines the scope of IP rights and national law only their existence. That point is well established in EU competition law and one could argue that only the EU can therefore legislate for plain packaging. The EU itself hasn’t come to a decision on plain packaging but, given the general right of member states to take measures in support of public health, I don’t see the competition law approach succeeding.”

Asked what tobacco companies would do if their court challenge is unsuccessful, O’Halloran responded: “Tobacco companies are already preparing for plain packaging. They’ve begun changing the exact look of their packs, even the feel of the card used in the packaging. When all packs are plain, these small differences may matter to smokers although they clearly cannot have the same impact on non-smokers.”

Evidence from Australia

In March 2015, fourteen studies on the impact of plain packaging between 2012 and 2013 were published in the British Medical Journal supplement, Tobacco Control (April 2015, Volume 24, Suppl 2). These studies provided peer reviewed statistically significant evidence of a reduction in the perceived appeal of cigarette packs to young adults, an increase in smokers thinking of quitting from 20 per cent to 27 per cent and little evidence of an increase in the use of cheaper and illicit tobacco products. According to Cancer Council Victoria, these results demonstrate that plain packaging in Australia is working.

Losing the last link

It is clear that the plain packaging ‘roller coaster’ is on the move in Europe. It is too early to say whether EU courts or the WTO will apply the brake. Tobacco companies in the UK, France and Ireland stand to lose a powerful marketing tool, and the last link between brand perception and the customer. Dr Alan Stanton of Royal College of Paediatrics and Child Health was asked by TJI if he thought having cigarettes and tobacco products in plain packs would stop children and young people from taking up the habit. “Yes,” he answered. “Whilst we could not claim to have watertight scientific evidence, it would seem to be very likely that this will be effective, as part of a range of measures.”

Huw Kidwell