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Consultation on the exposure draft Tobacco Plain Packaging Bill 2011 and Consultation Paper

Dear Madam or Sir

economiesuisse is the largest umbrella organization representing the Swiss economy. Our goal is to create an optimal economic environment for Swiss business. In order to achieve this, we work towards preserving entrepreneurial freedom for all businesses, continuously improving Switzerland's global competitiveness in manufacturing, services and research, as well as promoting sustained growth as a prerequisite for a high level of employment in Switzerland. We would like to thank you for the opportunity to express our position on the ongoing consultations on the proposed Tobacco Plain Packaging Bill 2011.

economiesuisse supports legislative measures which effectively reduce the negative impact of smoking on health. However, new regulations limit entrepreneurial freedom. Therefore, they are only to be implemented if they are evidence-based, respect the principle of proportionality and are proven to benefit public health. Before introducing new regulation, possible adverse and unintended consequences must be systematically studied and carefully taken into account. It must be certain, that any such regulation respects legally protected intellectual property rights.

The Tobacco Plain Packaging Bill 2011 does not respect these principles. Besides, it questions well established principles of the free market, such as commercial promotion of legitimate products and the distribution of information about those products to consumers. Furthermore, the Bill severely violates internationally recognised intellectual property rights.

In detail, the proposed Tobacco Plain Packaging Bill 2011 is **inadequate and needs to be clearly rejected** for the following reasons.

Interference with trademarks' main functions: Trademarks play a number of roles, including distinguishing one's goods from those of another¹; symbolizing the quality, goodwill and reputation associated with the product and its manufacturer; promoting innovation by facilitating the introduction of new products within brand families; and informing, reassuring and protecting consumers. Proposed regulations that limit or prohibit the use of words, figurative elements, colors or other terms that are intended to differentiate one product from its competitors, obviously preclude the ability of the trademark to fulfill its main functions. Furthermore, they reduce manufacturer's incentives to invest in quality and new products and lead to a simple price-based competition.

The possibility to show a trademark on the packaging of a product constitutes the very essence of a trademark right. The plain packaging would severely limit the use of intellectual property rights, including very valuable Swiss-registered trademarks, protected under national law and international treaties.

Unjustifiable encumbrance on the use of trademarks: Plain packaging would severely limit, or even prohibit outright, the use of trademark and trade dresses in which a substantive investment has been made, categorically violating the provisions of TRIPS Article 20². This may constitute a form of indirect expropriation of intellectual property.

Under the TRIPS Agreement, States may restrict the right of trademark owners only in limited circumstances³ and only taking into account the interests of such trademark owners and the public interest. Even if Governments are allowed to take measures necessary to protect key goals such as public health, a measure cannot be deemed "necessary" when there is no evidence that the measure would effectively support those objectives. To date, there is no scientific evidence that cigarettes sold in plain packs will reduce effectively tobacco consumption, the number of smokers or the harmful implication of smoking. Lacking the proof of effectiveness, the measure proposed is disproportionate.

On the contrary, a number of other measures that do not blatantly violate the rights of trademark owners are available and should be utilized in pursuing public health goals prior to unproven and speculative initiatives.

Increase risk of illicit trade: Plain packaging would open the door to illicit trade by stimulating both the demand and supply of illicit trade products. When regulatory measures make it more difficult to visually distinguish one brand from another, it also becomes simpler to manufacture and sell counterfeit products. Stripping brands of their trademarks have also been shown to disrupt the market by increasing the demand for products that are illegally imported and sold to consumers. These can be contraband or counterfeit and may imply even an increased health risk for consumers.

¹ Article 15(1) of the TRIPS Agreement reads as follows: "**any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks.**" [emphasis added]

² Article 20 of the TRIPS Agreement provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form, or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings".

³ Article 17 of the TRIPS Agreement states: "Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties."

Conclusion

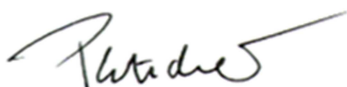
Plain packaging prevents trademark owners from using trademarks and trade dress, and therefore conflict with basic legal obligations arising from international treaties, including the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property (Paris Convention).

Plain packaging of tobacco products diminishes the overall respect accorded to trademark rights and therefore undermines generally accepted national and international principles of intellectual property law. Plain packaging not only infringes trademark rights and the ability of manufacturers to compete legally and inform consumers, but it also opens the door to the illicit trade, which is already a major problem worldwide.

Furthermore, this initiative is not based on solid scientific evidence showing that it would contribute to the legitimate public health objective. It would, on the contrary, constitute an expropriation of some of the world's most valuable trademarks and therefore entitle manufacturers to receive adequate compensation. Given that there are many other means available to Governments to support legitimate public health objectives, we encourage the Australian government not to take measures that constitute a disproportionate limitation to manufacturers' property rights.

In view of the above, economiesuisse encourages the Australian Government to reject the proposed Tobacco Plain Packaging Bill 2011.

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