

Ref: European Commission's Proposal for a revised Tobacco Products Directive

Business Action to Stop Counterfeiting and Piracy (BASCAP), an initiative of the International Chamber of Commerce (ICC), takes this opportunity to express its views and concerns on the European Commission's Proposal for a new Tobacco Products Directive COM(2012) 788 final).

BASCAP unites the global business community across all product sectors to address issues associated with intellectual property theft and to petition for greater commitments by local, national and international officials in the enforcement and protection of intellectual property rights. BASCAP supports the protection of public health as an underlying principle. As such, our views pertain to extenuating impacts on intellectual property rights and counterfeiting, and not the health-related aspects of the proposal. Furthermore, we preface our views with the acknowledgement that BASCAP membership comprises, inter alia, companies engaged in the manufacture and sale of tobacco products. Nonetheless, these views are registered on behalf of the cross-sector representation of BASCAP member companies equally concerned about the wider implications of the Proposal.

Trademarks, which are signs used to distinguish products, operate as indicators of origin and quality. The use of validly registered trademarks on lawfully available and legitimately competing products is therefore an important instrument to prevent counterfeiting and illicit trade.

BASCAP is pleased to note that the European Commission did not introduce plain or standardized packaging in its Proposal – such packaging is of great concern to BASCAP because it would prevent the use of validly registered trademarks and thereby disregards fundamental rights such as the right to property, the right to freedom of expression and information and the freedom to conduct business which were given renewed importance by the Treaty of Lisbon. These rights are secured in the Charter of Fundamental Rights of the European Union. Intellectual property rights such as the use of trademarks are explicitly covered by the right to property in Article 17 of the Charter of Fundamental Rights of the European Union. Furthermore plain packaging would violate the EU's international obligations in particular the TRIPS Agreement, the Paris Convention, and the WTO Agreement on Technical Barriers to Trade.

BASCAP remains concerned that a number of other measures currently included in the Proposal will result in a backwash of unintended negative consequences, undermining intellectual property rights and increasing the problem of counterfeiting throughout the EU. In particular, the Proposal, as currently drafted:

- Permits in article 12(2) the prohibition of elements or features based on uncertain concepts that are not otherwise defined or clarified, such as "positive social effects" or "misleading colors". This open-ended approach gives Member States the possibility to arbitrarily limit the use of validly registered trademarks and thereby disregarding the above mentioned fundamental rights and international binding trade obligations.
- Foresees a drastic minimization of package space available to the brand and other trademark characteristics, thereby limiting their distinguishing features.

In addition, BASCAP notes that the draft report of the European Parliament's Committee for Environment, Public Health and Food Safety (ENVI) proposed amendments to the Proposal which will introduce "standardized packaging", which is tantamount to so called plain packaging.

The measures identified above will seriously undermine the ability of brand owners to market their product in unique and easily identifiable ways, which is fundamental to the protection of intellectual property rights. Removing one industry's ability to use its intellectual property rights opens the door to extend this violation to other industries and other brand owners in the EU and elsewhere. The measures:

- Seriously compromise and undermine the EU's long-standing intellectual property rights policies and the laws and enforcement regimes established to protect them.
- Severely infringe manufacturers' intellectual property rights, which are legally protected against interference by the Charter of Fundamental Rights and fail to respect the very *essence* of the property right or free speech rights as required by the Charter of Fundamental Rights.
- Impair manufacturers' right to conduct business as protected by the Charter of Fundamental Rights. .
- Breach WTO rules, including Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as they unjustifiably encumber the use of trademarks, and Article 2.2 of the Technical Barriers to Trade (TBT) Agreement - as they are more trade restrictive than necessary.
- Undermine the EU's ability to prevent other countries from introducing similar trade restrictive and disproportionate measures for other products, impacting EU business in food, beverage and spirits sectors, for example.
- Increase rather than decrease burdens on already overstretched public agencies working to enforce intellectual property protections in the face of escalating counterfeiting and piracy throughout the EU and worldwide.

The EU institutions are currently sending a worrying signal to the business community about their commitment to respecting and protecting intellectual property rights. It is extraordinary that in the wake of rejecting the Anti-Counterfeiting Trade Agreement (ACTA), the EU institutions are considering the adoption of measures that will further weaken the intellectual property rights of the business community, and could jeopardize the EU's reputation as an international champion of intellectual property rights.

These measures are of concern to all businesses that depend on the protection of intellectual property rights and the business community remains wary of the introduction of similar measures for other products in the future.

We are hopeful that a balanced and considered version of the proposed Tobacco Products Directive will emerge that respects intellectual property rights, the Charter of Fundamental Rights and recognizes the value of trademarks in the fight against counterfeiting and other illicit trade practices. BASCAP remains committed to supporting the EU institutions in ensuring the safeguarding of the protection of intellectual property rights.

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