



City Research Online

City, University of London Institutional Repository

Citation: Alemanno, A. & Bonadio, E. (2012). Plain packaging of cigarettes under EU law. In: Voon, T., Mitchell, A. D. & Liberman, J. (Eds.), Public Health and Plain Packaging of Cigarettes: Legal Issues. (pp. 214-237). Edward Elgar Publishing. ISBN 9780857939425

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/6713/>

Link to published version:

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk

PLAIN PACKAGING OF CIGARETTES UNDER EU LAW

Alberto Alemanno* and Enrico Bonadio⁺

[Following Australia's move towards mandatory plain packaging of cigarettes, the European Union is also considering a similar tobacco control policy pending the ongoing revision of its Tobacco Products Directive. This chapter provides a detailed examination of the legality of plain packaging of cigarettes under EU law by exploring how such a policy might fare in the EU political and legal context. Although the analysis predominantly focuses on the adoption of an EU-wide plain packaging scheme, it also discusses the legal implications stemming from the more likely adoption of similar schemes at the national level. In the absence of a draft proposal by the EU Commission, which is expected no earlier than June 2012, the analysis takes as a point of reference the proposed scheme of plain packaging recently adopted in Australia. In particular, the analysis focuses on the legal basis on which the EU could enact plain packaging as well as on its compatibility with the proportionality principle, the EU trademark regime and fundamental rights.]

I	Introduction	2
II	The Legal Implications of Plain Packaging under EU Law	3
	A Public Consultation Document on the Possible Revision of the Tobacco Products Directive	3
	B The Definition of Plain Packaging	4
III	Legal Basis	4
	A The Legal Basis for EU-Wide Plain Packaging.....	Error! Bookmark not defined.
	1 Existence of an Internal Market Barrier	6
	2 Existence of a Genuine Barrier to Trade	6
	3 Intended Harmonisation Should Improve the Internal Market.....	7
	4 Conclusion on Legal Basis	8
IV	Proportionality	8
	A The Declared Objective(s) of Plain Packaging	8
	B The Proportionality Inquiry	9
	1 Suitability	9
	2 Necessity	10
	3 Judicial Review of Proportionality	10
V	Trademark Regime	10
	A Does Plain Packaging Jeopardise the Main Function of Trademarks?.....	11
	B Does Plain Packaging Infringe Trademark Rights?	12
VI	Fundamental rights	13
VII	The Legality of National Plain Packaging Schemes under EU Law	14
	A The Drivers Behind the Adoption of Plain Packaging at the National Level	14
	B Obstacles to the Free Movement of Tobacco Products.....	14
	C The 'Unitary Effect' of Community Trademarks	15
VIII	Conclusion	16

* PhD (Bocconi); LLM (Harvard); LLM (Bruges); JD (Turin). Jean Monnet Professor of EU Law & Risk Regulation, HEC Paris; Former Legal Secretary at Court of Justice of the European Union ; Attorney at law (New York). Email: alemanno@hec.fr.

⁺ PhD (Florence); JD (Pisa). Lecturer in Intellectual Property Law, City University of London; Solicitor of England and Wales; Avvocato (Milan). Email: enrico.bonadio.1@city.ac.uk

I Introduction

Despite its increased public rejection, smoking is the single largest cause of preventable death and disease in the European Union ('EU'), accounting for 650,000 deaths. In addition, over 13 million people in the 27 countries of the EU suffer from smoking-related diseases. For more than a decade, however, the prevalence of smoking has been on the decline,¹ reflecting a broader trend among industrialised countries that may be observed since the 1980s.

The EU has been actively contributing to a reduction of tobacco consumption during the last three decades, by acting at national, regional and international levels. However, unlike other jurisdictions engaged in tobacco control policies, the EU is not a nation-state and as such it has limited competence in public health matters.² In particular, EU tobacco policy has historically been based on the competence to establish and regulate the European internal market. Although pursuing a public health goal by promoting — rather than restricting — the free movement of cigarettes in Europe might appear paradoxical, this is the legal logic dominating the EU regulatory approach to tobacco.

In spite of these limitations, the EU has been one of the most active players in tobacco control policies across the world and, as such, played a significant role in the process that led to the conclusion of the World Health Organization ('WHO') *Framework Convention on Tobacco Control*³ ('WHO FCTC'). It is therefore no surprise that the EU, striving to go beyond the minimum requirements of the WHO FCTC,⁴ is currently engaged in strengthening and modernising its tobacco control policy, which is based on a mix of policy measures to curb smoking and protect citizens' health. These measures include pricing and tax policies, smoking bans in workplaces and public places, bans on advertising of tobacco products, targeted consumer information, warning labels and treatment for smokers who want to quit. In particular, EU efforts focused on the revision of the 2001 Tobacco Products Directive,⁵ which introduced pioneering tobacco control measures such as a ban on misleading descriptors (eg 'mild', 'light' or 'low tar'). This Directive also reinforced several pre-existing pack space appropriation measures by increasing the size of text health warnings and established maximum tar, nicotine and carbon monoxide levels (commonly referred to as 'TNCO ceilings') for cigarettes. Besides broadening the scope of the Directive, for example by including electronic cigarettes, herbal cigarettes, water pipes and other paraphernalia, the revision contemplates the introduction of new policy tools such as plain packaging of cigarettes and bans on cigarette vending machines and tobacco displays at points-of-sale.

This chapter examines the legality of mandatory plain packaging of cigarettes under EU law. Although the analysis predominantly focuses on the adoption of an EU-wide plain packaging scheme, within the framework of the revision of the Tobacco Products Directive, it also discusses the legal implications of similar mechanisms at the national level. This seems all the more justified given the

¹ The smoking prevalence remains high compared to other industrialised countries with an average of around 29%. Southern European countries have the greatest proportions of smokers — particularly Greece, where the proportion of smokers exceeds 40% — while the Northern countries of Sweden and Finland have the lowest proportions at 16% and 21% respectively. See: Eurobarometer Survey, 'Tobacco Summary', Special Eurobarometer 332/Wave 72.3 (May 2010).

² Article 168(5) of the TFEU expressly excludes harmonising measures in this area: see Article 168(5).

³ 2302 UNTS 166 (adopted 21 May 2003, entered into force 27 February 2005). The WHO FCTC is the first international treaty negotiated under the auspices of WHO and currently has 174 members.

⁴ Article 2(1) of the WHO FCTC (Relationship between this Convention and other agreements and legal instruments).

⁵ *Directive 2001/37 of the European Parliament and of the Council of 5 June 2001 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco Products* [2001] OJ L 194/26.

ongoing debates in several EU Member States, such as Belgium,⁶ France⁷ and the United Kingdom,⁸ over whether to introduce plain packaging in their own legal orders. In other words, should an EU-wide plain packaging scheme eventually not emerge within the framework of the revision of the Tobacco Products Directive, it is likely that plain packaging will be adopted by some EU Member States under the influence of the precedent to be set by Australia.⁹ In the absence of a draft proposal by the European Commission ('Commission'), which is not expected earlier than June 2012, the analysis will take as a point of reference the sort of scheme for plain packaging of cigarettes currently under consideration by the Australian Parliament.¹⁰

Section II, after introducing the reader to the main features of the EU Tobacco Products Directive, identifies the main legal implications of the introduction of cigarette plain packaging at the EU level. Section III focuses on the controversial issue of the EU legal basis for adopting a harmonised measure inspired by a public health objective. Section IV examines plain packaging in the light of the proportionality principle. Section V explores the inherent tension between plain packaging and trademark rights within the EU internal market. Section VI reviews plain packaging on the basis of the fundamental rights afforded by the EU legal order, notably the right of property. And finally, section VII explores possible scenarios that could arise should plain packaging be adopted at the national level instead of at the EU level, before formulating some final conclusions.

II The Legal Implications of Plain Packaging under EU Law

The Tobacco Products Directive dates from 2001. By recasting two previous directives dealing with labeling and maximum tar yields, this legislation became, together with the Tobacco Advertising Directive, the primary tool developed by the EU to regulate tobacco products and their entrance into the market. However, 'new international, scientific and market developments require reflecting whether the Directive still fully guarantees' its original objectives: facilitating the functioning of the internal market in tobacco products while ensuring a high level of health protection. This is the declared rationale behind the proposed revision of the Tobacco Products Directive from a Public Consultation Document published by the Commission in 2010.¹¹

A Public Consultation Document on the Possible Revision of the Tobacco Products Directive

The Public Consultation Document contemplates for the first time the introduction of plain packaging as one of the policy options that the EU legislature might consider while updating the Tobacco Products Directive.

Plain packaging would complement the labeling requirements already contained in Article 5 of the Directive. That provision currently mandates that packages of manufactured cigarettes display the results of the commonly measured TNCO yields from tobacco smoke and that all packages carry textual warnings. It also allows Member States to go beyond these requirements and introduces, on a voluntary basis, pictorial warnings to be chosen from an EU-wide library of colour photographs.

In particular, plain packaging is contemplated as one of the policy options available to the EU legislature when addressing the 'consumer information' policy problem as identified by the

⁶ On 19 January 2010, Belgium's Health Minister, in response to a question in the Belgium Parliament, expressed support for plain packaging, including at European Union level.

⁷ See 'Proposition de Loi Visant à l'Instauration d'un Paquet de Cigarettes Neutre et Standardisé'.

⁸ See United Kingdom, *Healthy Lives, Healthy People: A Tobacco Control Plan for England*, CM 7985 (30 November 2010) [3.25].

⁹ See Tobacco Plain Packaging Bill 2011 (Cth).

¹⁰ See Tobacco Plain Packaging Bill 2011(Cth), in particular cl 14(2).

¹¹ European Commission, Health and Consumer Protection Directorate-General, *Public Consultation Document on the Possible Revision of the Tobacco Products Directive 2001/37/EC* (2010).

Commission in its consultation document. Behind this problem lie three different issues that, according to the Commission, might effectively be addressed by plain packaging. First, this policy tool might help overcome the existing disparities in labeling due to the voluntary pictorial warnings regime, which led some Member States, but not all, to make pictorial warnings mandatory in their own jurisdictions. Second, plain packaging would enable the EU legislature to regulate packaging as an advertising tool, a crucial utilisation since 'tobacco packaging and product features are increasingly used to attract consumers and to promote products and brand image.'¹² Third, plain packaging could improve consumer information by preventing the existing TNCO quantitative labeling from being misread by consumers who might 'think that lower levels indicate that a product is less risky to their health' and thus 'decide to smoke or increase their consumption...in preference to quitting.'¹³ Although it is too early, lacking a Commission proposal, to ascribe the abovementioned objectives to an EU-wide plain packaging scheme, one can clearly identify two well-defined policy roles that this tool might play within the EU. First, by overcoming existing regulatory divergence among tobacco products, it may act as an internal market-enhancer. Second, by detracting attention from the packages and preventing them from being used to suggest that some products are less harmful than others, it may also serve as an anti-misleading marketing tool.

B The Definition of Plain Packaging

The definition of plain packaging discussed by the EU Commission in its consultation document¹⁴ is in line with that provided by the Guidelines for implementation of Article 11 (Packaging and labeling of Tobacco Products) and Article 13 (Tobacco advertising, promotion and sponsorship) of the WHO FCTC,¹⁵ which has inspired the Australian Tobacco Plain Packaging Bill 2011 (Cth).¹⁶

It is against this backdrop that this chapter provides a detailed analysis of plain packaging of cigarettes in the light of EU treaty provisions and existing EU legislation as well as the relevant case law.

III Legal Basis for EU-Wide Plain Packaging

A Background

According to the principle of conferral, the EU is not endowed with a general law-making power. As a result, it is necessary to search through the Treaty on the Functioning of the European Union ('TFEU') to identify a provision enabling the EU to adopt legislation in any given policy area¹⁷. To date, actual and potential legal bases for tobacco control policies include Article 38 (agriculture), Article 113 (taxation), Article 114 (internal market), Article 207 (commercial policy), Article 153 (worker's protection), Article 168 (public health) and Article 169 (consumer protection).

Currently, virtually all existing legislation on labeling, advertising and product regulation has been enacted based on the internal market basis provided for in Article 114. This is the most important TFEU provision relating to harmonisation: it empowers the EU to replace, by qualified majority vote, divergent national legislation with a common rule applicable across the whole territory. Although the protection of public health is one of the basic requirements that the EU must take into account in the enactment of any of its policies or activities,¹⁸ Member States remain generally competent to adopt

¹² Ibid 6.

¹³ Ibid 7.

¹⁴ Ibid.

¹⁵ Guidelines for implementation of Article 11 WHO FCTC, para 46 and Guidelines for implementation of Article 13 WHO FCTC, para 16.

¹⁶ Parliament of the Commonwealth of Australia, House of Representatives, *Tobacco Plain Packaging Bill 2011: Explanatory Memorandum* (6 July 2011) 2.

¹⁷ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ C 115, 9.5.2008, p. 1.

¹⁸ TFEU Article 9.

their own public health measures. This is because Article 168 of the TFEU — similarly to its predecessor, Article 152 of the Treaty of the European Community (TEC)¹⁹ — explicitly excludes the possibility of the EU harmonising the laws and regulations of Member States under that provision. Yet following the entry into force of the Lisbon Treaty ('Lisbon Treaty')²⁰, Article 168 adds two kinds of measures to the list of actions that could already be adopted in the past by the EU:

- in paragraph 4(c): 'measures setting high standards of quality and safety for medicinal products and devices for medical use';
- in paragraph 5: 'incentive measures designed to protect and improve human health ...and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonization of the laws and regulations of the Member States'.²¹

Although this is the first express reference to tobacco control measures to appear in the TFEU, it falls short of providing a new legal basis for the adoption of EU-wide measures such as plain packaging. Indeed, despite the implicit recognition that tobacco is detrimental to human health, the same provision expressly excludes the adoption of harmonized rules aimed at combating tobacco consumption. As a result, in the absence of any extension of the EU's powers following the entry into force of the Lisbon Treaty, the scope of competence of the EU in the field of public health remains, on the whole, largely unchanged.²²

This brief excursus into the complex world of EU competencies in regulating tobacco reveals that a legal basis for the introduction of plain packaging seems more likely to be found in TFEU Article 114 (internal market) than in TFEU Article 168 (public health).

Unlike many other legal bases provided for in the TFEU, Article 114 is not sector-specific and is rather driven by the functional concern to establish an internal market.²³ It is now settled that to rely on Article 114 as the basis for the adoption of a harmonised measure:

1. There must exist an 'internal market barrier' resulting from disparities in the measures of Member States;
2. This market barrier must not consist of an 'abstract risk of obstacles', but must 'obstruct the fundamental freedoms' or cause 'distortions of competition' within the internal market;
3. The intended harmonisation should 'genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market'.²⁴

¹⁹ Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community OJ C 321E, 29.12.2006, p. 1.

²⁰ TREATY OF LISBON AMENDING THE TREATY ON EUROPEAN UNION AND THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty]. As a result of the Lisbon Treaty, which entered into force on December 1, 2009, the distinction between the EC and EU has disappeared. The EC no longer exists under this name but is integrated within the European Union, which is now given explicit legal personality. TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C 191).

²¹ Emphasis added.

²² See, eg, Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford University Press, 2010) 325; Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010) 320-321.

²³ TFEU Article 26(2).

²⁴ See lastly *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* (Court of Justice of the European Union, C-58/08, 8 June 2010) [32].

B Existence of an Internal Market Barrier

Before ascertaining the existence of obstacles to trade warranting the introduction of plain packaging, one should recall that the European Court of Justice upheld the Tobacco Products Directive because it found that disparities existed between Member States' laws, regulations and administrative provisions on the presentation of tobacco products.²⁵ Therefore, in the framework of a revision of the Tobacco Products Directive, the question is whether obstacles still remain, or whether new ones have emerged, in the trade in tobacco products so as to justify the introduction of plain packaging.

As of today, virtually all features relating to tobacco packaging are harmonised under the Tobacco Products Directive. Therefore, the possibility of disparities in labeling across the EU would seem very limited. As suggested by the European Commission, the main, if not exclusive, source of discrepancies in product presentation seems to be pictorial warnings. As use of such warnings is voluntary at the EU level, some Member States have made them compulsory while others have not, thus leading to a disparity in labeling throughout the EU.

Would the existence of this obstacle alone justify the introduction of plain packaging in the EU internal market? The European Commission seems to believe so, despite the fact that the Tobacco Products Directive already addressed the potential disparities stemming from the voluntary character of picture-based warnings by introducing a common set of colour photographs.²⁶ Nevertheless, the European Commission suggests in its consultation document that the introduction of plain packaging of cigarettes could help to overcome this problem by enabling manufacturers currently affected by national mandatory graphic warnings to no longer comply with differing legislation. Yet it is doubtful whether the EU could defend the introduction of plain packaging as addressing this obstacle to the trade in tobacco products within the EU, for at least two reasons. First, it is self-evident that mandating pictorial warnings across the EU rather than introducing plain packaging would be a most immediate way to achieve the declared objective of removing this remaining disparity on the packages of cigarettes. Secondly, given the uncertainty regarding the exact relationship between plain packaging and pictorial warnings (should they be complementary or mutually exclusive?),²⁷ it remains unclear to what extent the introduction of plain packaging would remove the labeling disparities stemming from the voluntary character of pictorial warnings across the EU. The Australian scheme, as well as the majority of studies supporting plain packaging, suggest that standardised packs and mandatory graphic warnings go together.²⁸

C Existence of a Genuine Barrier to Trade

The only real obstacle to trade that an EU-wide plain packaging measure might remedy is legislative disparities that could potentially emerge from the introduction of national legislation mandating plain packaging. If the United Kingdom, France or Belgium introduced mandatory plain packaging of cigarettes, this would create an obstacle to trade 'such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market.'²⁹ In these circumstances, the

²⁵ *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, [65].

²⁶ See in particular Article 5(3) of the Tobacco Products Directive as well as *Decision 2003/641 On the Use of Color Photographs and Other Illustrations as Health Warnings on Tobacco Packages* [2003] OJ L 226/24.

²⁷ According to the tobacco control community, 'plain packaging cannot be dissociated from mandatory pictorial warnings': *Comments from the Tobacco Control Community on the RAND Report* (2010) 9. Nevertheless, the Commission discusses the two policy options separately in its stakeholder consultation paper.

²⁸ Tobacco Plain Packaging Bill 2011.

²⁹ *Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* (C-380/03) [2006] ECR I-11573, [37].

second condition for reliance on Article 114 of the TFEU could be satisfied. Absent national legislation mandating plain packaging in at least one EU country, this barrier is merely speculative. However, contrary to what one might expect, this is not an insurmountable problem to the adoption of plain packaging. A prospective obstacle to trade could still justify reliance on Article 114 if:

1. The emergence of such obstacles is 'likely'; and
2. The measure in question is 'designed to prevent them'.³⁰

It follows that should the European Commission be able to prove that obstacles to the free movement of tobacco products could arise as a result of the adoption of national plain packaging schemes, it would be able to validly rely on Article 114 to introduce plain packaging at the EU level despite the absence of actual obstacles to trade. It is therefore conceivable that a competence to harmonise that did not exist in the past may come into being where public pressure for national regulation is strong.³¹ In upholding the Tobacco Products Directive, the European Court of Justice also stated that 'progress in scientific knowledge is not... the only ground on which the EU legislature can decide to adapt EU legislation since it must, in exercising its discretion in this area, also take into account other considerations, such as the increased importance given to the social and political aspects of the anti-smoking campaign.'³²

D Intended Harmonisation Should Improve the Internal Market

To be validly adopted, an EU-wide plain packaging scheme should also 'genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.'³³ Under settled case law, if a mere finding of disparities between national rules, or an abstract risk of obstacles to the exercise of the fundamental freedoms or of distortions of competition, were sufficient to justify reliance upon Article 114, judicial review of compliance with the conditions underpinning that legal basis might be rendered nugatory.³⁴ To avoid this, measures adopted under Article 114 must actually contribute to the elimination of obstacles to free movement, or remove appreciable distortions of competition within the internal market.

This requirement imposes a check on proposed harmonisation measures that prevents them from circumventing the legal basis requirement. In this respect, it seems undisputed that a general rule mandating standardised packaging for the marketing of cigarettes in Europe would effectively remove any such obstacles. However, such a measure would also clearly pursue another objective: the protection of public health.

³⁰ See *Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* (C-380/03) [2006] ECR I-11573, [38].

³¹ See also *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* (C-210/03) [2004] ECR I-11893, [38].

³² *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, [80].

³³ *Federal Republic of Germany v European Parliament and Council of the European Union* (C-376/98) [2000] ECR I-08419, [84]; *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, [60]; *Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* (C-380/03) [2006] ECR I-11573, [37].

³⁴ *Federal Republic of Germany v European Parliament and Council of the European Union* (C-376/98) [2000] ECR I-08419, [84]; *Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* (C-380/03) [2006] ECR I-11573, [37]; *Arnold André GmbH & Co KG v Landrat des Kreises Herford* (C-434/02) [2004] ECR I-11825, [30]; *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* (C-210/03) [2004] ECR I-11893, [29]; *The Queen, on the Application of Alliance for Natural Health and Others v Secretary of State for Health and National Assembly for Wales* (C-154/04 and C-155/04) [2005] ECR I-6451, [28].

It is settled case law that, provided that the legal conditions for recourse to Article 114 are fulfilled, 'the EU legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made.'³⁵ This is supported by the first subparagraph of Article 168, which provides that a 'high level of human health protection' is to be ensured in the implementation of all EU policies and activities. In sum, while Article 168 excludes any harmonisation of laws and regulations of Member States that is designed to protect human health, that provision does not mean 'that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health.'³⁶

E Conclusion on Legal Basis

Our analysis identifies the legal conditions under which plain packaging of cigarettes could be validly introduced in the EU legal order by relying on the internal market legal basis. The European Commission, being explicitly bound to uphold 'a high level of human health protection', could propose the enactment of an EU-wide plain packaging scheme even in the absence of an actual barrier to trade. This is because, given the increasing consideration of plain packaging schemes by the legislatures of Member States, there seems to be more than an abstract risk of obstacles arising in the near future.

IV Proportionality

Plain packaging, like any other policy option proposed by the European Commission and adopted by the EU legislature, is subject not only to the principle of conferral but also to the principle of proportionality. Under this principle, the content and form of EU action must not exceed what is necessary to achieve the objectives of the TFEU. According to established case law, an EU act is proportionate when it is suitable and necessary to achieve its declared goal.³⁷ In particular, the principle of proportionality requires:

1. That measures adopted by EU institutions should not exceed the limits of what is suitable or appropriate in order to attain the legitimate objective pursued by the legislation in question (suitability limb);
2. Where there is a choice between several appropriate measures recourse must be had to the least onerous method (necessity limb); and
3. That the disadvantages caused must not be disproportionate to the aims pursued (proportionality stricto sensu).³⁸

A The Declared Objective(s) of Plain Packaging

For the reasons mentioned above, it is likely that plain packaging, similar to all tobacco control tools adopted in the past, would be presented as pursuing an internal market objective. At the same time, given the undisputable public health character of the standardised pack, the EU measure, in accordance with Article 114(3) of the TFEU, would also encompass a high level of human health protection. Research shows that packaging of tobacco products is an important element of

³⁵ *Federal Republic of Germany v European Parliament and Council of the European Union* (C-376/98) [2000] ECR I-08419, [88]; *Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* (C-380/03) [2006] ECR I-11573, [39], [92].

³⁶ *Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* (C-380/03) [2006] ECR I-11573, [95].

³⁷ See, eg, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (C-11/70) [1970] ECR 1125.

³⁸ *Pfizer Animal Health v Council* (T-13/99) [2002] ECR II-3305, [411].

advertising and promotion.³⁹ In particular, it suggests that removing the colour, brand imagery and logos from packaging not only reduces its attractiveness but also enhances the ability to communicate health warning to the consumer.⁴⁰ However, given the rather polarised scientific debate over its effectiveness in reducing tobacco-related morbidity and mortality,⁴¹ the impact of plain packaging on smoking behavior is not easily defined with precision.⁴² According to the Guidelines on Article 11 and Article 13 of the WHO FCTC,⁴³ plain packaging may reduce the prevalence of tobacco use so as to protect present and future generations from the adverse consequences of tobacco consumption in the three ways: by increasing ‘the noticeability and effectiveness of health warnings and messages’; by preventing ‘the package from detracting attention from them’; and by addressing ‘industry package design techniques that may suggest that some products are less harmful than others’ and that ‘attract consumers, promote products and cultivate brand identity’.

Therefore, depending on the exact formulation of the declared public health objectives selected by the EU Commission when proposing a EU-wide plain packaging scheme, the outcome of the proportionality test might differ. For the purposes of our analysis, we assume that the declared goal of the measure will be the free movement objective combined with the aim to ensure a high level of health protection.

Once the objectives pursued are identified, it is necessary to determine whether plain packaging of cigarettes exceeds the limits of what is appropriate (suitability limb) and necessary (necessity limb) to achieve those objectives.⁴⁴

B The Proportionality Inquiry

1 Suitability

Under the first limb of the proportionality test, the European Court of Justice inquires first whether the adopted measure is suitable or appropriate to achieve the desired end. Therefore, the question to be determined in applying the suitability test is whether plain packaging has any benefits at all for the harmonisation of national laws on plain packaging that are likely to arise and for achieving a high level of human health protection. It seems quite easy to prove that an EU-wide scheme would overcome emerging disparities among national labeling schemes. It is more problematic to prove the

³⁹ See, eg, David Hammond et al, ‘Cigarette Pack Design and Perceptions of Risk Among UK Adults and Youth’, (2009) 19 *European Journal of Public Health* 631 and Crawford Moodie & Gerard B Hastings, ‘Making the Pack the Hero, Tobacco Industry Response to Marketing Restrictions in the UK: Findings from a Long-Term Audit’ (2009) 9 *International Journal of Mental Health and Addiction* 24.

⁴⁰ Sambrook Research Institute, *A Review of the Science Base to Support the Development of Health Warnings for Tobacco Packages* (prepared for European Commission, Directorate General for Health and Consumers, 18 May 2009) 147-48.

⁴¹ A significant number of reports, mainly commissioned by the tobacco industry, has recently been published with the declared goal of assessing the existing literature. These documents typically highlight the methodological limits and flaws of the existing studies. See, eg, Jorge Padilla and Nadine Watson, *A Critical Review of the Literature on Generic Packaging for Cigarettes* (prepared for Philip Morris International, 4 January 2010); Berenberg Bank, *Global Tobacco – The Plain Risk to Global Tobacco* (21 March 2011); Deloitte, *Tobacco Plain Packaging Regulation: An International Assessment of the Intended and Unintended Impacts* (Prepared for British American Tobacco, May 2011).

⁴² United Kingdom Department of Health, *A Smokefree Future: A Comprehensive Tobacco Control Strategy for England* (1 February 2010) 3.25.

⁴³ WHO Framework Convention on Tobacco Control Conference of the Parties, ‘Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control’, FCTC/COP3(10) (22 November 2008); WHO Framework Convention on Tobacco Control Conference of the Parties, ‘Guidelines for Implementation of Article 13 of the WHO Framework Convention on Tobacco Control’, FCTC/COP3(12) (22 November 2008).

⁴⁴ See, eg, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* (C-331/88) [1990] ECR I-4023, [13].

extent to which plain packaging is appropriate to contribute to a high level of human health protection. In these circumstances, as illustrated below, the intensity of judicial review exercised by the EU courts is crucial in determining the outcome of the suitability inquiry.

2 Necessity

The second limb of the proportionality test is an inquiry into the necessity of the harmonised measure. Under settled case law, necessity means that the measure adopted through EU action must not go beyond what is necessary to achieve its objective⁴⁵. In practical terms, the necessity limb requires verification whether or not less restrictive measures to achieve the declared goal could exist. Provided that these alternative policy options exist, the legislator is bound to choose the least intrusive of all equally effective means in order not to undermine the Member States' regulatory autonomy.

The question is therefore whether plain packaging is necessary to achieve the internal market objective or whether this could be achieved by a less onerous method. If we assume that the trade barrier targeted by EU plain packaging is the adoption of national regimes in one or more Member States, it is difficult to imagine an alternative measure. However, this conclusion assumes that such national schemes would be legal under EU law. As illustrated in section VII, this remains an open question.

3 Judicial Review of Proportionality

The crucial issue in any proportionality analysis is the intensity of judicial review applied by the court. The EU judiciary is quite careful not to substitute its judgment for that of the EU legislature and tends to be quite deferential with respect to discretionary policy choices.⁴⁶ It is settled case law that the EU legislature 'must be allowed a broad discretion in an area... which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessment.'⁴⁷ Moreover, it is generally held that 'where the Community legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question.'⁴⁸ The rationale for this application of proportionality, which is generally defined as 'manifest disproportionality', finds its origin in a mix of concerns relating to legitimacy and expertise.⁴⁹ Indeed, as illustrated by our previous analysis, very often the proportionality test turns on questions of evidence that lead the EU jurisdiction far from its area of epistemological competence. However, while operating within a 'manifest disproportionality' test, EU Courts often engage with the contending arguments and, in so doing, may sometimes find an error warranting annulment. Given the uncertainty surrounding the judicial application of the principle, it is not easy to predict how the EU judiciary may review the proportionality of a hypothetical EU-wide plain packaging scheme.

V Trademark Regime

⁴⁵ See, e.g., Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; Case C-339/92 *ADM Ölmühlen* [1993] ECR I-6473, paragraph 15; and Case C-210/00 *Käserer Champignon Hofmeister* [2002] ECR I-6453, paragraph 59.

⁴⁶ See *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* (C-120/97) [1999] ECR 223, [34].

⁴⁷ See, to that effect, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (C-84/94) [1996] ECR I-5755, [58]; *Federal Republic of Germany v European Parliament and Council of the European Union* (C-233/94) [1997] ECR I-2405, [55]-[56]; *The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, Ex Parte National Farmers' Union and Others* (C-157/96) [1998] ECR I-2211, [61].

⁴⁸ *Agrarproduktion Staebelow GmbH v Landrat des Landkreises Bad Doberan* (C-504/04) [2006] ECR I-679, [38]; *Jippes and Others v Minister van Landbouw, Natuurbeheer en Visserij* (C-189/01) [2001] ECR I- 5689, [84].

⁴⁹ Paul Craig, *EU Administrative Law* (Oxford University Press, 2006) 668-9.

A further obstacle to the introduction of plain packaging is the EU trademark regime. Plain packaging entails the removal of all the design elements typically displayed on cigarette packs. The use of the characterising features of brand names (eg ‘Marlboro’, ‘Camel’, etc) would also be banned from the pack: in particular the distinctive typeface, color and font size of tobacco signs would be replaced by a standard plain format. Tobacco manufacturers typically register all these signs as trademarks. Indeed, Article 2 of Directive 2008/95⁵⁰ (‘Trademark Directive’) provides 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’.⁵¹ An analogous provision is contained in Article 4 of Regulation 207/2009⁵² (‘Trademark Regulation’).

Given the likelihood that these EU trademark provisions would be invoked to oppose the introduction of this tobacco control measure, the following paragraphs analyse the compatibility of an EU-wide plain packaging scheme with EU trademark law.

A Does Plain Packaging Jeopardise the Main Function of Trademarks?

Trademarks make it easier for the public to make educated purchase decisions. It is for this reason that, in order to be registrable, trademarks should effectively distinguish the goods or services of one company from those of other companies.⁵³ This has been recognised by the EU courts as well as the decision practice of the Office for Harmonization in the Internal Market (‘OHIM’).⁵⁴

This fundamental function may be threatened should trademarks not be visible, or even available, to consumers when selecting a product. This is exactly what plain packaging would create, as all of the distinctive elements displayed on the box would be removed. This new measure may therefore threaten consumers’ ability to make reasoned choices, as there would be little difference — besides the brand names — between the different cigarette boxes marketed by tobacco companies.

The concerns related to the loss of distinctiveness appear heightened if examined in the light of ECJ findings made in proceedings involving the legality of the Tobacco Products Directive. In this case the ECJ 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 trademark rights. After confirming that this provision prohibits the use of trademarks incorporating the above descriptors, the Court noted that tobacco producers may continue using other distinctive signs on the packs. In particular, it held that ‘[w]hile 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

⁵⁰ *Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States Relating To Trade Marks* [1998] OJ L 299/25.

⁵¹ Emphasis added. The Trademark Directive codified the previous *First Council Directive 89/104/EEC of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks* [1988] OJ L 40/1, which had been amended by *Council Decision 92/10/EEC of 19 December 1991 Postponing the Date on which the National Provisions Applying Directive 89/104/EEC to Approximate the Laws of the Member States Relating to Trade Marks Are to be Put Into Effect* [1992] OJ L 6/35.

⁵² *Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community Trade Mark* [2009] OJ L 78/1.

The Trademark Regulation codified the previous *Council Regulation (EC) No 40/94 of 20 December 1993 on the Community Trade Mark* [1994] OJ L 11/1, which had been amended several times.

⁵³ See Trademark Directive Article 2, Recital 11; Trademark Regulation, Article 4.

⁵⁴ See, eg, *Arsenal Football Club plc v Reed* (C-206/01) [2002] ECR I-10273, [47]. See also OHIM, Fourth Board of Appeal, November 19, 2008, Case No. R 804/2008-4 (with particular reference to three-dimensional trademarks).

from the packaging, to distinguish its product by using other distinctive signs'.⁵⁵ According to an a contrario interpretation of this finding, it may seem that a measure that does not allow tobacco producers to use signs capable of distinguishing their products might negatively impact on the main function of their trademarks.⁵⁶

Yet the above finding could not be invoked to claim that plain packaging is not compliant with EU trademark law. The distinctiveness of a trademark is relevant when it comes to granting registration, with the result that signs devoid of distinctive character will not be protected.⁵⁷ However, this does not mean that public law measures that have a negative impact on the distinctive character of already registered trademarks are necessarily contrary to EU law as there is no a general prohibition on restricting the use of distinctive elements under EU law .

B Does Plain Packaging Infringe Trademark Rights?

In order to determine if plain packaging is contrary to EU trademark law, it is necessary to investigate if and to what extent it encroaches upon the rights offered by trademark registration. Article 5 of the Trademark Directive and Article 9 of the Trademark Regulation, lay down the scope of protection given by a trademark registration. It is generally believed that these provisions do not offer their owners a positive right to use the protected sign, but a negative right to prevent third parties from using it.⁵⁸ Indeed, the right to use a sign does not arise from registration at all, but from the freedom to carry out commercial activities in the market⁵⁹. As a matter of fact any person interested in trading is free to start using trademarks for distinguishing his products and services, provided that such signs do not infringe upon earlier exclusive rights owned by third parties.

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.⁶⁰ 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

⁵⁵ *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (C-491/01) [2002] ECR I-11453, [152].

⁵⁶ See also Burkhardt Goebel, 'Trademarks as Fundamental Rights—Europe' (2009) 99 *Trademark Reporter* 953.

⁵⁷ See Trademark Directive Article 2; Trademark Regulation Article 4.

⁵⁸ See Chapter 5 in this volume (analysing an analogous provision of TRIPS Agreement, Article 16). See also Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Kluwer, 2001) 291; Carlos Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, (Oxford University Press, 2007) 182; Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WTO Doc WT/DS176/AB/R (adopted 1 February 2002) [186]; Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, WTO Doc WT/DS290/R (adopted 20 April 2005) [7.664] ('EC – Trademarks and Geographical Indications (Australia)').

⁵⁹ 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) 4 *European Intellectual Property Review* 198, 199.

⁶⁰ 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) 22-29. See also Report by Daniel Gervais for Japan Tobacco International, *Analysis of the Compatibility of certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention* (30 November 2010) 11-12; Kur, n 59, 203.

right is essentially a right enforceable against other individuals if they infringe the use made by the holder.⁶¹

Following this interpretation, it would seem that plain packaging — which would be implemented by ‘provisions of public law’ — would not breach trademark 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. Despite the loss of distinctiveness of tobacco trademarks, rights holders could still exercise the right to prohibit the misappropriation of their signs by unauthorised third parties.

Thus, the fact that trademark 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.⁶² The validity of this conclusion seems confirmed by the WTO Panel in the abovementioned *EC – Trademarks and Geographical Indications (Australia)*⁶³, a case between US and EU regarding the former’s coexistence regime between geographical indications and trademarks⁶⁴. In that case, the Panel held that a ‘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’.⁶⁵

VI Fundamental Rights

The enactment of an EU-wide plain packaging scheme may encounter further difficulties when examined in the light of the fundamental rights of the European Union. Under Article 6 of the Treaty of the the European Union (TEU)⁶⁶, these rights flow on the one hand from the Charter of Fundamental Rights of the EU (‘Charter’)⁶⁷, and on the other from the European Convention of Human Rights (‘ECHR’)⁶⁸ as well as the constitutional traditions common to the Member States. Under Article 52(3) of the Charter, the meaning and scope of Charter rights that correspond to ECHR rights are the same as those laid down in the ECHR. Although the EU is not directly bound by the ECHR, the ECJ recognizes, under settled case law, ECHR rights as general principles of EU law:⁶⁹ a breach of these rights might thus amount to a violation of EU law. The question is therefore whether plain packaging may encroach upon the fundamental freedom to pursue trade as well as the right of property, as enshrined in the Charter and the ECHR.

The fundamental freedom to pursue trade is protected by Article 16 and the right to property by Article 17 of the Charter. Before being codified in the Charter, both rights were recognised as general

⁶¹ See Opinion of Advocate General Geelhoed in Case C-491/01, para 266 (emphasis added).

⁶² See Chapter 5 in this volume (analysing the compatibility of plain packaging with the TRIPS Agreement).

⁶³ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, WTO Doc WT/DS290/R (adopted 20 April 2005) [7.664].

⁶⁴ The EU and its Member States are WTO Members and thus they must respect WTO agreements including TRIPS and the interpretations given by WTO adjudicatory bodies.

⁶⁵ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, WTO Doc WT/DS290/R (adopted 20 April 2005) [7.246].

⁶⁶ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ C 115, 9.5.2008, p. 1.

⁶⁷ Charter of Fundamental Rights [2000] OJ C364/1.

⁶⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

⁶⁹ Following the entry into force of the Lisbon Treaty, the EU is mandated to join the ECHR. Yet the modalities under which the EU will accede to the ECHR remain to be seen. See J P Jacqué, ‘The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms’ (2011) 48 *Common Market Law Review* 995.

principles of EU law.⁷⁰ Neither is an absolute right,⁷¹ but may be subject to restrictions that pursue objectives of general interest and that do not constitute, in relation to the aim pursued, a disproportionate interference that impairs the very substance of the right in question.⁷²

The limitations on the use of brands imposed by plain packaging would not impair the very substance of the right of the tobacco industry to pursue its trade. This is because such limitations would only have an impact on how the right is exercised, without putting at risk its existence.⁷³ Even after the introduction of an EU-wide plain packaging regime, tobacco manufacturers would still be able to place their goods on the market. Moreover, in the absence of a positive right of use enshrined in their trademark rights, it is unlikely that the tobacco industry could successfully challenge plain packaging by claiming that it amounts to a breach of the right to property.

VII The Legality of National Plain Packaging Schemes under EU Law

Our investigation has so far focused on whether an EU-wide plain packaging scheme would be compatible with EU law. To provide a full analysis, however, it is necessary to consider an increasingly likely scenario in which one or more of the Member States of the EU introduces its own national plain packaging scheme.

A Drivers Behind the Adoption of Plain Packaging at the National Level

The drivers behind the enactment of plain packaging legislation at the national level are similar to those that might lead the EU to embrace plain packaging. Virtually all Member States are parties to the WHO FCTC⁷⁴ and as such Article 11 and Article 13 and their Guidelines encourage them to develop effective restrictions on the labeling and advertising of cigarettes. In principle, in the absence of EU regulatory action, Member States are free to adopt plain packaging schemes within their own jurisdictions. However, the likely obstacles to the free movement of cigarette products that might stem from such schemes raise questions as to whether they would be compatible with EU law.

B Obstacles to the Free Movement of Tobacco Products

Article 34 of the TFEU prohibits quantitative restrictions within the EU and applies to all 'trading rules enacted by Member States, which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.⁷⁵ There is no doubt that plain packaging rules could constitute obstacles to the free movement of tobacco products. However, national schemes may nonetheless be justified under Article 36 of the TFEU on the grounds of protecting of public health. To justify a measure, the relevant Member State would need to prove that it: (i) falls within one of the grounds of justification covered by the first sentence of Article 36 (ie public health); (ii) is justified because it is necessary and appropriate to achieve that objective; (iii) does not constitute arbitrary discrimination or a disguised restriction on trade between Member States. Thus, Member State action must pass a test of proportionality that is similar to the test applied to EU-wide measures. However, because of the potentially disruptive effect that national measures may have on the EU internal market, EU courts tend to engage in a more intensive review when determining whether

⁷⁰ C-306/93, *SMW Winzersekt GmbH v Land Rheinland-Pfalz* [1994] ECR 1994, I-05555, para 22.

⁷¹ C-210/03, note 31, para 72 ; C-183/95, *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* [1997] I-04315, para 42.

⁷² See, e.g., C-210/03, above note 31, para 72; Case 265/87 *Schröder* [1989] ECR I-2237, para 15; Case C-280/93 *Germany v Council* [1994] ECR I-4973, para 78; and C-223/02 *Spain and Finland v Parliament and Council* [2004] ECR I-7789, para 52.

⁷³ See, by analogy, *SMW Winzersekt GmbH v Land Rheinland-Pfalz* (C-306/93) [1994] ECR I-5555 [24].

⁷⁴ All EU Member States, with the exception of the Czech Republic, have signed and ratified the WHO FCTC.

⁷⁵ *Procureur du Roi v Dassonville* (C-8/74) [1974] ECR 837, 852.

restrictive measures adopted by a Member State are necessary or warranted⁷⁶. Moreover, unlike an EU-wide scheme, national plain packaging schemes would be examined solely in light of the objective of protecting public health under both the suitability and necessity tests. This is likely to lead the interpreter, be it the ECJ or a national court applying EU law, to engage in a closer analysis of the effectiveness of plain packaging in reducing tobacco consumption.

Although the burden of proof bears on the acting Member State, who has to adduce evidence or data in support of the contested measure, the national authorities cannot – in principle – “be deprived of the possibility of establishing that an internal restrictive measure satisfies those requirements, solely on the ground that that Member State is not able to produce studies serving as the basis for the adoption of the legislation at issue”⁷⁷. This would seem to suggest that, despite a more intrusive standard of judicial review, national measures may still survive, at least in principle, the proportionality scrutiny even in the absence of ‘hard’ evidence in their support. The judgment delivered on September 12, 2011 by the EFTA Court, *Philip Morris v Norway*⁷⁸, seems to confirm this conclusion⁷⁹. In a request for an advisory opinion, the EFTA Court was asked to determine whether a general prohibition on the visible display of tobacco products, such as the total advertising ban in force in Norway since January 2010, could entail a measure having an equivalent effect to a quantitative restriction within the meaning of Article 11 of the European Economic Area (EEA) Agreement, whose language essentially overlaps with Article 34 TFEU. The Court held that “by its nature” a visual display ban of tobacco products is not only liable to favour domestic products over imported ones – as consumers tend to be more familiar with the former⁸⁰ –, but also that such a discriminatory effect would be particularly significant with regard to market penetration of new products⁸¹. It then justified such a measure by judging that “visual display ban is suitable for the protection of public health as by its nature it seems likely to limit, at least in the long run, the consumption of tobacco products”⁸². Despite the fact that the ECJ is not formally bound by the EFTA Court’s case law, the reasoning developed by the latter in *Philip Morris v Norway* might be followed, by analogy, by the ECJ when called upon to examine the legality of national plain packaging schemes under EU law⁸³.

C The ‘Unitary Effect’ of Community Trademarks

Another area in which the introduction of plain packaging at the national level may give rise to concerns is trademark law. One of the main principles of EU trademark law is the so-called ‘unitary effect’ of the Community Trademark, which is a unique title granted by the Office for the Harmonization in the Internal Market that is valid in all the twenty-seven EU Member States.

⁷⁶ See, on this point, Alberto Alemanno, *The Shaping of EU Risk Regulation by EC Courts* (Jean Monnet Working Paper 18/2008); Craig, *EU Administrative Law*, above n 49, 688-9, 704-6.

⁷⁷ *Markus Stoß and Others v Wetteraukreis; Kulpa Automatenservice Asperg GmbH and Others v Land Baden - Württemberg* (Court of Justice of the European Communities, C-316/07, C-358/07, C-360/07, C-409/07 and C-410/07, 8 September 2010) [72].

⁷⁸ E-16/10 *Philip Morris Norway v Staten v/Helse- og omsorgsdepartementet*, 2011 not yet reported.

⁷⁹ This Court has jurisdiction with regard to EFTA States which are parties to the EEA Agreement (at present Iceland, Liechtenstein and Norway). See *Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (ESA/Court Agreement)*.

⁸⁰ Para 48. The Court reached this conclusion by relying on *Gourmet*, a judgment in which the CJEU stated that « a general prohibition on advertising of alcohol...must...be regarded as potentially affecting market access for products from other Member States more heavily than for domestic products », because alcoholic beverages, the consumption is linked « to traditional social practices and to local habits and customs ». See C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* [2001] ECR I-1795, at paragraph 21.

⁸¹ E-16/10 *Philip Morris Norway v Staten v/Helse- og omsorgsdepartementet*, 2011 not yet reported, para 49.

⁸² *Ibid.*, para 84.

⁸³ See, Alberto Alemanno, *The Philip Morris judgment: the EFTA Court enters the post-Keck debate with a precautionary twist*, *European Law Reporter* (forthcoming, 2011).

According to this principle, as enshrined in Article 1(2) of the Trademark Regulation,⁸⁴ a Community Trademark 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 in respect of the whole Community’.⁸⁵ In other words, the Community Trademark is a unique title that is valid in all 27 Member States, meaning that its use cannot be prohibited in individual countries.

The introduction of plain packaging at a national level, by preventing the use of tobacco-related Community Trademarks in some Member States but not others, is likely to clash with the unitary character of the Community Trademark system. Although Article 22 of the Trademark Regulation provides for an exception to this principle by stating that a Community Trademark may be licenced for the whole or part of the Community, no exception to the principle of unitary effect would allow individual Member States to prohibit the use of Community Trademarks licensed for the EU as a whole.

VIII Conclusion

The analysis above demonstrates that the road towards mandatory plain packaging of cigarettes within the EU faces several difficulties under EU law. This is especially the case for national schemes, which — in the absence of a proposal for an EU-wide plan — seem likely to be adopted. However, the mere likelihood that these schemes could be adopted may give the EU competence to adopt an EU-wide plain packaging scheme. Thus, regardless of whether plain packaging is considered as an ‘internal market enhancer’ or as an ‘anti-misleading marketing tool’, it is likely that the EU could validly introduce a plain packaging scheme within the EU legal order. However, while the obstacles to trade that would stem from national plain packaging schemes may give the EU competence to act, any EU-wide scheme would still face legal hurdles.

⁸⁴ On the nature of Community Trademarks see also David Bainbridge, *Intellectual Property* (Pearson, 2010) 792.

⁸⁵ Emphasis added. This provision applies unless otherwise provided in the Trademark Regulation (see Recital 3).