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## European Intellectual Property Review

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### Plain packaging of tobacco products under EU intellectual property law

Enrico Bonadio

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**Legislation:** [Directive 2008/95 on trade marks](#)

[Regulation 207/2009 on the Community trade mark](#)

Charter of Fundamental Rights of the European Union 2000 art.17

European Convention on Human Rights 1950 Protocol 1 art.1

***\*E.I.P.R. 599** Plain packaging is a new, yet unapplied, tobacco control policy tool. It would remove from cigarettes boxes all fancy and design elements displayed on packaging, such elements usually being registered by tobacco manufacturers as trade marks. The article explores the compatibility of this new measure with EU intellectual property law (in particular with trade mark and design law) as well as with the fundamental rights provisions enshrined in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.*

#### Introduction

“Plain packaging”, also known as generic or standardised packaging, is a new, but not yet applied, tobacco control policy tool. It requires that all forms of tobacco branding should be labelled exclusively with simple unadorned text. This entails that trade marks, graphics and logos be detached from cigarette packs, except from the brand name which is displayed in a standard font (identical for all brands in the market: e.g. Arial, 12 point). The pack should also be in a neutral colour and include only the content and consumer information (e.g. toxic constituents) as well as health warnings required by law. In essence, plain packaging aims at standardising the appearance of all cigarette boxes in order to make them unappealing, especially for adolescents, thus reducing the prevalence and uptake of smoking.<sup>1</sup>

Some significant evidence shows that this innovative way of marketing tobacco products is likely to reduce tobacco consumption. In particular, studies show that plain packaging could attain such a result in two ways. It does not only contribute to making cigarettes look less attractive but it also makes health warnings and information more visible. By relying on these studies, it is claimed that generic packaging, by increasing the effectiveness of health warnings and reducing misconceptions about the risks of smoking, might carry the potential to reduce smoking uptake (especially among young people) and accordingly protect human health. In particular, plain packaging is expected to play a valuable role in the process of smoking initiation, where it can break the shift from experimentation to regular use,<sup>2</sup> which typically characterises the initiation of smoking.<sup>3</sup>

Australia has been the first country to seriously take into consideration this new measure, by passing a law in 2011 mandating plain packaging of tobacco products. The European Union has also recently taken into account a similar tobacco control tool. It has done so in the context of the public consultation for the possible revision of Directive 2001/37 on the manufacture, presentation and sale of tobacco products (Tobacco Products Directive).<sup>4</sup> Plain packaging is indeed one of the policy options that the EU legislator might consider while updating the Tobacco Products Directive. This new measure would complement the labeling requirements already contained in art.5 of the Tobacco Products Directive. Such provision currently mandates that packages of manufactured cigarettes display the results of the commonly measured yields from tobacco smoke (tar, nicotine and carbon monoxide) and that all carry textual warnings. In Belgium and France plain packaging related

proposals have also been discussed: in Belgium a Bill was presented on May 2011 and in France on December 2010.<sup>5</sup> Parliamentary and governmental discussions regarding this marketing restriction measure have also occurred in the United *\*E.I.P.R. 600* Kingdom.<sup>6</sup> All these moves have been prompted inter alia by the entering into force of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC), a multilateral treaty aimed at protecting “present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke”.<sup>7</sup> In particular, the FCTC recommends that states specifically adopt plain packaging in order to increase the noticeability and effectiveness of health warnings and messages and thus eliminate the effects of advertising and promotion on packaging.<sup>8</sup>

That said, the aim of this article is to focus on the compatibility of this new measure with EU intellectual property law and fundamental rights provisions.<sup>9</sup> Indeed, as mentioned above, the EU and/or some of its Member States might soon adopt plain packaging of tobacco products, so that an analysis of its conformity with the above provisions is timely.<sup>10</sup>

### **Plain packaging versus trade mark rights under EU law**

We have seen that plain packaging would remove from cigarettes boxes all fancy and design elements displayed on packaging. The use of the characterising features of the brand name (e.g. “Marlboro”, “Philip Morris”, “Winston”, etc.) would also be banned from the pack: in particular the distinctive typeface, colour and font size of tobacco signs affixed on the boxes should be replaced by a standard plain format. Tobacco manufacturers typically register all these signs as trade marks. Indeed art.2 Directive 2008/95 (Trade Mark Directive) states that:

“[A] trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their *packaging*, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.”<sup>11</sup> (Emphasis added.)

An analogous provision is contained in art.4 of Regulation 207/2009 (Trade Mark Regulation) that regulates the Community trade mark right.<sup>12</sup>

### **Does plain packaging jeopardise trade marks' functions?**

One may argue that this new measure would be likely to interfere with the two main functions of trade marks, i.e. (1) the function of badge of origin, and (2) the function of conveyor of psychological messages.<sup>13</sup>

First, plain packaging may jeopardise the function of trade marks as “indication of origin”, in the sense of indication of company and trade origin. Indeed, by definition trade marks enable consumers to make simplified and educated purchase choices, thus reducing purchasing risks and ensuring consumer choice. In order to be registrable and protectable, therefore, they should be capable of distinguishing the goods or services of one company from those of other companies.<sup>14</sup> This has also been stressed by many decisions of the Court of Justice of the European Union (CJEU) and General Court as well as of the Office for Harmonization in the Internal Market (OHIM). For example, in *Arsenal FC v Reed* it was held that:

“Trade mark rights constitute an essential element in the system of undistorted competition which the Treaty is intended to establish and maintain. In such a system, undertakings must be able to attract and retain customers by the quality of their goods or services, which is made possible only by distinctive signs allowing them to be identified.”<sup>15</sup>

This fundamental function--the argument goes--cannot be fulfilled if trade marks are not visible, or even available, to consumers when selecting a product. This is exactly what plain packaging as applied to cigarettes would cause. It indeed may threaten consumers' ability to make reasoned choices, as there would be no much difference between the cigarette boxes marketed by tobacco companies. As a result this measure would prevent tobacco trade marks from serving this institutional purpose, which is (as shown above) to help

consumers to distinguish the products of an undertaking which consumers know and trust from those of another unknown competitor. Rather, consumers--who have a legitimate interest in being able to distinguish goods--would get confused as to the trade origin and quality of cigarettes.

**\*E.I.P.R. 601** Concerns could also be raised by retailers of the tobacco industry, i.e. that such a marketing restriction would make them waste valuable time in recognising the different brands requested by their clients.<sup>16</sup> As was also noted by the CJEU in *Björnekulla v Procordia Food* if the purpose of trade marks as a badge of origin is of major significance to consumers or end-users, it is also important to intermediaries who deal with the goods commercially.<sup>17</sup>

The loss of tobacco trade marks' distinctiveness is the major concern stemming from the adoption of generic packaging: it is thus an argument in the hands of the opponents of this marketing restriction measure.

The concerns related to the loss of distinctiveness appear heightened if examined in the light of the CJEU's findings in the proceedings involving the legality of the Tobacco Products Directive. In this case the CJEU was called upon to examine the extent to which the prohibition of descriptors such as "light", "ultra-light", "low-tar" and "mild" could infringe the fundamental right to property, including intellectual property and trade mark rights. After confirming that this provision prohibits the use of trade marks incorporating the above descriptors, the court noted that tobacco producers may continue using other distinctive signs on the packs. In particular, it held that:

"While that article entails prohibition, in relation only to the packaging of tobacco products, on using a trade mark incorporating one of the descriptors referred to in that provision, the fact remains that a manufacturer of tobacco products may continue, notwithstanding the removal of that description from the packaging, to distinguish its product by using other distinctive signs."<sup>18</sup>

According to an a contrario interpretation of such a finding, it may seem that a measure--such as generic packaging--that does not allow tobacco producers to use signs capable of distinguishing their products might negatively impact on trade marks' main function.<sup>19</sup>

Yet the above finding could not be invoked to claim that plain packaging is not compliant with EU trade mark law. Indeed, trade marks' distinctiveness turns out to be relevant when it comes to granting the registration, with the result that signs devoid of distinctive character will not be protected.<sup>20</sup> This, however, does not entail that public law measures (such as generic packaging) which have a negative impact on the distinctive character of already registered trademarks are necessarily contrary to EU law: there is no EU provision which prohibits the adoption of public measures aimed at restricting the use of the distinctive elements of registered trademarks under specific circumstances.

Secondly, generic packaging may also jeopardise the function of trade marks as "conveyor of messages".<sup>21</sup> It should initially be noted that in markets where goods or services tend to be homogeneous and standardised consumers often make purchase choices relying on the "brand image" of the trade mark, regardless of the features of the product on which such sign is affixed. Trade marks thus convey messages and direct them to consumers. This has also been recognised by EU case law. For instance, in *Sigla v OHIM* the General Court held that:

"[A] mark also acts as means of conveying other messages concerning, inter alia, the qualities or particular characteristics of the goods or services which it covers or the images or feelings which it conveys, such as, for example, luxury, *lifestyle*, *exclusivity*, *adventure*, *youth* ... The messages in question ... confer on that mark a significant value which deserves protection, particularly because, in most cases, the reputation of a mark is the result of considerable effort and investment on the part of its proprietor."<sup>22</sup>

That trade marks do serve the purpose in question is also indirectly confirmed by the provisions of the Trade Mark Directive and Trade Mark Regulation devoted to the registrability and infringement of trade marks that have a reputation in the EU (arts4(a)

and 5(2) Trade Mark Directive and arts 8(5) and 9(1)(c) Trade Mark Regulation). According to these provisions, in order to prevent the registration or the use of a later similar or identical sign, the owner of the famous trade mark must show that the former takes unfair advantage of, or is detrimental to, the reputation of the latter (or its distinctive character): no confusion between the earlier and the later trade marks should be proved by the owner of the former--just a "mental" link between the two signs should be established.<sup>23</sup> It is therefore indirectly acknowledged that--especially when it comes to standardised products--consumers make purchase choices also relying on extra-product and psychological features related to a trade mark. This confirms that trade marks also serve a function as "conveyors of messages". Tobacco trade marks, which are often famous trade marks, *\*E.I.P.R. 602* constitute a good example in this regard. Their brand image--often linked to lifestyle, exclusivity, adventure and youth related messages--is often more important to today's image-conscious public than the underlying product. As generic packaging requires the total removal of the fancy and market appeal elements from cigarettes boxes, it may deprive tobacco trade marks of their overall "brand image", and thus seriously jeopardise the goodwill which is usually attached to these brands. As has been noted, the result would be a final product that would inevitably appear boring, daunting and lifeless to the eyes of consumers.<sup>24</sup>

It could therefore be argued that plain packaging--by ruling out any possibility of showing the fancy characteristic of tobacco trade marks on cigarettes packs--prevents tobacco producers from conveying psychological messages related to youth, dynamism, lifestyle or adventure, which would jeopardise the second function of trade marks. The author believes that this conclusion could not be countered by stressing that generic packaging would still allow manufacturers to keep brand names on the product, although in a standardised format, so that this function of trade marks would be safeguarded. As a matter of fact, displaying on the packs tobacco trade marks in a standardised, colourless and daunting format is not capable of conveying any valuable extra-product messages such as youth, dynamism, lifestyle or adventure.

Yet the above findings could not be invoked to claim that standardised packaging is not compliant with EU trade mark law. Indeed, image-based messages conveyed by famous trade marks become relevant only when it comes to preventing the registration or the use of a later similar or identical sign which purport to unduly exploit such image. This does not entail, however, that regulatory measures (such as plain packaging) which jeopardise this function of trade marks are contrary to EU law. As a matter of fact, even after the adoption of this new measure, tobacco trade mark proprietors could still invoke the above mentioned EU trade mark provisions (i.e. arts 4(a) and 5(2) Trade Mark Directive and arts 8(5) and 9(1)(c) Trade Mark Regulation) to prevent the registration and use of later similar or identical signs which exploit extra-product messages associated to their signs.

### **Trade mark rights as *ius excludendi alios***

In order to determine if this new measure is contrary to EU trade mark law provisions, one should investigate if and to what extent standardised packaging encroaches upon the rights offered by trade mark registrations. In particular, one should verify whether the limitation of right owners' activities as a result of the adoption of plain packaging infringes the rights provided to them by art.5 Trade Mark Directive and art.9 Trade Mark Regulation, which lay down the scope of protection given by a trade mark registration. It is generally believed that these provisions do not offer their owners a positive right to actually use the protected sign, but just a *ius excludendi alios*, i.e. the negative right to prevent third parties from using it.<sup>25</sup> Indeed, the right to use a sign does not arise from the registration act, but it is a characteristic intrinsic to the freedom to carry out commercial activities in the market.<sup>26</sup>

This reading is disputed by some commentators who consider it too formalistic: by permitting a right of registration but at the same time denying a right of use--it is argued--such an interpretation may annihilate the whole aim of registration, which is to offer owners a right of exclusive use.<sup>27</sup> Yet the above disputed reading had been endorsed by Advocate General Geelhoed in his Opinion on the validity of the Tobacco Products



Directive, where he stated that:

"[T]he essential substance of a trademark right does not consist in an entitlement as against the authorities to use a trademark unimpeded by provisions of public law. On the contrary, a trademark right is essentially a right enforceable against other individuals if they infringe the use made by the holder."<sup>28</sup>

Following this interpretation it would seem that generic packaging--i.e. a "provision of public law"--formally respects trade mark rights as it does not authorise third parties to exploit tobacco signs, but merely consists of a restriction on right owners' ability to use their own signs. In other terms, even after the adoption of plain packaging and despite the loss of distinctiveness and attractiveness of tobacco trade marks, right holders could still exercise the most important right granted to them, i.e. the right to prohibit the misappropriation of their signs by unauthorised third parties.

**\*E.I.P.R. 603** Thus the fact that trade mark rights are essentially negative rights under EU law should permit Member States to pursue and adopt public policies such as measures aimed at protecting public health.<sup>29</sup> The validity of this finding is enhanced by the WTO Panel in the case *EC--Trademarks and Geographical Indications*. In this case the WTO adjudicatory body held that:

"[T]he fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement."<sup>30</sup>

### **Deceptiveness issues**

According to art.12(2)(b) Trade Mark Directive and art.51(1)(c) Trade Mark Regulation, registered trade marks shall be revoked if they are liable to mislead the public, particularly as to the nature and quality of the goods they distinguish.

How and to what extent the adoption of plain packaging would be here relevant? We should first look at the above-mentioned art.7 Tobacco Products Directive. This provision states that "texts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products". What this provision tells us is that certain names, trade marks and figurative signs are liable to mislead consumers as they may suggest that consumption of tobacco products is beneficial to health compared with other tobacco products--and therefore they have the potential of encouraging smoking: hence, they should not be used on tobacco packaging.<sup>31</sup>

Also figurative signs are mentioned in art.7--think of colourful logos or fancy designs displayed on cigarette packs.<sup>32</sup> Thus certain fanciful and colourful signs shown on tobacco packaging might be caught by the prohibition of registration on deceptiveness grounds contained in the Trade Mark Directive and Trade Mark Regulation, i.e. if they suggest that the underlying product is less damaging than others:<sup>33</sup> for example, signs consisting of strong light colours such as pink, yellow or rose may convey to consumers feelings and messages related to lightness and mildness. It has been argued that:

"[T]here is evidence that the tobacco industry has turned to other means to continue to promote these false beliefs [*i.e.* that some cigarettes are less hazardous than others]--through, for instance, the use of brand imagery and color on tobacco packages ... Removing colors from packs ... would significantly reduce false beliefs."<sup>34</sup>

The potential for colourful elements displayed on tobacco packaging to make consumers believe that the relevant product is less harmful than others is buttressed by statistical research. Indeed, 29 per cent of EU smokers and 10 per cent of EU citizens (both smokers and non-smokers) believe that the colour of cigarettes packs is relevant for identifying that some types of cigarettes are less damaging than others.<sup>35</sup>

Proponents of plain packaging could therefore rely on the above argument and statistical data. They might stress, for example, that this measure--by prohibiting the use of any fancy and/or colourful signs, including those capable of misleading consumers as to the

harmfulness of the product and thus encouraging smoking--is in line with the spirit of art.12(2)(b) Trade Mark Directive and art.51(1)(c) Trade Mark Regulation according to which registered trade marks shall be revoked if they are liable to deceive consumers as to the nature and quality of the relevant goods.

### ***Does plain packaging expose right owners to a revocation of their tobacco trade marks for non-use?***

We have seen that generic packaging would entail the removal from tobacco packaging of all fancy and characteristic elements. This will prevent tobacco producers from using elements which are often covered by trade mark registrations. Under these circumstances, would the non-use of these trade marks cause a revocation pursuant to arts 10 and 12 Trade Mark Directive and arts 15 and 51 Trade Mark Regulation? These provisions state that trade mark registration shall be liable for revocation if within a continuous period of five years the sign has not been put to "genuine use" in connection with the relevant goods.

There is little doubt that under the above circumstances the trade marks removed and no longer used as a consequence of the introduction of plain packaging cannot be revoked. As a matter of fact, the above-mentioned provisions clarify that, where there has been no genuine *\*E.I.P.R. 604* use of a sign in the relevant period, the registration shall not be revoked if there are "proper reasons".<sup>36</sup> The prohibition of using certain signs on cigarettes boxes no doubt constitutes a "proper reason" which justifies the non-use of a registered trade mark and prevents the revocation of the title. This is also buttressed by art.19 TRIPS Agreement which provides for revocation of registrations:

"[U]nless valid reasons based on the existence of obstacles to such use are shown by the trade mark owner. Circumstances arising independently of the will of the owner of the trade mark which constitute an obstacle to the use of the trade mark, such as import restrictions on or other *government requirements* for goods or services protected by the trade mark, shall be recognized as valid reasons for non-use." (Emphasis added.)

The EU case law is in line with this provision. In *Laboratories v OHIM* the General Court held that that the concept of "proper reasons" refers basically to circumstances, not related to the right owner, which prohibit the latter from using the sign, circumstances connected with mere commercial difficulties the holder is experiencing being totally irrelevant.<sup>37</sup> And in *Häupl v Lidl* the CJEU clarified that in order to avoid the revocation of a trade mark registration for non-use the existence of obstacles should be shown that have a "sufficiently direct relationship with a trade mark making its use impossible or unreasonable and which arise independently of the will of the proprietor of that mark".<sup>38</sup>

Therefore the non-use of trade marks as a consequence of the mandatory introduction of plain packaging could not be invoked for claiming the revocation of the relevant registration.<sup>39</sup>

### ***Public policy and morality related issues***

It is worthwhile verifying whether this marketing restriction measure could be justified by relying on public policy or morality grounds. Indeed, art.3(1)(f) Trade Mark Directive and art.7(1)(f) Trade Mark Regulation prohibit registration of trade marks on those grounds.

One might argue, for example, that the adoption of plain packaging is aimed at preventing the use and commercial exploitation of signs and figurative elements in connection with harmful products--and that their registration would therefore be contrary to public policy and/or accepted principles of morality. This argument seems to be in line with a school of thought based on the "nature of product" theory,<sup>40</sup> according to which harmful products including tobacco, alcohol and weapons should be exempted from trade agreements and protection and do not deserve trade mark registration as they fail to contribute to a collective good such as public health.<sup>41</sup>

Yet this objection would be rather weak because--when it comes to applying this absolute ground for refusal--what is relevant is the intrinsic qualities of the sign in question and not whether its concrete use in connection with a product goes against public policy and/or morality. This is in line with EU trade mark case law. For example, in *Sportwetten v OHIM*

the applicant requested the registration of a sign in connection with betting services.<sup>42</sup> According to the General Court it was irrelevant whether the applicant is allowed or not to provide the services in question: what is relevant here--the General Court noted--is whether the sign is inherently contrary to public policy or accepted principles of morality, irrespective of the applicant or the products and services he sells or provides. These arguments are based on the (right) assumption that the nature or character of a product cannot be invoked for rejecting trade mark protection. Indeed a system which refuses trade mark registrations based on the characteristics of the relevant product could turn out to be an arbitrary one, in which subjective and ideological assessments about the good values would often be conclusive.<sup>43</sup>

No trade mark related public policy or morality issues thus stem from the adoption of plain packaging of tobacco products.

### **Plain packaging and the unitary character of Community trade marks**

One of the main principles of EU trade mark law is the so-called unitary effect of the Community trade mark. According to this principle, as enshrined in art.1(2) Trade Mark Regulation,<sup>44</sup> a Community trade mark has "an equal effect throughout the Community: it shall not be registered, transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor shall its use be prohibited, save \*E.I.P.R. 605 in respect of the whole Community".<sup>45</sup> In other words, being that the Community trade mark is a unique title valid in all the 27 Member States, its use cannot be prohibited in one or more countries.

That said, the introduction of plain packaging just at national level, by preventing the use of tobacco-related Community trade marks in some countries while allowing it to persist in other EU states, is likely to clash with the unitary character of the Community trade mark system, thus going against the target of achieving a real internal market. Although art.22 Trade Mark Regulation provides for an exception to this principle by stating that the Community trade mark may be licensed for the whole or part of the Community, no exceptions to the principle of unitary effect is foreseen allowing for the prohibition of use of a Community trade mark in just a part or a country of the Union.

Yet it may also be stressed that the adoption of plain packaging does not entail a total *prohibition* on the use of tobacco trade marks but just a *restriction* thereof, as tobacco signs could still be shown on boxes or containers available for wholesale distribution,<sup>46</sup> invoices and other commercial documents as well as displayed in a standardised form on the packs. Tobacco manufacturers therefore would not be totally prevented from using their signs. It would therefore follow that the introduction of generic packaging would imply no violation of the provision in question.

### **Plain packaging versus design rights under EU law**

The adoption of generic packaging should also be assessed under EU provisions regulating another intellectual property title, i.e. the design right.

As is known, this right protects the visual appearance of a product as well as the design of any aspect of the shape or configuration of the whole or a part of a product. Article 1 Directive 98/71 (which harmonises the law of registered designs in the EU) and art.3 of Regulation 6/2002 (which sets up a unique design right valid in all 27 Member States) clarify that a design consists of the appearance of a product resulting from the features of the lines, contours, shape and texture of the product. Thus the fancy elements, lines and contours which are usually shown on tobacco packaging are in principle eligible for registration as design.<sup>47</sup>

The issues involved here are similar to the ones discussed in connection with trade marks.

First, it may be argued that this measure--by removing all the ornamental features from the tobacco boxes--would prevent tobacco producers from using a registered design (in case they have protected it). Generic packaging would therefore be contrary to EU design law.

On the other hand, it may again be noted that what IPRs offer is just a negative right, and



not the positive right to use the protected asset, in this case a design (see art.12(1) Directive 98/71 and art.19 Regulation 6/2002). It would therefore follow that this measure respects design rights as it does not authorise third parties to exploit tobacco designs--but it is merely a restriction on right owners' ability to use their own design. Under this (preferred) interpretation, therefore, plain packaging would be compliant with EU design law.

### **Does plain packaging infringe the fundamental right to property?**

The enactment of a EU-wide or national plain packaging scheme may find further difficulties when examined in the light of the fundamental rights of the European Union. Under art.6 of the Treaty on European Union (TEU) these rights ensue on the one hand from the Charter of Fundamental Rights of the EU (CFR),<sup>48</sup> and on the other from the European Convention of Human Rights (ECHR) as well as the constitutional traditions common to the Member States. Under art.52(3) CFR, the meaning and scope of Charter rights that correspond to ECHR rights should be the same as those laid down in the ECHR. Although the EU is not directly bound by the ECHR, the CJEU recognises, under settled case law, ECHR rights as general principles of EU law.<sup>49</sup> In particular the question is whether plain packaging may encroach upon the fundamental freedom to the right of property, as enshrined in the CFR and the ECHR.

### **The Charter of Fundamental Rights of the EU**

Article 17(2) CFR stipulates that "intellectual property shall be protected".<sup>50</sup> Thus the Charter protects intellectual property as fundamental right: intangible property is given the same fundamental right status as tangible property, which is referred to in the first paragraph of art.17.

Yet, according to settled case law, the right to property is not an absolute right, but must be considered in relation to its social function. As a result, restrictions may be imposed on the exercise of this right (as well as on similar rights such as the right to pursue trade), provided that the **\*E.I.P.R. 606** restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.<sup>51</sup> Nevertheless, one might argue that plain packaging too heavily restricts tobacco IPRs holders' rights and that its impact might be disproportionate to the aim pursued, i.e. the protection of public health. Again, the CJEU finding in the Tobacco Products Directive case seems to lend support to this conclusion. Indeed, as previously discussed, the CJEU--when called upon to determine the proportionality of the prohibition to use descriptors such as "light", "ultra-light" and "mild"--concluded in the affirmative to the extent that tobacco companies could still continue showing their distinctive trade marks on cigarettes boxes (e.g. Marlboro, Lucky Strike, etc.). However, according to an a contrario reading again, a measure such as generic packaging, which prevents tobacco producers from using any sign capable of distinguishing their products, might instead be considered detrimental to trade mark rights and, as such, disproportionate to the aim pursued. Such a conclusion would be based on the assumption that intellectual property and, in particular, trade mark rights, also offer their owners positive rights to use the protected asset (which would be infringed by the measure in question), and not just a *ius excludendi alios*. Instead, should trade mark registrations be interpreted as conferring only a negative right to oppose the use of the relevant signs by unauthorised third parties (which seems to be the preferable interpretation), plain packaging would not clash with art.17(2) CFR because it would not encroach upon such a negative right.

### **The European Convention on Human Rights (ECHR)**

The ECHR is an international treaty adopted in 1950 by the Council of Europe and aims at protecting human rights and fundamental freedoms in Europe. Currently 47 European countries are parties to the ECHR. As mentioned above, the EU is mandated to accede to this treaty and such accession will strengthen the protection of human rights in the territories of EU Member States. One of the rights protected by the ECHR is the right to property<sup>52</sup> as art.1 of Protocol 1 of the ECHR states that every natural or legal person is

entitled to the peaceful enjoyment of his possessions and cannot be deprived of them.

That intellectual property is included in the concept of "property" has also been confirmed by the European Court of Human Rights (ECtHR), the watchdog of the ECHR.<sup>53</sup> In line with its previous case law,<sup>54</sup> in *Anheuser-Busch v Portugal* the ECtHR held that art.1 Protocol 1 of the ECHR carries an autonomous meaning "which is not limited to ownership of physical goods" and thus may also apply to intellectual property rights including trade mark registrations and applications.<sup>55</sup> The case originated from one of the longest litigation in intellectual property history, i.e. the dispute between the US beer producer Anheuser-Busch Inc and the Czech company Budějovický Budvar. In particular, the former company argued that Portugal had infringed their property rights under the ECHR by refusing the registration of the trade mark BUDWEISER pursuant to a bilateral treaty entered into force after the filing of the relevant application. The ECtHR even stated that a mere application for trade mark registration amounts to a substantive interest protected by the above art.1, as it gives rise to interests and rights of proprietary nature.<sup>56</sup> A similar ruling was delivered by the ECtHR in *Paefgen GmbH v Germany* with reference to domain names.<sup>57</sup> These decisions are not only in line with the previous case law of the Court of Strasbourg but also with certain national Member States' case law. For example, the principle that trade marks and domain names amount to fundamental rights to property constitute an established case law of the German Federal Constitutional Court.<sup>58</sup>

That said, does plain packaging, by removing all the distinctive and ornamental elements--which constitute "property"--from the tobacco producers' ultimate tool of advertising, i.e. packaging, breach art.1 Protocol 1 of the ECHR? It might be argued that such removal amounts to a de facto expropriation<sup>59</sup> and thus jeopardises legal **\*E.I.P.R. 607** certainty as well as the reasonable reliance on existing rights<sup>60</sup>: the fact that trade marks or designs will still remain valid on the relevant registers even after the adoption of plain packaging would not be a valid counter-argument as what are offered to registration owners would be just a "theoretical" or "paper" right which does not allow them to use their sign or design.

Yet such a conclusion would be based on the (probably erroneous) assumption that IPRs also provide their owners with positive rights to use the protected asset, and not just a negative right to oppose unauthorised uses.

In any event, such a substantial limitation on tobacco producers' enjoyment of their trade marks and designs could in principle be justified by the "public interest" clauses of art.1 Protocol 1 of the ECHR. While the first paragraph of this provision states that "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law", the second paragraph protects "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...".<sup>61</sup> Although these two provisions, dealing with deprivation of property and control of the use of property respectively,<sup>62</sup> are formally different, their classification is, in practice, irrelevant in light of the overriding importance and common application of the "fair balance" test.<sup>63</sup> Thus in both cases a fair balance must be struck between the public interest and the individuals' property rights. Hence a test of proportionality again becomes important.<sup>64</sup>

In order for plain packaging to pass such a test, one should prove that this measure is not disproportionate to the aim pursued. In applying this test, the payment and level of compensation following the deprivation of property typically plays a major role,<sup>65</sup> the lack of compensation being only permitted in exceptional circumstances.<sup>66</sup> It is the ECtHR that decides, on a case-by-case basis, whether a person or entity dispossessed of his/its property deserves compensation. Thus far, compensation has been denied in very few cases.<sup>67</sup> In any event, in the context of the EU debate on plain packaging the EU Commission is not likely to contemplate the right of tobacco manufacturers to compensation for the restriction of their trade mark related activities.<sup>68</sup>

### **Conclusion on right to property**

The above analysis demonstrates that a hypothetical EU-wide or national plain packaging

scheme is not likely to be found in breach of the EU regime of property rights. This is mainly due to the fact that IPRs are generally interpreted as giving their owners just a negative right to exclude others from the exploitation of the protected asset. However, should the EU or national courts embrace the opposite interpretation based on the centrality of trade mark and design positive rights, plain packaging could be found disproportionate to the aim pursued and thus not justifiable on public interest grounds. This would appear all the more so should compensation in favour of tobacco manufacturers not be envisaged.

## Conclusion

As illustrated by this analysis, plain packaging is a delicate issue and its adoption at EU and/or Member States' level should be carefully assessed under existing EU intellectual property and fundamental rights provisions.

On the one hand, it could be argued that generic packaging respects IPRs and in particular their fundamental nature as *ius excludendi alios*, as they do not authorise third parties to exploit tobacco trade marks and designs, but they merely amount to a restriction on right owners' ability to use their own signs and ornamental features of the packs: this seems to be the preferable interpretation. For analogous reasons a hypothetical plain packaging scheme is not likely to be found in breach of the EU regime of fundamental property rights. Moreover this new measure--by prohibiting the use of any fancy and/or colourful signs, even those which might be capable of misleading purchasers as to the harmfulness of the product and thus inducing smoking--is in line with the spirit of the EU provisions according to which registered trade marks shall be revoked if they are liable to deceive consumers as to the nature and quality of the relevant goods. Further, no issue related to revocation **\*E.I.P.R. 608** of trade mark registrations for non-use would arise as tobacco manufacturers would be justified for not using their signs on the packaging.

On the other hand, opponents of generic packaging might stress that this measure would seriously jeopardise the main functions of registered trade marks and prevent tobacco producers from using their registered designs on the packs (where registration has occurred): with the result that this measure would make said IPRs just "theoretical" or "paper" rights which do not allow their owners to use the protected asset. Indeed, permitting a right of registration but at the same time denying a right of use of the distinctive and ornamental elements of tobacco trade marks and designs (which generic packaging would cause) would annihilate the whole aim of registration, which is to offer owners a right of exclusive use. Yet, as highlighted in this article, such an argument would be based on the (probably erroneous) assumption that IPRs also offer their proprietors positive rights to use the protected asset, and not just a right to prevent unauthorised third parties from exploiting it.

Comments are welcome and should be sent to [enrico.bonadio.1@city.ac.uk](mailto:enrico.bonadio.1@city.ac.uk). I thank Alberto Alemanno for thoughtful and useful discussions. All mistakes remain mine.

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1. For an overview of the features of generic packaging see Becky Freeman, Simon Chapman and Matthew Rimmer, "The case for the plain packaging of tobacco products" (2007) 103(4) *Addiction* 580; Alberto Alemanno and Enrico Bonadio, "The Case of Plain Packaging for Cigarettes" (2010) 1(3) *European Journal of Risk Regulation* 268.
  2. Packaging is relevant to tobacco manufacturers, particularly when it comes to targeting young people and first-time customers. Unlike many other mass products, cigarette boxes remain with users once first opened and are continuously shown in public, thus becoming a powerful and direct form of mobile advertising for the brand. Although it is not the main factor influencing customers' behaviours, packaging is still an important asset for tobacco majors: it is estimated that one in seven smokers claims that packaging influences purchase choices. See the Commission's Eurobarometer of May 2010, p.67. The results of the survey are available at [http://ec.europa.eu/health/tobacco/docs/ebs332\\_en.pdf](http://ec.europa.eu/health/tobacco/docs/ebs332_en.pdf) [Accessed June 27, 2012].
  3. The tobacco industry is obviously firmly against plain packaging. First of all, opponents of this marketing restriction stress that the latter would not be very effective to the stated purpose of reducing smoking and protecting human health. Supporters of this claim often refer to the lack of evidence proving that generic

packaging makes cigarette boxes less attractive to consumers and health warnings and information more visible and as a result induces smoking cessation. In this regard see Patrick Basham and John C. Luik, "Erasing Intellectual Property--'Plain Packaging' for Consumer Products and the Implications for Trademark Rights", *Democracy Institute--Washington Legal Foundation* (2011), pp.75-117 (highlighting that many papers and reports supporting the introduction of standardised packaging are flawed and not supported by scientific evidence). Moreover, plain packaging could even have negative "boomerang" effects: in this regard see Alberto Alemanno and Enrico Bonadio, "Do you Mind My Smoking? Plain Packaging of Cigarettes Under the TRIPS Agreement" (2011) 10(3) *John Marshall Review of Intellectual Property* 454.

4. Directive 2001/37 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products.
5. See the document of the Belgian Chambre des Représentants of May 3, 2011 (Doc. 53, 1424/001), which also mentions the Bill presented by a French Member of Parliament.
6. On February 2010 the UK Government released a report entitled *A Smokefree Future: A Comprehensive Tobacco Control Strategy for England*, in which generic packaging was examined in great detail. The report is available on the website of the UK Department of Health, [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_111749](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_111749) [Accessed June 27, 2012]. A proposal introducing mandatory plain packaging for cigarettes is also likely to appear in the near future.
7. FCTC art.3. The FCTC became effective on February 27, 2005 and the treaty, which is now closed for signature, has 168 signatories, including the European Union, which makes it the most widely embraced treaty in UN history.
8. See the Guidelines of arts 11 (para.46) and 13 (paras 15-17) FCTC.
9. In a previous article I analysed, together with Alberto Alemanno, the compatibility of this measure with the TRIPS Agreement. See Alemanno and Bonadio, "Do you Mind My Smoking? Plain Packaging of Cigarettes Under the TRIPS Agreement" (2011) 10(3) *John Marshall Review of Intellectual Property* 450, 454.
10. Plain packaging might also be considered contrary to other EU provisions, such as those rules preserving the freedom of movement of goods. In this regard see Alberto Alemanno and Enrico Bonadio, "Plain Packaging of Cigarettes under EU Law" in Andrew Mitchell, Tania Voon and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (UK: Edward Elgar, 2012).
11. Directive 2008/95 to approximate the laws of the Member States relating to trade marks codified the previous Council Directive 89/104.
12. Regulation 207/2009 of codified the previous Regulation 40/94.
13. On the two main functions of trade marks: see, e.g., Guy Tritton, *Intellectual Property in Europe*, 3rd edn (London: Sweet & Maxwell, 2008), pp.225 et seq.
14. See again art.2 Trade Mark Directive (and its Recital 11) as well as art.4 Trade Mark Regulation.
15. *Arsenal FC Plc v Reed* (C-206/01) [2002] E.C.R. I-10273; [2003] 1 C.M.L.R. 12 at [47]. See also *Frits Loendersloot (t/a F. Loendersloot Internationale Expeditie) v George Ballantine & Son Ltd* (C-349/95) [1997] E.C.R. I-6227; [1998] 1 C.M.L.R. 1015, a case of repackaging of alcohol products, in which it was held that "account must be taken of the essential function of the trade mark, which is to guarantee to the consumer or end user the identity of the trade-marked product's origin by enabling him to distinguish it without any risk of confusion from products of different origin" (at [24]).
16. See Tim Wilson, "The Cost of Plain Packaging", presentation held at the IPRIA Seminar "Banning Tobacco Logos: A Look at the Issues", Melbourne, May 26, 2010; Imperial Tobacco Australia Ltd, "Senate Community Affairs Inquiry into the Tobacco Packaging (Removing Branding from Cigarettes Packs) Bill 2009" (April 2010), pp.32-33, [http://www.imperial-tobacco.com/files/misc/submission\\_on\\_proposals.pdf](http://www.imperial-tobacco.com/files/misc/submission_on_proposals.pdf) [Accessed June 27, 2012]. For an opposite position see Burkhardt Goebel, "Trademarks as fundamental rights--Europe" (2009) 99 *Trademark Reporter* 931, 951.
17. *Björnekulla v Procordia Food AB* (C-371/02) [2004] E.C.R. I-5791; [2005] 3 C.M.L.R. 16 at [23].
18. *R. v Secretary of State for Health Ex p. British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] E.C.R. I-11453; [2003] 1 C.M.L.R. 14 at [152].
19. See also Goebel, "Trademarks as fundamental rights--Europe" (2009) 99 *Trademark Reporter* 931 953. However, this argument might be countered by stressing that the new measure would not confuse tobacco consumers and would thus be lawful under EU trade mark law, as manufacturers would be allowed to keep brand names on the product, although in a standardised format. In other terms, tobacco packaging would

still enjoy a (low but still) minimum level of distinctiveness and therefore prevent any confusion among purchasers.

20. See again art.2 Trade Mark Directive and art.4 Trade Mark Regulation.
21. On the function of trade marks as conveyor of "psychological messages" see, e.g., Tritton, *Intellectual Property in Europe* (2008), p.227.
22. *Sigla v OHIM* (T-215/03) [2007] E.C.R. II-711; [2007] E.T.M.R. 79 at [35] (emphasis added).
23. See *Adidas-Salomon AG v Fitnessworld* (C-408/01) [2003] E.C.R. I-12537; [2004] 1 C.M.L.R. 14 at [89]-[90]. See also *Intel Corp Inc v CPM* (C-252/07) [2008] E.C.R. I-8823; [2009] Bus. L.R. 1079; *Environmental Manufacturing v OHIM - Wolf (Representation of the head of a wolf)* (T-570/10) May 22, 2012.
24. See Angela Paladino, "The Impact of Packaging on Brands--The Case of Cigarettes", presentation held at the IPRIA Seminar "Banning Tobacco Logos: A Look at the Issues", Melbourne, May 26, 2010.
25. See Tania Voon and Andrew Mitchell, "Implications of WTO Law for Plain Packaging of Tobacco Products" in *Public Health and Plain Packaging of Cigarettes* (2012), para.B2 (analysing an analogous provision of TRIPS Agreement, i.e. art.16). See also Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Kluwer, 2001), p.291; Carlos Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, 2007), p.182; WTO Appellate Body Report, *United States--Section 211 Omnibus Appropriations Act of 1998*, WTO Doc WT/DS176/AB/R, adopted on February 1, 2002, para.186; WTO Panel Report, *European Communities--Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Doc WT/DS290/R, adopted on April 20, 2005, para.7.246.
26. See Annette Kur, "The Right to Use One's Own Trade Mark: A Self-evident Issue or a New Concept in German, European, and International Trade Mark Law?" [1996] E.I.P.R. 198, 199.
27. See Basham and Luik, "Erasing Intellectual Property", Democracy Institute--Washington Legal Foundation (2011), pp.22-29 (quoting an excerpt from the Panel report in the already mentioned *EC--Trademarks and Geographical Indications*, WTO Doc WT/DS290/R, para.7.664: "Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function. This includes its interest in using its own trademark in connection with the relevant goods and services of its own and authorized undertakings"). See also Daniel Gervais, "Analysis of the Compatibility of certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention--report for Japan Tobacco International" (November 20, 2010), pp.11-12; Kur, "The Right to Use One's Own Trade Mark" [1996] E.I.P.R. 198, 203.
28. See Opinion of A.G. Geelhoed in *British American Tobacco* [2002] E.C.R. I-11453; [2003] 1 C.M.L.R. 14 at [266] (emphasis added).
29. See Voon and Mitchell, "Implications of WTO Law for Plain Packaging of Tobacco Products" in *Public Health and Plain Packaging of Cigarettes* (2012), para.B2 (analysing the compatibility of plain packaging with TRIPS Agreement).
30. WTO Panel Report, *EC--Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Doc WT/DS174/R, 15 March 2005, para.7.246.
31. *British American Tobacco* [2002] E.C.R. I-11453; [2003] 1 C.M.L.R. 14 at [138] (recalling the arguments put forward by the Advocate General in [241] to [248] of his Opinion).
32. Trade mark registration of colours is in principle allowed under EU law. In *Libertel Groep BV v Benelux Merkenbureau* (C-104/01) [2003] E.C.R. I-3793; [2005] 2 C.M.L.R. 45 the CJEU held that colours are capable of being registered as trade marks, provided that they are clearly described in the application and coupled with a sample.
33. See also Basham and Luik, "Erasing Intellectual Property", Democracy Institute--Washington Legal Foundation (2011) (highlighting that packaging colours mislead smokers about the risks of smoking by making them believe that certain tobacco products are safer than others).
34. See Hammond et al., "Cigarette Pack Design and Perceptions of Risk Among UK Adults and Youth" (2009) 19(6) *European Journal of Public Health* 631, quoted in Basham and Luik, "Erasing Intellectual Property", Democracy Institute--Washington Legal Foundation (2011), pp.113-114.
35. See the Commission's Eurobarometer of May 2010, pp.83 and 87-88. The results of the survey are available at [http://ec.europa.eu/health/tobacco/docs/ebs332\\_en.pdf](http://ec.europa.eu/health/tobacco/docs/ebs332_en.pdf) [Accessed June 27, 2012].



36. In order to object to the revocation of their trade marks, tobacco manufacturers also could rely on the fact that their distinctive signs are used on invoices and other commercial documents as well as on boxes or containers handled by wholesalers and importers. The EU case law clarified that the said uses can prevent trade marks from being revoked: see *Mo-Hwa Park v OHIM* (T-28/09), decision of January 13, 2011 (finding that even a minimum use of trade marks can be held genuine: in that case 13 invoices as well as catalogues showing the sign were considered enough to prove that the trade mark was genuinely used in connection with the relevant goods); *La Mer Technology Inc v Laboratoires Goemar SA* (C-259/02) [2004] E.C.R. I-1159; [2004] E.T.M.R. 47 (holding that importation by a single agent can be sufficient to qualify as "genuine use", provided that there was a genuine commercial justification for the act of importation).
37. *Laboratories RTB v OHIM* (T-156/01) [2003] E.C.R. II-2789; [2004] E.T.M.R. 52 at [41].
38. *Armin Häupl v Lidl Stiftung & Co. KG* (C-246/05) [2007] E.C.R. I-4673; [2007] E.T.M.R. 61 at [54].
39. This is also what the Australian Tobacco Plain Packaging Law provides. In particular, this law prevents the refusal of a registration, or its revocation, merely because the owner is prevented from using it on tobacco products and their packaging.
40. Ian Shapiro, "Treating cigarettes as an exception to the trade rules" (2002) 22(1) *SAIS Review* 87; Donald Zeigler, "International trade agreements challenge tobacco and alcohol control policies" (2002) 25 *Drug and Alcohol Rev.* 567; Ellen Shaffer et al., "International trade agreements: a threat to tobacco control policy" (2005) 14, *Tobacco Control* 19. For a critical overview of these opinions see Basham and Luik, "Erasing Intellectual Property", Democracy Institute--Washington Legal Foundation (2011), pp.14-21.
41. William Kingston, "Trademark registration is not a right" (2006) 26 *Journal of Macromarketing* 17.
42. *Sportwetten GmbH v OHIM (INTERTOPS)* (T-140/02) [2005] E.C.R. II-3247; [2006] E.T.M.R. 15 at [32].
43. Basham and Luik, "Erasing Intellectual Property", Democracy Institute--Washington Legal Foundation (2011), pp.20-21.
44. On the nature of Community trade marks see also David Bainbridge, *Intellectual Property*, 9th edn (2012), p.839.
45. This provision applies unless otherwise provided in the Trade Mark Regulation (see Recital 3).
46. Goebel, "Trademarks as fundamental rights--Europe" (2009) 99 *Trademark Reporter* 931, 951.
47. However, it seems that tobacco manufacturers are not much interested in registering tobacco packaging as design as they already obtain a strong protection by registering it as a trade mark. Indeed, a quick research on the online OHIM and WIPO design-related databases has not revealed any design registration consisting of the fancy and colourful aspects of tobacco packaging.
48. The Charter was adopted in Nice on December 2000 and given legal effect with the entry into force of the Treaty of Lisbon on December 1, 2009.
49. Following the entry into force of the Lisbon Treaty, the EU is mandated to join the ECHR (see art.6(2) of the Treaty on the European Union). See J.P. Jacqu e, "The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms" (2011) 48 *C.M.L. Rev.* 995.
50. This provision is in line with international treaties on human and fundamental rights. For example, art.27(2) of the Universal Declaration of Human Rights of 1948 states that: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Also art.15 of the United Nations International Covenant on Economic, Social and Cultural Rights of 1966 protects "the right of everyone ... (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".
51. See inter alia *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* (C-210/03) [2004] E.C.R. I-11893; [2005] 1 *C.M.L.R.* 26 at [72]; *Schrader v Hauptzollamt Gronau* (265/87) [1989] E.C.R. 2237 at [15]; *Germany v Council* (C-280/93) [1994] E.C.R. I-4973 at [78]; *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Standley* (C-293/97) [1999] E.C.R. I-2603, [1999] 2 *C.M.L.R.* 902 at [54]; *Di Lenardo and Dilexport v Ministero del Commercio con l'Estero* (C-37/02 and C-38/02) [2004] E.C.R. I-6945, [2006] 3 *C.M.L.R.* 33 at [82]; and *Spain and Finland v Parliament and Council* (C-223/02) [2004] E.C.R. I-7789 at [52].
52. On the importance of this fundamental right, also in the EU context, see the Opinion of A.G. Geelhoed in [2002] E.C.R. I-11453; [2003] 1 *C.M.L.R.* 14 at [259].
53. See also Megan M. Carpenter, "Trademarks and Human Rights: Oil and Water? Or Chocolate and Peanut Butter?" (2009) 99 *Trademark Reporter* 892.

54. See *Smith Kline and French Laboratories v Netherlands* (12633/87), October 4, 1990 ECtHR (stating that a patent, being transferable and assignable, falls within the scope of the term "possessions" of art.1 of Protocol 1); *Gasus Dossier- und Fördertechnik GmbH v Netherlands* (Series A 306-B), February 23, 1995 ECtHR, in which it was held that the concept of "possessions" has an "autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as property rights, and thus as 'possessions' ..."; *Beyeler v Italy* (33202/96) (2001) 33 E.H.R.R. 52 ECtHR at [100]; *Melnychuk v Ukraine* (28743/03), July 5, 2005 ECtHR (a case regarding an alleged copyright infringement).
55. *Anheuser-Bush Inc v Portugal* (73049/01), January 11, 2007. For comments of this ruling see Goebel, "Trademarks as fundamental rights--Europe" (2009) 99 *Trademark Reporter* 931, 942; Burkhardt Goebel, "Trade marks are 'possessions', as are applications" (2007) 2(4) *Journal of Intellectual Property Law & Practice* 197; Klaus D. Beiter, "The right to property and the protection of interests in intellectual property--a human rights perspective on the European Court of Human Right's decision in *Anheuser-Bush Inc v Portugal*" (2008) 39(6) *International Review of Intellectual Property and Competition Law* 714.
56. *Anheuser-Bush* (73049/01), January 11, 2007 ECtHR at [78].
57. *Paeffgen GmbH v Germany* (25379/04, 21722/05 and 21770/05), September 18, 2007 ECtHR. In this case the ECtHR held that the exclusive right to exploit a domain name constitutes a "possession" as it has an economic value.
58. See also Goebel, "Trademarks as fundamental rights--Europe" (2009) 99 *Trademark Reporter* 931, 943-944.
59. The concept of "privation of property" not only includes the measures which transfer the property of the asset to the government, but also the so-called de facto expropriations, i.e. the measures which merely interfere with the possession of assets, even though they do not trigger the formal transfer of the property to a public body. See *Henrich v France* (13616/88), September 22, 1994; *Papamichalopoulos v Greece* (14556/89) (1993) 16 E.H.R.R. 440 ECtHR.
60. See also Goebel, "Trademarks as fundamental rights--Europe" (2009) 99 *Trademark Reporter* 931, 950.
61. A similar clause is included in art.17(1) CFR, which also explicitly provides the person deprived of the property with a right to compensation.
62. In the case of *Tre Traktörer Aktiebolag v Sweden* (10873/84) (1991) 13 E.H.R.R. 309 ECtHR, it was held that, by subjecting the sale of alcoholic beverages to a mechanism of licences, Swedish legislation had taken a proper measure to implement a national health-related policy in this sector--and there was no doubt that the purpose pursued by the measure was the lawful control of the use of property (in this case a licence to serve alcoholic beverages) in accordance with the general interest (at [57]).
63. See *Pine Valley Developments Ltd v Ireland* (1993) 16 E.H.R.R. 379 ECtHR. See also *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 2nd edn, edited by D. Harris, M. O'Boyle, E. Bates and C. Buckley (Oxford University Press, 2009), p.679; *Jacobs, White and Ovey: The European Convention on Human Rights*, 5th edn, edited by R. White and C. Ovey (Oxford University Press, 2010), p.501.
64. See also *Jacobs, White and Ovey: The European Convention on Human Rights* (2009), p.493.
65. *Jacobs, White and Ovey: The European Convention on Human Rights* (2009), p.493 (analysing cases regarding compensation under art.1 Protocol 1).
66. *Holy Monasteries v Greece* (13092/87, 13984/88) (1995) 20 E.H.R.R. 1 ECtHR; *The Former King of Greece v Greece* (25701/94) (2003) 36 E.H.R.R. CD43 ECtHR; *Zvolský and Zvolská v Czech Republic* (46129/99), November 12, 2002; see also *Jacobs, White & Ovey: The European Convention on Human Rights* (2009), pp.493-494.
67. For example, an exceptional circumstance justifying no payment of compensation may follow from the manner how, and the period when, a property subsequently dispossessed was acquired. See *Jahn v Germany* (46720/99, 72203/01, 72552/01) [2006] E.H.R.R. 49 ECtHR (where the property had been acquired during a transition period between two different political regimes); *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v United Kingdom* (21319/93, 21449/93, 21675/93) [1998] E.H.R.R. 127 ECtHR (in which the applicant unsuccessfully claimed the reimbursement of a tax paid in a particular period). See also *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2009), pp.684-686.
68. It also remains to be seen whether generic pack is capable of satisfying a necessity test: indeed one could say that there are other means to pursue the same public health objective which are more effective and less restrictive of intellectual property rights, such as educational campaigns, health information and

warnings, and advertising restrictions.