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Plain Packaging and its impact on the global economy

SUMMARY: 1. Introduction: a lot more than a box. – 2. Plain packaging legislations around the world. – 3. Conclusion.

1. *Introduction: a lot more than a box*

In homogenous consumer goods categories like cigarettes,² packaging differentiates brands. It has been often highlighted the key role played by pack design in the overall marketing mix,³ emphasising that the package acts as a promotional tool in order to reach out to consumer helping them «to make the right choice».⁴

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² R. L. UNDERWOOD, «The communicative power of product packaging: creating brand identity via lived and mediated experience», *Journal of Marketing Theory & Practice*, 2003, available at: <https://www.jstor.org/journal/jmarktheoprac>

³ A. PALMER, *The Product. Principles of Marketing*, Oxford: Oxford University Press, 2000.

⁴ R. L. UNDERWOOD, J. OZANNE, «Is your package an effective communicator? A normative framework for increasing the communicative competence of packaging», *Journal of Marketing Communications*, 1998, available at: <https://www.tandfonline.com/doi/abs/10.1080/135272698345762>

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The packaging is a lot more than a box containing the product. First of all, it allows the seller not only to display his brand, but also to create its own style through colours, figures, particular font. A packaging as it just described is a very powerful commercial and marketing weapon.

The value of showing your brand around is undisputed. If your product is well wanted by the market and most of all by the consumers, showing your brand around is the first – implicit – step of an advertising campaign. Furthermore, a brand is synonymous of quality, reliability and recognizability.

Another essential element that concurs to the importance of the packaging is more consumer-related, in the sense that it is the first thing a consumer will see in a store when deciding between several different competitor's products. In that moment the packaging plays a fundamental role in the consumer's attribution of value to that specific product.

There are a lot of iconic packaging around, and they are very important for business purposes. Think of the friendly bear-shaped plastic bottles containing honey, created by Ralph and Luella Gamber, the founders of Dutch Gold Honey Inc.; think also about the soy sauce sold in the stylish Kikkoman bottle, whose design has remained unchanged for more than 60 years; not to mention the simple and clean Tiffany's blue box, «the most recognizable and most desired retail container in history»;⁵ another iconic packaging is the one of Toblerone, created back in 1906.

Packaging helps the brand to be noticed and therefore, it allows the product to be bought and finally, it is key for the company to improve consumer loyalty. Brands are so important that an entire movement has born around them with the slogan «Brands Matter!».⁶

⁵ R. KARA, «How Tiffany's Iconic Box Became the World's Most Popular Package», October 2014, available at: <https://www.adweek.com/brand-marketing/how-tiffany-s-iconic-box-became-world-s-most-popular-package-160228/>

⁶ More info available at: <https://consumerchoicecenter.org/campaigns/brandsmatter/>

The overall characteristics of the package reflects the product inside. If the outside cover is high quality, consumers will assume that also the product is highly quality. That is why packaging is an essential communication tool.

2. *Plain packaging legislations around the world*

However, things get controversial when all of these marketing and commercial efforts are put in place in order to sell goods that can cause damages. The leading case in this field is represented by the Tobacco Industry and its cigarette's packaging. In particular, it is called Plain Tobacco Packaging, and it refers to a generic, neutral, standardised or homogeneous packaging, consisting in the absolute lack of any brands, colours, trademarks, drawings, that allows the manufacturer only to print its company name in a standard font and size next to all the health and legal warnings.

The rationale behind this practice is that in removing all the cool and positive things from the packaging, Governments seek to deter smoking. On the other hand, the industry has tried to advocate against this policy and in favour of the use of trademarks and brands as marketing tools.

The World Health Organization ('WHO') published a series of reports⁷ in which highlighted the devastating effects of the tobacco's, stating that «the tobacco epidemic is one of the biggest public health threats the world has ever faced, killing around 6 million people a year».⁸

The WHO has established the Framework Convention on Tobacco Control ('FCTC'). One of the most relevant provisions is Article 3, which set the collective goal «to protect present

⁷ «WHO Report on the Global Tobacco Epidemic», *World Health Organization*. There are report from 2008, but the most recent one is dated 2017, available at: http://www.who.int/tobacco/global_report/2017/en/.

⁸ «Fact Sheets on Tobacco», March 2018, available at: <http://www.who.int/mediacentre/factsheets/fs339/en/>

and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke».

Plain packaging legislation saw the light for the first time in 1989 by the New Zealand Department of Health's Toxic Substances Board which recommended white packs with just a black text in order to sell cigarettes.⁹

On 12 December 2012, Australia became the first country in the world to oblige the tobacco industry to sell cigarettes in plain packaging. With the entering into force of the Tobacco Plain Packaging Act¹⁰ all the products manufactured after 1 October 2012, and on sale after 1 December 2012 must be in the plain packaging.

Australia opened the road to plain packaging legislation, which has been implemented or will be implemented by many other countries, including France (2017),¹¹ United Kingdom (2017),¹² New Zealand (2018),¹³ Norway (July 2018),¹⁴ Ireland¹⁵ (September 2018) and Hungary (May 2019).¹⁶ Also, Canada¹⁷ and Slovenia¹⁸ enacted plain packaging cigarette laws, that have passed their respective Parliaments, however are not yet in effect.

⁹ B. FREEMAN, S. CHAPMAN, M. RIMMER, «The case for the plain packaging of tobacco products», 2007, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1004646

¹⁰ Tobacco Plain Packaging Act 2011, available at: <https://www.legislation.gov.au/Details/F2012C00687>

¹¹ «La France adopte le paquet de cigarettes neutre», *Le Soir*, December 2015, available at: <http://plus.lesoir.be/18064/article/2015-12-17/la-france-adopte-le-paquet-de-cigarettes-neutre>

¹² «MPs pass legislation to introduce standardised cigarette packaging», *The Guardian*, March 2015, available at: <https://www.theguardian.com/politics/2015/mar/11/mps-pass-legislation-introduce-standardised-cigarette-packaging>

¹³ «Tobacco Standardised packaging», March 2018, available at: <https://www.health.govt.nz/our-work/preventative-health-wellness/tobacco-control/tobacco-standardised-packaging>

¹⁴ «Tobacco labelling» (resource centre), available at: <http://www.tobaccolabels.ca/countries/norway/>

¹⁵ «Plain Packaging for cigarettes to begin in September», *The Irish Times*, March 2017, available: <https://www.irishtimes.com/news/health/plain-packaging-for-cigarettes-to-begin-in-september-1.3028834>

¹⁶ «Hungary: plain pack on the shelves», *FCTC*, July 2017, available at: <http://untobaccocontrol.org/impldb/hungary-plain-packs-on-the-shelves/>

¹⁷ Minister of Health Mandate Letter, October 2017, available at: <https://pm.gc.ca/eng/minister-health-mandate-letter>

¹⁸ «Slovenia passes law enforcing plain tobacco», *Reuters*, February 2017, available at: <https://www.reuters.com/article/us-slovenia-tobacco-idUSKBN15U2BI>

The tobacco industry and related stakeholders have sought to challenge this kind of legislation using different tools and methods: from political lobbying to public campaigns, from litigation to trade agreements.

Five countries – Ukraine, Honduras, the Dominican Republic, Cuba, and Indonesia – have challenged Australia’s regime of plain packaging of tobacco products in the WTO.¹⁹ The main argument used by the complainants is that plain packaging imposes unfair restrictions on the use of trademarks, geographical indications and other markings in violation of several WTO agreements.

Furthermore, the TRIPS provides for a minimum standard for the protection of intellectual property rights – including trademarks, patent law and copyright law.

In particular, Article 20 of TRIPS, states that «The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements [...]». In addition, it could be argued that plain packaging would «undermine the very purposes underlying trademark protection and the reason why trademarks are given protection under the Agreement».²⁰

However, The TRIPS Agreement contains an exemption, ex Article 8.1, according to which «Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement».

¹⁹ «Dispute regarding Australia on Certain Measures Concerning Trademarks and Other Plain», *WTO Dispute Settlement*.

«Packaging Requirements Applicable to Tobacco Products and Packaging», available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds467_e.htm

²⁰ J. KATZ, R. DEARDEN, *Plain packaging and international trade treaties*, Oxfordshire: Admap Publications, 1998.

It appears, in the end, that The WTO backed Australia's argument that its legislation on tobacco plain packaging does not violate any provisions because it qualifies as a legitimate public-health measure.²¹

The issue is far from solved because it is highly likely that an appeal will be proposed, and the question could be far from its solutions.

3. *Conclusion*

It is well known that a substantial part of the expenses of a company is devoted to marketing purposes. Companies invest significant research effort and therefore money into packaging design in order to communicate what they want to transmit to their consumers.²²

The issue at hand, in particular with reference to the Tobacco Industry, is big due to the fact that a cigarettes pack communicates which kind of person you are accordingly to the brand displayed. Furthermore, a pack of cigarettes is generally displayed throughout the whole day.²³

Even if the argument in favour of plain packaging legislation seems a pure and simple minimization of the massive investments made in advertising efforts and also a controversial position, meaning that if the goal is to reduce the consumption of cigarettes, a valuable option to take into consideration could be the one to absolute prohibit it instead of imposing too much burdens on private companies, the Doha Declaration on Public Health and the

²¹ «WTO official expects appeal to landmark tobacco logo case», *Bloomberg*, May 2018, available at: <https://www.bloomberg.com/news/articles/2018-05-08/wto-official-expects-appeal-to-landmark-tobacco-logo-case>

²² K. M. CUMMINGS, C. P. MORLEY, J. K. HORAN, C. STEGER, N. R. LEAVELL, «Marketing to America's youth: evidence from corporate documents», *Tobacco Control*, 2002, available at: http://tobaccocontrol.bmj.com/content/11/suppl_1/i5.info

²³ M. WAKEFIELD, C. MORLEY, J.K. HORAN, K. M. CUMMINGS, «The cigarette pack as image: new evidence from tobacco industry documents», *Tobacco Control*, 2002, available at: http://tobaccocontrol.bmj.com/content/11/suppl_1/i73

WTO General Council Decision recognise that member states could make use of flexibilities in the TRIPS Agreement to address public health concerns.²⁴

The debate is open for discussion, now more than before since the issue of plain packaging has returned as a possible solution for obesity. In this particular case, fast food producers – above all – could be required to remove everything but the name of the product in order to avoid communicating a positive message in relation to unhealthy foods.

In the end, due to the long discussions about tobacco products now other industries, such as unhealthy foods and alcohol ones, fear a plain packaging legislation that would undermine the creative efforts in packaging advertising, with the final effect of reducing investments in creative thinking and arts.

²⁴ WTO, Declaration on the TRIPS Agreement and Public Health. Adopted at Doha on 14 November 2001, available at: https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm