

Thailand's draft tobacco consumption control act: Plain packaging and beyond

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Australia will soon be the first country to require all tobacco products to be sold in plain packaging. From Dec 1, 2012, tobacco packaging will be standardised for all manufacturers; photographic health warnings will occupy 75% of the front and 90% of the back of the packaging, and product names will appear in a uniform font on the remainder of the pack, which itself must be coloured olive green. No famous logos, other branding, trademarks or colours can be applied.

The justification given by the Australian government is that branding on tobacco packs leads to an uptake in smokers and reinforces their commitment to smoking itself. The counter-argument is that branding is simply about differentiating the brands, and brand loyalty must not be confused with any addictive nature of the product.

While Australia is toughening its stand, a court in the United States recently invalidated a regulation requiring graphic health warnings on cigarette packs in that country. It found that the US Food and Drug Administration could not show that graphic health warnings covering half of the pack would reduce smoking.

The court also noted the lack of data in favour of graphic health warnings from countries including Thailand that have implemented them: "The dearth of data reflecting decreased smoking rates in these countries is somewhat surprising and strongly implies that such warnings are not very effective at promoting cessation and discouraging initiation."

Thailand already has some of the strictest tobacco regulations in the world. All packs include graphic health warnings that cover 55% of the front and back of the pack. Smoking is banned in most places and tobacco products are not allowed to be marketed or advertised at all. Now the Public Health Ministry may be considering following Australia's lead. A draft Tobacco Consumption Control Act contains more restrictions including the government dictating product packaging design, which could lead to plain packaging in Thailand. This gives rise to some important legal and practical issues.

Constitutional issues: The constitution of Thailand provides that the "property right of a person is protected" and that a person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake fair and free competition. Arguably, due to the lack of impact assessments on the correlation between use of trademarks on tobacco and social problems of smoking, such a trademark ban would not be proportional under the constitution.

Trademark rights to use and value: Trademarks provide substantial benefits to their owners in terms of asset value, licensing value, assignment value and overall good will. Importantly, trademarks differentiate the goods of one business from the goods of others, thereby conferring an important benefit to Thai consumers by enabling them to differentiate goods from one company from another. Just because a good is a controversial product does not mean that the important trademark function should not still be afforded to both the public and the trademark owner.

By registering a trademark, the trademark owner has obtained the exclusive rights to use and license the use of the trademark in Thailand. A ban on use of trademarks on tobacco products would serve to disallow trademark owners' use of their trademarks and put those trademarks at risk of being cancelled for non-use.

Indeed, as Thailand prepares for accession to the Madrid Protocol for international registration of trademarks, Thai companies may choose to use this new international trademark application system as their businesses expand abroad. However, if their original Thailand trademark is cancelled for any reason, then this will amount to a "central attack" and their equivalent trademarks in those other countries will be cancelled as well.

Thailand's international obligations under WTO treaties: In addition to the protection that trademarks enjoy under Thai law, they are also protected under international treaties including the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (Trips). Article 20 of Trips prohibits unjustifiable encumbrances on the use of a trademark in the course of trade.

Three countries have already challenged the Australian plain packaging measure in the WTO, and on Sept 28 the WTO Dispute Settlement Body agreed to establish a panel to hear Ukraine's complaint. Loss of the WTO cases or other pending international cases could result in annulment of the Australian law and possible payment of compensation by Canberra.

Of course, Thailand has also been down this road before when the Public Health Ministry proposed putting graphic health warnings on alcoholic beverages and a number of countries including Australia questioned the proposal in the WTO.

Trademarks help fight against counterfeit goods: Since 2007, Thailand has been on the US Trade Representative's Priority Watch List of the world's worst intellectual property violators. However, identifying counterfeit, smuggled or other illicitly traded tobacco products will become extremely difficult as plain packaging will remove many of the common product markings.

If all packages are identical without security features, Customs will not be able to easily tell a counterfeit from a genuine product. This could also increase the ease with which infringers can copy such products, which in turn would increase the trade in unlawful, untaxed products, and the government will lose tax revenue.

Overall, Thailand needs to take a pragmatic and practical approach to this issue, rather than simply following one country's extreme lead or taking directions from ill-informed NGOs. It is important to remember that Australia has a different social, legal and economic make-up from Thailand. As such, Thai authorities will need to ensure any measures they introduce do not end up infringing on Thais' constitutional rights, undermining intellectual property protection, violating the country's international trade obligations or unexpectedly resulting in increased levels of smuggling and counterfeiting of tobacco products.

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