

Brussels, 10 October 2013

## **ECTA's comments on the European Parliament Plenary Vote on the proposed Directive on tobacco products**

ECTA, a leading EU organisation whose principal aims are the safeguarding of the integrity of European Trade Mark and Design Law and the proper protection of trade marks and designs in the EU, has been following with interest, and concern, the progress of the proposals for a new Tobacco Products Directive.

Previously, ECTA has expressed its concerns about plans, in certain EU Member States, to introduce laws requiring tobacco products to be sold only in '*plain packaging*' ie packaging which is devoid of all '*trade marks*', other than a '*brand name*' in words of standard size and lettering. Such a law has been introduced in Australia, but is currently the subject of challenges by five countries before the WTO. In particular, in 2012 ECTA responded to a UK Government Consultation on plain packaging<sup>1</sup> and early in 2013 ECTA responded to a Consultation of the Irish Government on the proposals, published at the end of 2012, for a revised Tobacco Products Directive<sup>2</sup>.

Yesterday the European Parliament, in plenary session, voted on the current proposals for the Tobacco Products Directive. Of crucial importance was the Parliament's rejection of an amendment requiring mandatory '*plain packaging*' for tobacco products. To date, all the EU institutions have rejected such proposals. The vote is to be welcomed, because the proposal would have amounted to a most serious invasion and erosion of valuable trade marks, whose rights were validly obtained and maintained with costly investments over the years. ECTA encourages Governments which are or may be planning to introduce plain packaging laws, to take notice of the vote of the European Parliament.

ECTA, on the other hand, is perplexed by the concurrent Parliament's adoption of compulsory '*oversized*' health warnings on packaging (no less than 65% on the front and back faces of the packs, positioned at the top of each face), given that, in ECTA's view, such proposals are open to essentially the same reservations which ECTA expressed in regard to plain packaging.

It cannot be stated too often that registered trade marks, and the '*goodwill*' created by their long use on products, are rights of property as much as any other property. As such they are protected not only under trade mark laws (in the EU based on the Harmonization Directive) but also under the Article 1 of the First Protocol of the ECHR and Article 17 of the Charter of Fundamental Rights of the EU. In addition, Article 20 of TRIPS prohibits

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<sup>1</sup> [http://www.ecta.org/IMG/pdf/ecta\\_consultation\\_on\\_plain\\_packaging\\_form\\_final\\_2\\_july\\_2012.pdf](http://www.ecta.org/IMG/pdf/ecta_consultation_on_plain_packaging_form_final_2_july_2012.pdf)

<sup>2</sup> [http://www.ecta.org/IMG/pdf/public\\_consultation\\_ireland-plain\\_packaging\\_15\\_january\\_2013.pdf](http://www.ecta.org/IMG/pdf/public_consultation_ireland-plain_packaging_15_january_2013.pdf)

unjustifiable encumbrance of trade marks, which are detrimental to the capability of trade marks to distinguish the products of one undertaking from those of another.

So far as the health warnings are concerned, packaging of tobacco products is already required to bear very prominent health warnings, which no consumer or prospective consumer can fail to see. Larger health warnings will have the effect that the freedom to display trademarks and logos diminishes and thereby the ability to use a trademark in the course of trade and to maintain a trademark is reduced. Given that what is presently proposed will make it virtually impossible for tobacco companies to use most of their trade marks (including logos, representations of packs). ECTA calls upon all those concerned, in particular those who have so far supported such measures, to reconsider the proposals and to reject what amount to serious and unnecessary erosions of intellectual property rights. ECTA which does not have the means and the expertise to adjudicate if any increase in the size of health warnings is warranted and can be demonstrated to be necessary, would nonetheless suggest that taking all interests into account, perhaps a reasonable compromise could be achieved with a 50% of the front and back face on the front and back faces of the packs.

Finally ECTA wishes to emphasise that this debate is not only concerned with tobacco products. Already there have been suggestions that similar measures, to those that have been proposed for tobacco, might be applied to alcoholic drinks and to other products that are considered 'unhealthy'. To adopt plain packaging requirements, or requirements for the oversized health warnings, for tobacco products, would be setting a most dangerous precedent for other products, in respect of which such measures would be similarly open to objection.

It is understood that the Council, the Commission and the European Parliament will now commence negotiations to seek political agreement by early 2014.

ECTA will be following closely the developments and will continue in its efforts to protect validly acquired intellectual property rights.