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ECTA Workshop
Plain Packaging

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brand Distinguish trade mark

Brand as a marketing tool

with the main aspect in advertising and thereby emotional influence binding the customers to the company's products. It may be altered according to ephemeral trends. It can affect unfair competition law.

Trademark as a judicial tool

registered by administrative authorities according to tm-law with the main aspect to grant the owner a monopoly to use the logo and to prevent others from imitating.

Part A

The WTO-Panel's decision

- ❖ Concerning some systematic procedural points
- ❖ Nature of the right conferred by registration of a trade mark
 - under the light of EU-Law
 - under constitutional law in all modern democracies
- ❖ concerning the principle of proportionality

Part B

Recent Developments

ECJ C-129/17, EU:C:2018:594,
Judgement of 25. 7. 2018, EU:C:2018:594
Mitsubishi / Duma and GSI

ECJ C- 517/18 of 26. July 2018;
reference from France
**Federation des fabricants de cigars /
Premier ministre, Ministre des Solidarites
et de la Sante**

ECJ Answer in the Mitsubishi / Duma - case

Art. 5 of TMD 2008/95/EC ... of 22 October 2008 ... and Article 9 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark must be interpreted as meaning that the proprietor of a mark is entitled to oppose a third party, without its consent, removing all the signs identical to that mark and affixing other signs on products placed in the customs warehouse, as in the main proceedings, with a view to importing them or trading them in the European Economic Area (EEA) where they have never yet been marketed.

Questions in the French Reference

- ❖ *1. Are the provisions of paragraphs 1 and 3 of Article 13 of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 to be interpreted as prohibiting the use, on units of packaging, outer packaging and tobacco products, of any brand name which refers to certain qualities, irrespective of its reputation?*
- ❖
- ❖ *2. Depending on the interpretation to be given to Article 13(1) and (3) of the Directive, do their provisions, as they apply to names and trade marks, respect the right of ownership, freedom of expression, freedom of enterprise and the principles of proportionality and legal certainty?*
- ❖
- ❖ *3. If the answer to the previous question is in the affirmative, do the provisions of Article 13(1) and (3) of the Directive, in conjunction with those of Article 24(2) of the same Directive, respect the right to property, freedom of expression and enterprise and the principle of proportionality?*



Opinion under the aspect of Constitutional considerations:

Definition of „property“

Definition of proportionality

Part C

Further Steps

WTO Members have the opportunity to provide their views to the WTO Appellate Board by participating in the appeal as a „Third Participant“.

Complaints in the concerned different EU-MS under different aspects with a view to various ECJ – references.

Developing a new marketing strategy for the packaging under the aspects of public health awareness by all means including the trademark as it is registered. But meet all requirements except those concerning the trademark's logo itself. This may deliver to court a new view on „Proportionality“.