



July 8, 2014

An Taoiseach Enda Kenny
Department of the Taoiseach
Government Buildings
Upper Merrion Street
Dublin 2
Ireland

Dear Taoiseach Kenny,

On behalf of Amcham Poland, which is the leading voice for international investors in Poland, we would like to present our opinion on your Government's proposal that would impose plain packaging requirements on tobacco products.

As business an organization that strongly supports the Transatlantic Trade and Investment Partnership (TTIP), we are working toward increasing bilateral trade between Poland and the U.S. We believe that innovation is one of the key sources of competitive advantage for a company on the international market and is crucial for long-term economic growth. In this context IPR protection is one of our key priorities.

We understand, and fully support, the aim of the European Union and its Member States, including Ireland, to improve public health and to propose balanced measures to address public health challenges. At the same time, we are concerned that your Government's plain packaging proposals represent unjustified restrictions to IPR and international trade, and would substantially undermine the integrity of the internal market.

In our opinion, Ireland, Poland, the EU, and the global trade network would all be losing out if such restrictions were imposed.

We would therefore be grateful if you take our views into consideration in assessing the proposed legislation for the introduction of standardised packaging for tobacco products.

Under plain packaging measures, branding information such as logos and other distinctive elements which are protected under IP laws, will be banned from the packaging of products (with the exception of a single brand name in a small standardised typeface, size and colour). As a result, the means for product differentiation between products from different trade sources will be limited, and a considerable number of IPRs, such as trademarks, will be negatively affected. Plain



packaging measures would also deprive brand owners of all IPRs that would otherwise be available.

The imposition of any restrictions to IPR and international trade in one sector, or on any particular goods or services, represents a potential precedent for other sectors and types of consumer goods or services. Protecting and enforcing intellectual property rights is key to the future of an innovation-based economy. IPRs are the cornerstone of the economy; they boost innovation, creativity and investments and create jobs.

The European Parliament and Council have already sent a strong message to the revised Tobacco Products Directive by rejecting the introduction of such measures against IPRs as mandatory plain packaging in the EU.,

We are concerned with the potential implications of such measures for the trademark system as a whole. Consequently, we respectfully call upon the Government and the Parliament of Ireland to consider most carefully the legal issues associated with plain packaging measures, especially as regards to the following EU and international obligations:

- The TRIPs Agreement, which clearly recognises the right to use trademarksⁱ
- Relevant provisions of Paris Convention ⁱⁱ
- Relevant EU Legislations, which stress that the implementation of plain packaging by any Member State of the EU would need to be accompanied by compensation for breach of intellectual property rightsⁱⁱⁱ
- The TBT Agreement^{iv}

We would like to add that we have analyzed plain packaging requirements in the context of the Constitution of Poland, and have found that such measures would:

- raise the allegation of defying the constitutional principle of business activity freedom - the possibility to introduce manufactured goods to the market is an element of constitutionally protected freedom to conduct business activity. In order to do this effectively, an entrepreneur needs to be able to differentiate his/her products from the competition. Trademarks are used to differentiate products. When there is no possibility to use a trademark, the right to conduct business activity freely is defied;
- raise the allegation of defying the proportionality principle – i.e. how far a regulator may interfere and restrict the rights of entrepreneurs in order to achieve a particular objective. The purpose of the plain packaging concept according to its authors is to limit tobacco product consumption. This, however, has not been supported by any research that would confirm the effectiveness of this solution
- raise the allegation of defying the constitutional principle to protect ownership and other property rights.

Summarising the measures mentioned above, it is clear that trademarks are universally recognized as rights of property conferring also the right to use such



property, the right to registration is not to be dependent in any way on the nature of the product. Trademarks are also not to be subjected to unjustified restrictions on their use.

Additionally, we believe it is clear that standardised packaging would further open the door to the illicit trade of tobacco products, which is already a huge problem across the EU, affecting many Members States such as Poland and Ireland. When regulatory measures make it more difficult to visually distinguish one brand from another, it becomes simpler to manufacture and sell counterfeit products. Stripping brands of their trademarks will also disrupt the market by increasing the demand for products that are illegally imported and sold to consumers.

We would respectfully ask you to carefully reflect on our considerations when assessing the proposed legislation for the introduction of standardised packaging or plain packaging for tobacco products in Ireland. We believe there are more effective and less damaging ways to achieve your stated health objectives – and these should be pursued.

Sincerely,

Joseph Wancer
Chairman of Board of Directors

ⁱ Article 2 (Intellectual Property conventions), Article 8 (1) (General Principles), Article 15 (4) (Registration not to be dependent on nature of goods), and Article 20 (Unjustifiable encumbrances)

ⁱⁱ Article 6 quinquies (Protection of marks registered), Article 7 (Nature of the good to which the mark is applied), and 10 bis (Unfair competition)

ⁱⁱⁱ Article 17 (2) of the Charter of Fundamental Rights of the European Union, which states that intellectual property shall be protected, and expressly provides a right to use property as well as Article 41 of the Charter, which provides for a right to an effective remedy; Article 118 of the Treaty of Lisbon which provides a new legal basis to establish measures for the creation of IPRs; ECHR First Protocol Art 1, protecting property rights as well as Art 41, which provides for just satisfaction; Community Trade Mark Regulation and EU Harmonization Directive, which contain provisions clearly recognizing registered trademarks as rights of property

^{iv} Art 2.2, which requires Members to “ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade”