

Plain Packaging for Tobacco Products Under Turkish Law

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Arguably, plain packaging legislation to tobacco products undermines the objective of trademarks. The possibility of legislatively mandated plain packaging for tobacco products in Turkey also raises legal issues with how such restrictions would fit into the existing legislative framework. Specifically, those provisions which protect intellectual property and commercial stability under the Turkish Constitution, as well as the criteria for third parties to initiate cancellation actions based on non-use.

What is Plain Packaging Legislation?

In general terms, plain packaging legislation for tobacco products requires all tobacco packaging to be the same color, with text being the same size, style and color. The intention is to prevent consumers becoming familiar with and recognizing tobacco brands, as well as decreasing competition and preventing promotion of tobacco companies via packaging.

Packaging restrictions are particularly important to tobacco producers in countries with comprehensive bans on advertising and promotion, such as Australia, England and Turkey. Such bans mean that the product's package itself is the primary vehicle for communicating brand messages.

Related legislation requires producers to display written and visual warnings about health issues caused by tobacco products.

Global Consideration and Introduction of Plain Packaging Legislation

Discussion and research into legislatively mandated plain packaging requirements for tobacco products has existed since 1989, when the New Zealand Department of Health suggested that all tobacco packs should be white with plain black text, absent of any color or logos. Since then, discussions and research into plain packaging have spread around the world, including Canada, England, Ireland, India and the European Commission.

Australia has recently introduced plain packaging legislation, with products on sale since December 2012 being required to have plain packaging. Australia is currently working through the legal issues this legislation has raised, including defense of a complaint made by the governments of Honduras and Ukraine to the World Trade Organization. The complaint claims that the Australian legislation is contrary to a WTO intellectual property agreement.

Arguments in Favor of Plain Packaging for Tobacco Products

Supporters of plain packaging for tobacco products argue:

- consumers to think that some products are less harmful than others.
- Removing the distinguishing elements from tobacco packaging will decrease smoking rates, particularly among teenagers.
- It is a human right to achieve and maintain high health standards, with the state being obliged to support and protect public health, in this context by introducing plain packaging requirements.

Plain Packaging Schemes Conflict with the Turkish Constitution

The Turkish Constitution plays a major role in the Turkish legal framework, with all other laws and regulations being required to be interpreted in line with its provisions. Certain obligations and rights stated by the Constitution appear to conflict with plain packaging schemes for tobacco products:

- Although not explicitly stated, it is widely accepted by judicial decisions that the Turkish Constitution protects intellectual and industrial property rights on the basis that they are property rights (Article 35). If Turkey introduces plain packaging requirements, tobacco packaging would no longer be permitted to display logos, color devices, diagrams and graphics. As a result, the property rights of tobacco companies would be negatively impacted.
- The Turkish Constitution requires the state to take measures to ensure private enterprises operate with security and stability (Article 48). Arguably, prohibiting or restricting enterprise from promoting themselves through use of trademarks would be a breach of this Constitutional obligation.

Plain Packaging Undermines the Key Objectives of Trademarks

Plain packaging eliminates two basic functions of a trademark: promoting the product and indicating the product's origin. Trademark owners aim to build a strong connection between consumers and their trademark. The underlying aim is to signify that all products bearing a particular trademark come from the same origin, in turn increasing the likelihood of consumers buying those particular products.

If consumers cannot see familiar trademarks or other elements which they associate with a particular producer, they will not be able to easily select products based on positive past experiences with that particular producer's products. Consequently, plain packaging would inhibit the establishment and maintenance of consumer perceptions and goodwill towards such trademarks.

Although word marks for tobacco companies are quite strong, using these word marks in simple font on a plain background without any aesthetic or distinctive elements will certainly reduce their distinctiveness compared to current usages of word marks.

Plain Packaging Restrictions Would Prevent Use of Legitimately Registered Rights

Plain packaging schemes do not restrict registration of trademarks, but rather the use of trademarks on packaging. Similarly, registering device, color, logo or 3D forms is not banned by plain packaging legislation. However, given that these elements would not be permitted to be used on packaging, plain packaging schemes would seem to prevent legitimate intellectual property right holders from obtaining any commercial benefit from such registrations.

Arguably though, such registrations would continue to serve a defensive function as the basis for actions against inappropriate use by third parties.

Plain Packaging Could Expose Right Holders to Cancellation Actions Based on Non-use

Under Turkish law, when an intellectual property right is registered with the Turkish Patent Authority, if the right holder does not use that mark within five years of the registration date, third parties can initiate cancellation actions on the basis of non-use

Since the right holder would be legislatively prohibited from using their registered mark on tobacco packaging, it is unclear how the current criteria for non-use actions would continue to apply if plain packaging legislation were introduced in Turkey.

Other Tobacco-Related Regulation in Turkey Suggests Plain Packaging is Possible

Turkey already has a solid and relatively strict regulatory framework for tobacco and related products. Since 2010, Turkish legislation has required written and visual warnings to cover 65% of the front of the packet and 65% of the back. As a member of the World Health Organization's Framework Convention on Tobacco Control, Turkey has already banned advertising of tobacco products and indoor smoking in 2008. In 2012, Turkey adopted an anti brand-stretching provision which prohibits tobacco brand names, emblems, trademarks, logos or other signs and distinctive feature (including color combinations) from being used in relation to non-tobacco goods and services.

With the introduction of these provisions, Turkey is part of a leading group of countries to introduce onerous anti-tobacco laws, along with UK, Ireland, New Zealand, Uruguay and Bermuda. Arguably, these steps could be interpreted as signs that legislatively mandated plain packaging for tobacco products may not be far away for Turkey.

It remains unsettled whether plain packaging actually reduces rates of smoking. Limited research has been conducted on the causative link and recent studies have often reached contradictory conclusions. In light of this, it would be advisable for Turkey to wait for clear and solid data on the effectiveness of plain packaging schemes at meeting their goals, before introducing such a framework. Especially since such a scheme does not easily fit into Turkey's current legal framework and would have serious impacts on use of intellectual property rights.

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