
COMMENTS
of
THE WASHINGTON LEGAL FOUNDATION
to the
DEPARTMENT OF HEALTH

Concerning
CONSULTATION ON “YOUR HEALTH IS YOUR
WEALTH” – POLICY FRAMEWORK FOR
A HEALTHIER IRELAND 2012-2020

Comments Focus on Proposals to Impose Severe Restrictions
on Packaging of Disfavored Products, Particularly Cigarettes

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Public Health Policy Framework
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**Re: Comments Regarding Consultation on “Your Health Is Your Wealth”
Policy Framework for a Healthier Ireland 2012-2020**

To the Department of Health:

The Washington Legal Foundation (WLF) very much appreciates the opportunity to comment on “Your Health Is Your Wealth – Health and Wellbeing Framework for a Healthier Ireland” (hereinafter, the “Framework”). The Department of Health is to be applauded for its comprehensive efforts to improve the health of the Irish population and reduce health inequalities by addressing the causes of preventable illness. In particular, WLF shares the Department’s concerns regarding the major health hazards posed by cigarette smoking. WLF applauds the Department’s focus on finding ways to reduce tobacco consumption, particularly among minor children.

WLF nonetheless has serious concerns about the Framework’s basic approach to health-improvement efforts. Whether addressing smoking or other health concerns, the Framework’s basic approach appears to be to prevent manufacturers of disfavored products from marketing or even speaking at all about their products. Thus, the Framework identifies the absence of a “plain

packaging” mandate for “all tobacco products” as a “legislative gap” in need of correction. *See* Technical Supplement: A Discussion Paper on Public Health and the Law (16/04/2012) (“Technical Suppl.”) at p.61. Similar speech bans are contemplated for other industries, such as the alcoholic beverage industry. *Id.* at 62. The experience of the United States has been that such bans do little if anything to improve public health, and that the greatest health gains are achieved when governments: (1) adopt comprehensive education programs directed at consumers; and (2) increase enforcement of laws prohibiting sales to children.

The “plain packaging” model that the Framework seeks to emulate – the plain packaging legislation adopted in Australia – prohibits the use of trademarks or logos on cigarette packages, other than inclusion of the brand name (in small type) at the very bottom of the front of the package. Legislation of that sort not only ignores the important role of free speech in a free society, but also has an extremely negative impact on valuable intellectual property rights.

While prohibiting use of trademarks or logos may reduce sales of the most popular cigarette brands, WLF is aware of no evidence to suggest that doing so will reduce overall sales. Rather, the more likely effect is to cause sales to shift toward generic or counterfeit cigarettes; indeed, an increased focus on price competition will likely lead to reduced prices and thereby could result in increases in the quantity of cigarettes sold. Moreover, plain packaging requirements will exacerbate the already significant market share of illicit cigarettes.

In the face of evidence that tobacco sales can be reduced significantly through normal law enforcement efforts and through public education campaigns, there can be no justification for adoption of draconian speech restrictions such as requiring plain packaging of tobacco

products. So long as tobacco remains a legal product for adults, efforts to eliminate well-accepted marketing techniques, such as use of labeling with which consumers can identify, is a slippery slope that does not bode well for the future of property rights, speech rights, and personal autonomy.

I. Interests of WLF

The Washington Legal Foundation (WLF) is a public-interest law and policy center located in Washington, DC, USA. WLF is one of the USA's leading advocates for free markets and individual rights. In particular, WLF attorneys have appeared on numerous occasions before government bodies – both internationally and within the United States – in support of property rights and free speech rights. WLF has been a particularly strong advocate for commercial speech rights. WLF believes that government regulators have an appropriate role to play in ensuring that commercial speakers do not provide false or misleading information to consumers. But WLF regularly opposes government efforts to prevent consumers from hearing truthful speech. Such efforts are often justified as an effort to prevent consumers from hearing truthful information that might induce them to make decisions that are not in their best interest. WLF believes that such paternalism towards adult consumers is rarely, if ever, warranted. Rather, WLF urges governments to trust in the ability of consumers who receive truthful information to make decisions that are in their best interests. If adult consumers rationally decide, based on truthful information, to take actions they deem in their best interest, then society as a whole virtually always benefits – even if some public health officials may not agree with all such decisions. WLF believes that the Department of Health, in seeking to improve public health

within Ireland, would do well to recognize the ability of most adult consumers to make intelligent, informed decisions regarding their health when granted unrestricted access to truthful information about their options.

II. The Need for a National Policy

The Department of Health has identified a number of important reasons for the adoption of a “national policy on public health.” Those include:

- Poor diet, a lack of physical activity, tobacco smoking, and alcohol consumption contribute significantly to most chronic diseases, and the Department has forecast that those diseases may increase significantly in coming decades;
- Rising rates of obesity threaten to reverse recent improvements in life expectancy;
- Those from lower socioeconomic groups have poorer health experience and a shorter life expectancy than wealthier individuals; and
- The ageing of the Irish population requires an increased focus on the health concerns that arise among older individuals.

WLF applauds the Department of Health for moving forward with development of a national health policy and does not take issue with any of its rationales for doing so. We simply urge the Department to focus on non-coercive means of achieving its goals. The likely efficacy of non-coercive steps is well illustrated if one focuses on the third of the four “bullet points” cited above: the health inequities that correlate with socioeconomic status. A principal cause of those inequities is the lifestyle choices of those from lower socioeconomic groups – they are much more likely to engage in activities (*e.g.*, poor diet, a lack of physical activity, tobacco smoking, and excessive alcohol consumption) that lead to poorer health outcomes than are those with higher incomes. All available evidence suggests that those lifestyle choices can be altered

through government education campaigns, without any need to infringe on free speech and property rights.

III. The Experience in the United States and the United Kingdom

The Framework suggests that Ireland should emulate Australia, whose “plain packaging” requirements for cigarettes are the most draconian of the cigarette packaging restrictions adopted by a number of nations. The United States adopted cigarette packaging restrictions in 2009. Those restrictions are far less severe than those adopted in Australia, and they have not yet taken effect. Also, the U.S. packaging restrictions may never actually come into effect; they are being challenged in American courts as a violation of the First Amendment to the U.S. Constitution, which protects freedom of speech. A court located in the District of Columbia recently struck down a major portion of the packaging restrictions on First Amendment grounds; another court located in Ohio recently upheld most of the restrictions. The free-speech issue will not be resolved until decided by the U.S. Supreme Court, likely in another year or two.

Within the United States, a sizable market for the sale of “generic” cigarettes has arisen within the last 20 years. The experience with that market is worth noting. Some “generic” cigarettes are sold in relatively plain packaging; others are sold with some colorful labeling but under brand names that are generally unrecognizable to consumers. Generic cigarettes generally sell at a considerable discount to the more popular “brand” names. Interestingly, evidence indicates that virtually the only selling point for generic cigarettes is the price. In other words, consumers in America do not appear to differentiate among generic cigarettes based on the elaborateness of the label; a lower-priced generic cigarette with a plain label will almost always

outsell a somewhat higher-priced generic cigarette with a fancier label.

That experience does not bode well for using plain packaging as a means of cutting down on cigarette consumption. Consumers looking for reduced price will continue to buy the lowest-priced cigarette, regardless how it is packaged. Consumers who, from their personal experience, have developed a preference for the taste, freshness, and feel of a particular brand of cigarette will continue to seek out that brand regardless of how it is packaged.

Supporters of plain packaging may be correct, of course, that over time consumers will begin to doubt the taste and freshness of products that are required to be packaged with unattractive labels. But WLF would not view such a result as a plus. If adult consumers are seeking out cigarettes that are not stale or otherwise substandard, it ill behooves public officials to seek to deceive consumers into believing that such cigarettes are not available. So long as cigarettes remain a legal product, consumers who choose to use them ought to be permitted to receive information that allows them to differentiate among available products based on quality.

The likelihood that the Bill will lead to increased consumer confusion is exacerbated by the increased threat of illicit sales created by “plain packaging” requirements. Illicit sales and counterfeiting of cigarettes is a huge problem in Ireland, the United States, and elsewhere. Most estimates place the annual cost of counterfeit goods to the U.S. economy at \$200-\$250 billion, with counterfeit cigarettes comprising a significant portion of that total. There is every reason to believe that adoption of plain packaging would cause the counterfeiting problem to sky-rocket; the existence of elaborate trademarks is one of the best controls on counterfeiting currently in place.

In countries (like Ireland) with high taxes on cigarettes, illicit sales (*i.e.*, sales of cigarettes that are produced legally abroad but brought illegally into Ireland) are also a major problem. Cigarette smokers are attracted to illicit cigarettes because (since taxes are not paid) they cost considerably less than cigarettes available through regular commercial channels. For example, the government of the United Kingdom (where cigarette taxes are similarly high) recently estimated that 10% of all cigarettes sold in that country, and 46% of all hand-rolled tobacco, were purchased through illicit channels in 2009-2010. *See* HM Revenue & Customs, "Measuring Tax Gaps - 2011" at 25-27 (available at <http://www.hmrc.gov.uk/stats/mtg-2011.pdf>). Plain packaging is likely to exacerbate the problem. If branded cigarettes must be sold in plain packages, consumers will have a much more difficult time distinguishing between legal, regulated cigarettes and illegal, unregulated, untaxed cigarettes.

Counterfeiting and illicit sales cause substantial losses to cigarette manufacturers, of course, but they are not the only losers. Governments around the world derive substantial revenues from the sale of tobacco products. That revenue is lost when consumers buy counterfeit or illicit cigarettes. Honest retailers who sell cigarettes legally are also injured, due both to a reduction in cigarette sales and to a loss of customers who could be expected to make other purchases when they come to buy cigarettes.

Moreover, in the United States increased availability of counterfeit cigarettes has been associated with increased tobacco sales, particularly among young people. The high price of cigarettes, a situation caused primarily by high tax rates, is by far the largest impediment faced by teenagers seeking to purchase cigarettes. Counterfeit cigarettes are generally sold in the

United States with counterfeit tax stamps, falsely indicating that taxes have been paid. For that reason, counterfeit cigarettes can be sold at a markedly lower price than cigarettes being sold legitimately. The same is true of illicit cigarettes. Consumers attracted by the lower price flock to these counterfeit and illicit products – and teenage tobacco use thereby increases.

IV. Free Expression and Australia's Legislation

The “plain packaging” restrictions imposed by Australia law (and scheduled to take effect later this year) would not be permissible within the United States. Based on existing case precedent, American courts would strike down those restrictions as violations of the First Amendment to the U.S. Constitution. WLF recognizes, of course, that the U.S. Constitution is inapplicable in Ireland, which operates under a somewhat different set of rules governing protection of free expression. But regardless whether the restrictions of the sort imposed by Australia would be constitutionally permissible in Ireland, WLF respectfully suggests that the Department of Health ought to think twice before recommending imposition of such severe restrictions on the marketing of a lawful product.

WLF notes that Australia's purported legislative findings are wholly unsubstantiated and that its restrictions are way out of proportion to its listed objectives. The Australian Parliament stated that the tobacco industry has used “colour and imagery” on its packaging to “misleadingly convey relative brand strength and quality.” But it provided no substantiation for that claim, which on its face makes little sense. The principal purpose of using “colour and imagery” on packaging is to create an image for a particular brand that is distinct from other brands. A consumer who has had a positive experience with that brand in the past will be drawn to that

brand when making his next purchase; if not, no amount of attractive colouring will draw the consumer back to that brand. WLF does not understand how a colour could be said to convey anything about relative strength and quality. But even assuming that it could, consumers would quickly realize if a product did not bear the qualities “promised” by its package colour/logo, and those trademarks would have little or no value in the marketplace.

Moreover, if the Department of Health were to conclude that some cigarette packaging is misleading consumers regarding “strength” or “quality,” then an obvious solution is to adopt legislation prohibiting manufacturers from “mislead[ing]” or “deceiv[ing] consumers,” not to bar all use of trademarks and logos. Surely there is no basis for arguing that *any* distinctive packaging is inherently misleading.

The Australian legislation also stated that distinctive packaging enables manufacturers “to target particular market segments, and convey brand character.” That statement is no doubt true, but WLF fails to understand why that is an argument for prohibiting distinctive packaging. If a particular brand of cigarettes is filtered, or has a milder taste, or is menthol-flavored,¹ a reasonable consumer would want to know that fact. Prohibiting distinctive cigarette packaging would make it more difficult for smokers to find the type of cigarette for which they are looking. Disempowering consumers in this manner serves no valid public health purpose of which WLF is aware.

¹ For example, in the United States, menthol-flavored cigarettes often have green labels. American consumers have thus come to understand that if they want to purchase a menthol cigarette, they should look for a green label.

V. The “Slippery Slope” Toward Widespread Speech Restrictions

WLF notes that the right of cigarette manufacturers and retailers to advertise their products is already subject to significant restrictions within Ireland. One of the few remaining avenues by which they can differentiate their products from other cigarettes is through the use of distinctive packaging. If “plain packaging” is adopted and cigarette manufacturer’s are essentially disabled from engaging in any communications with consumers, it is difficult to discern how those speech restrictions can be meaningfully distinguished from a wide variety of potentially onerous restrictions on other products. WLF is concerned that this precedent would, for example, justify broad restrictions on marketing and packaging for liquor, candy, soft drinks, butter, red meat, prescription drugs, and a broad array of products whose consumption, in the view of some government officials, should be curtailed for public health reasons. Nor would one need go very far down the “slippery slope” before government officials could justify restricting the speech of those who oppose government measures designed to improve public health (*e.g.*, measures designed to reduce the emission of greenhouse gasses that can lead to global warming).

Indeed, the Framework suggests that some officials in Ireland have already proceeded well down the slippery slope. The Framework includes suggestions for imposing similarly draconian speech restrictions on the alcoholic beverage industry. *See* Technical Suppl. at 62.

WLF believes that one of the best measures of a free society is its willingness to permit individuals to speak freely. The Irish government should, of course, take steps to ensure that consumers are not being provided false or misleading information. The “plain packaging” restrictions suggested by the Framework, however, have little or nothing to do with the

prevention of misleading speech. Rather, they are designed to reduce sales by greatly limiting the quantity of *nonmisleading* information that manufacturers are permitted to convey. But the premise of a free society is that there is no such thing as too much speech – that the people are not foolish and will separate the wheat from the chaff. Even if use of trademarks and logos on cigarette packaging has a tendency to increase overall cigarette sales – and, as explained below, there is virtually no evidence suggesting that to be true – the proper course of action is for the government to respond with speech of its own rather than to engage in censorship. Government education programs can ensure that consumers are fully aware of the health risks of smoking, and such full awareness has been shown to lead to significant decreases in smoking rates.

There will, of course, be a significant number of adults who will choose to continue to smoke despite full awareness of the health risks involved. Permitting them to make such choices is no different from permitting individuals to make a wide variety of choices that entail increased risks to personal safety, everything from BASE jumping and mountain climbing to luge racing. A free society permits adults to make such rational choices because it recognizes that society benefits thereby. And the only way to ensure that such choices are truly rational is to ensure that the dissemination of speech is uninhibited – thereby ensuring that consumers receive information from the greatest possible number of sources.

VI. Plain Packaging Is Ineffective

WLF shares the Department of Health’s goal of reducing cigarette consumption, particularly among Ireland’s youth. There simply is no credible evidence, however, that “plain packaging” will reduce consumption. In the absence of such evidence, there can be no

justification whatsoever for imposing such severe speech restrictions.

WLF notes, for example, that Ireland recently adopted a ban on displaying cigarettes openly in stores. A report from the Ireland Office of Tobacco Control (issued in October 2010, one year after the display ban went into effect) indicates that the ban had little impact on smoking rates. *See* Ireland Office of Tobacco Control, “Ireland: Current Trends in Cigarette Smoking” (available at <http://www.otc.ie/research.asp#section1>). In particular, the report concluded that smoking rates among 15-17-year-olds “did not decline.” *Id.* Leading researchers at Compass Lexecon recently completed a comprehensive review of *all* of the scientific research conducted in recent years regarding the likely impact of “plain packaging” requirements on cigarette sales. Their conclusion: none of the literature provides “evidence that can be used to support the contention that generic packaging would reduce the uptake of youth smoking or overall smoking prevalence.” *See* Jorge Padilla and Nadine Watson, *Update of the Critical Review of the Literature on Generic Packaging* (Dec. 2011) (available at <http://www.plain-packaging.com>).

In the absence of credible evidence that “plain packaging” will lead to reductions in smoking, adoption of that proposal makes no sense at this time. At the very least, Ireland ought to wait until Australia’s plain packaging law has been in place for two years or more and then examine the results, before adopting a speech-restricting measure with no record of success.

VII. Property Rights

Because some cigarette brands have developed devoted users over the years, their manufacturers have acquired valuable property rights in the trademarks associated with their

brands. Plain packaging threatens to decrease considerably the value of those property rights. In the United States, federal courts have repeatedly enjoined state governments that have taken steps to lessen or destroy the value of such trademarks.

WLF does not claim particular expertise regarding all relevant laws that protect the intellectual property rights of cigarette manufacturers. But our somewhat limited knowledge of that law suggests that adoption of plain packaging might well place Ireland in breach of several such laws. Indeed, WLF understands that the Canadian government abandoned a proposal to adopt plain packaging out of such legal concerns – as well as concerns that plain packaging would do little if anything to reduce cigarette consumption. Plain packaging appears to be inconsistent with each of the following laws:

1. The World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Article 20 of the TRIPS Agreement (to which Ireland is a party) prohibits “unjustifiable encumbrances” on trademarks by, among other things, requiring “use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of another.” “Plain packaging” would have just such detrimental impact – by prohibiting the use of trademarks or logos on cigarette packaging, it would greatly diminish the ability of consumers to distinguish among brands. Nothing in TRIPS suggests that an untested hope that the encumbrances would decrease cigarette sales (and thereby improve public health) renders such an encumbrance “justifiable.” “Plain packaging” also appears to violate TRIPS Article 15 (which provides that “the nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the

trademark”). While the TRIPS Agreement does permit limited exceptions to trademark rights, *see* Article 17, that provision is not relevant here because it is limited to exceptions that “take account of the legitimate interests of the owner of the trademark and third parties.” “Plain packaging” cannot be said to “take account” of the interests of cigarette manufacturers in their trademarks given that it would essentially eliminate all value in the trademarks, and cannot be said to “take account” of the interests of consumers because it diminishes their ability to understand the nature of the products they are buying.

2. The Paris Convention for the Protection of Industrial Property. Article *6quinquies* of the Paris Convention requires that a trademark “duly registered in its country of origin” must be protected in other countries of the Paris Union (including Ireland). All of the significant trademarks potentially affected by “plain packaging” are registered in their country of origin. In the absence of evidence that the trademarks are deceptive to the public, the failure to provide protection to those trademarks appears inconsistent with Article *6quinquies*.

3. The WTO Agreement on Technical Barriers to Trade (the “TBT Agreement”). If adopted, “plain packaging” is highly likely to have a significant impact on trade – its ban on trademarks and logos will lead to a shift in sales to counterfeit and illicit cigarettes, as well as lower-priced generic cigarettes, and thus a significant decrease in importation of brand-name cigarettes and cigarette components. Article 2.2 of the TBT Agreement prohibits adoption of regulations that create “unnecessary obstacles to trade,” that is, regulations that are “more trade-restrictive than necessary to fulfill a legitimate objective.” In the absence of significant evidence supporting the contention of “plain packaging” supporters that adoption would lead to fulfillment

of their “legitimate objective” (a decrease in overall tobacco sales), the Bill appears to conflict with Article 2.2.

VIII. Alternative Measures

The experience in the United States indicates that there are numerous means of reducing smoking without interfering with the speech rights of manufacturers and consumers, or the property rights of manufacturers. Those techniques include: (1) stiff fines for retailers shown to have made sales to underage consumers; (2) increased educational campaigns warning of the health effects of smoking; and (3) increasing the number of public places at which smoking is prohibited. Indeed, studies indicate that a combination of enforcement and education has allowed Germany (through its “Federal Drug Prevention Strategy”) to reduce cigarette consumption considerably, even though Germany does not impose significant speech restrictions on the tobacco industry.

In light of the proven success of those methods, there is little justification for adoption of more drastic techniques – such as plain packaging – that deprive us all of a little of our freedom and could well place Ireland in violation of its international agreements.

IX. Conclusion

The Washington Legal Foundation once again thanks the Department of Health for this opportunity to express its views. WLF respectfully recommends that, in adopting a national policy on public health, the Department of Health not include measures such as “plain packaging,” particularly in the absence of substantial evidence that such speech restrictions would have any appreciable effect on overall cigarette sales. All other techniques for reducing tobacco consumption should be tried first before the nation even begins to consider such drastic curbs on the marketing of a legal product.

Respectfully submitted,

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