



MARKENVERBAND

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## BRANDS CONTRIBUTE TO A SMART AND SUSTAINABLE ECONOMY AND TO PROSPERITY IN EUROPE

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Europe draws its economic performance and competitiveness from knowledge, innovation and creativity. Quality, innovation and performance can only be clearly positioned, distinctly differentiated and reliably defended via brands. This safeguards competitive advantages for high-quality, innovative products, which on their part contribute to stable, well-paid jobs.

Attacks on brands themselves – also with disproportionate regulation – are detrimental to a smart and sustainable economy in Europe and the European social model.

Brands – irrespective of industry and company size – are regularly affected by comprehensive regulation with respect to labelling and warnings. “Plain packaging” is threatening their very existence.

Disproportionate regulation has a negative impact on the benefits of brands for society, consumers and companies. Foreseeable collateral damage to the entire economy – for instance to competitiveness and innovative capacity, growth and employment, as well as on fair competition and the developed culture of consumption– needs to be resolutely avoided.

**Plain packaging as the prohibition of any trademarks, typical brand lettering and logos, figurative and colour marks is a dramatic attack on brands themselves. This is a regulatory mistake and should be rejected as a regulatory option.**

## 1. Brands create a culture of consumption and societal trust

Brands provide a **reliable performance promise**. They stand for distinctive products which optimally combine consumer wishes and technological possibilities to the result of resource-efficient solutions across the entire value chain.

Brands guarantee a clear allocation of entrepreneurial performance. This also applies with respect to social, ecological and environmental responsibility and sustainability. Brands communicate **social compatibility** and strengthen such by enabling empowered consumers to make informed purchase decisions.

Brands stand for fair competition on the merits. This is a prerequisite and catalyst for high quality, constant innovation, efficient management of all resources, fair prices and ultimately for **well-functioning markets**<sup>1</sup>. Brands build trust and if there is no trust markets collapse.

Brands support a **lively, diverse and differentiated society**. They allow for individual and freely chosen affiliation to communities and strengthen identification with like-minded people and differentiation to others.

## 2. Brands strengthen the empowerment of consumers

Brands make decisive contributions to bringing the concept of the empowered consumer to life. They stand for constant innovation, high quality, an attractive price-performance ratio and transparent compliance with high social, societal and environmental standards.

Brands per se communicate **constantly verifiable consumer information** and make a significant contribution to a high level of consumer protection<sup>2</sup>. Brands act as beacons in the market. By branding products, a company provides orientation, is clearly recognisable and a reliable contact partner for praise and criticism.

Brands ensure market transparency and offer **consumers clear orientation** because reliable knowledge regarding the quality of products eliminates uncertainty and risk. Brands distinguish and thereby facilitate the efficient finding of the desired product, minimise time-consuming information and search processes, prevent bad buys and

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<sup>1</sup> In detail: "Brands in Competition", MARKENVERBAND position paper published in January 2010.

<sup>2</sup> In detail: "Brands and Consumer Protection", MARKENVERBAND position paper published in January 2010.

therefore save money<sup>3</sup>. Brands form the basis of informed and intended purchasing, they reduce complexity in the interest of the empowered consumer and satisfy the desire to simplify everyday life. Brands offer clear orientation and create **trust**.

Brand-oriented companies invest heavily in identifying and analysing consumer wishes and satisfying these with attractive performances. Thus they spur competition to find the consumer-friendliest solutions and provide for a **wide choice for consumers**.

### 3. Brands contribute to the competitiveness of companies

Brands give companies the possibility of **clear differentiation** in an increasingly developed and global market. They provide clear information on the origin of a product and thus a clear allocation of product characteristics to a company.

This clear allocation makes it possible to create **customer loyalty** to brands and companies. This, as a consequence, secures return on investment as the basis for further investments in innovation, value creation and economically viable jobs.

For many companies, brands are often their **most important and most valuable assets**. And protecting these brands means acknowledging the intrinsic value of companies. It also means opening their access to qualitative sources of finance by making it possible for intangible assets to be taken into consideration appropriately and manageably<sup>4</sup>.

### 4. Brands communicate with shape, image, lettering and colour

Companies rely on individual product design to assert and anchor brand promise and brand value. This is based on a specific use of form and brand-specific lettering and figurative and colour marks. Individual symbolism provides an anchor to which the allocation of product characteristics, competitive differentiation and orientation for consumers can be attached.

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<sup>3</sup> In detail: Weizsäcker, Carl Christian: Discounting ist nicht die Zukunft der Wirtschaft.  
In: Markentechnik Jahrbuch 2008 / 2009.

<sup>4</sup> Of significance here is the work of ISO on the development of uniform brand valuation standards.

This connection has been confirmed in a survey of MARKENVERBAND members together with the German Design Council. In the study "The Beauty of Added Value"<sup>5</sup>, the added business value of brands and designs is evidenced empirically for the first time.

Companies above all see clear added value in design for launching new products (95 %), winning market share (87 %) and value-based pricing (84 %). Over 95 % see design as playing a major role in the brand value of their company.

For almost 94 %, the packaging design of their products is very important for the management and stewardship of their brand. At the same time, more than 75 per cent see state regulation of packaging design as having an impact on their design and communication possibilities.

## **5. Brands are values in themselves, which must be nurtured and protected**

Brands position European innovations and performance on an increasingly global market. The protection of brands – above all from globally increasing counterfeiting and piracy – has rightly received considerable attention for many years. Companies invest considerably resources in the achievement of increasingly higher security standards. Several activities of the EU are also worthy of mention here<sup>6</sup>.

For good reason, the protection of intellectual property is an important part of various forward-looking EU strategies and projects<sup>7</sup>. These need to be implemented in a timely and targeted fashion.

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<sup>5</sup> Available in German / English at: [www.markenverband.de/publikationen/studien/Designstudie](http://www.markenverband.de/publikationen/studien/Designstudie)

<sup>6</sup> For example, the action plan for combating product and brand piracy (of September 2008) including the European Observatory on Counterfeiting and Piracy, the Anti-Counterfeiting Trade Agreement (ACTA) or the revision of the Directive on the enforcement of intellectual property rights .

<sup>7</sup> This ranges from the "Europe 2020" strategy for the internal market, innovation and industry policy of the EU, the support of creative industries and policies in favour of small and medium-sized enterprises (SME).

## 6. Brands are impacted by excessive regulation

On this background it is incomprehensible, that at European level regulatory options are increasingly considered and pursued with reference to health, consumer or environmental protection which – as a rule – have a negative impact on the overall benefits of brands for policies regarding society, business and consumers. The following are to be mentioned in ascending order of the intensity of the threat they pose:

- labelling regulations (for instance regarding nutrition, energy or CO<sub>2</sub>)
- warnings for specific products / product groups
- plain packaging

If **labelling** is identified as being politically necessary as a regulatory option, the relevant projects must from the onset be assessed on the basis of six objective quality criteria (useful, simple, objective, verifiable, appropriate and rational)<sup>8</sup>. This is the only way to prevent additional costs for companies and further uncontrolled proliferation of labels and increasing consumer confusion. The obligatory use of statutory marks / certification marks requires an equally differentiated assessment.

**Warnings** on specific products are used for the targeted address of consumers. The extent to which warnings contribute to the achievement of politically defined objectives is disputed. It is, however, certain that increased space used for warnings on products have a negative effect on all elements of a brand, i.e., leads towards brand-free products and plain packaging through the back door.

**Plain packaging** poses an existential threat to brands because this prohibits the use of any and all trademarks, brand-specific lettering and figurative or colour marks. The size and form of packaging / secondary packaging are also prescribed by law. Companies then only have the possibility of putting the brand name in a specific position on the packaging in a uniform font with a uniform font size.

## 7. Plain packaging poses an existential threat to brands

Plain packaging is currently being discussed for a specific product group (tobacco). However, extensions / spill-overs are to be feared in this respect in future if for politically motivated reasons “critical” substances are identified and intervention is taken against legally manufactured products.

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<sup>8</sup> See MARKENVERBAND statement on food information published in June 2010.

Plain packaging is therefore a challenge across all industries and products. It is a dramatic attack on brands per se and a regulatory mistake, which causes extensive collateral damage far beyond individual industries or enterprises.

An **overall assessment** shows that significant negative effects are to be expected:

- Society will lose impulses for innovation, growth and employment, just as it will lose orientation, reliability and trust as the basis for interaction.
- Offers and choice for consumers will be restricted and a developed culture of consumption will be damaged by predatory pricing. Ultimately, consumers will be disempowered.
- At the level of companies, investments, growth and jobs in the affected industries are at risk across the entire value chain and for all parties involved (manufacturers and retailers). Innovations will hardly have any chance of success – both in terms of return on investment and market communication. Fundamentally, the functioning of markets will be impeded and competition undermined. Products would as a result become completely interchangeable and the focus would ultimately be on price due to a lack of any other signals.

On the basis of scientific studies, plain packaging also appears **legally questionable**:

- European competency to introduce plain packaging is not apparent (neither in Article 114 TFEU nor in Article 168 TFEU).
- The project would appear legally incompatible<sup>9</sup> across the entire legislative process with:
  - international agreements
  - primary EU law<sup>10</sup>
  - national constitutional requirements and traditions

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<sup>9</sup> See overview in Appendix.

<sup>10</sup> Also in view of the “Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union”, COM (2010) 573 of 19 October 2010.

In conclusion, the introduction of plain packaging

- dramatically restricts freedom to conduct business,
- enduringly infringes intellectual property rights,
- undermines the regulatory protection of intellectual property,
- weakens the fight against counterfeiting and piracy,
- devalues brands as the often most important assets of companies,
- destroys possibilities for financing companies,
- has a negative impact on a developed culture of consumption and
- disempowers consumers.

The plain packaging project creates **no European added value**, is **disproportionate** and **expropriates brand owners**.

An objective and differentiated assessment should – not just at European level – lead to the conclusion that **plain packaging is to be rejected as a regulatory option**.

MARKENVERBAND is the leading organisation representing the brands industry in Germany.

It represents the interests at national and European level of currently around 400 member companies of all sizes and from various industries. It advocates a positive consumer climate, competition on the merits, empowered consumers, the protection of intellectual property and sustainable economic development.

MARKENVERBAND is a registered interest representative at the EU Commission (No. 2157421414-31).

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## Appendix: Regulations for the protection of business activities and intellectual property / trademarks

### International agreements

- “Paris Convention for the Protection of Industrial Property” (PCPIP), in particular Articles 6, 7 and 10
- WTO “Agreement on Trade-Related Aspects of Intellectual Property Rights” (TRIPS), in particular Articles 2, 8, 15 (4) and 20

### Primary EU law

- Article 16 CFREU (Freedom to conduct a business)
- Article 17 CFREU (Right to property)<sup>11</sup>
- Article 34 TFEU (Free movement of goods)
- Article 345 TFEU (Member States’ systems of property ownership)

### National constitutional law, for example, the **Grundgesetz of the Federal Republic of Germany**

- Art 5 GG (freedom of expression)
- Art 12 GG (occupational freedom)
- Art 14 GG (right to own property)

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<sup>11</sup> This is further substantiated by ECJ judgement C-491/01 of 10 December 2002 with regard to Directive 2001/37/EC. Noteworthy is paragraph 149: “As regards the validity of the Directive in respect of the right to property, the Court has consistently held that, while that right forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.”