PLAIN PACKAGING OF TOBACCO:

Is it lawful?

Tobacco companies say plain packaging is unlawful – is this true?

**Plain packaging laws have been upheld as lawful by national, regional, and international courts and tribunals**, which have found the arguments put forward by the tobacco companies to be flawed.

Plain packaging is recommended in the implementation guidelines to Article 11 and 13 the Framework Convention on Tobacco Control — one of the most widely ratified international treaties in the world.

If adopted using appropriate national administrative, constitutional, and legislative arrangements, then there is no inherent reason why plain packaging should be found unlawful.

Legal challenges to plain packaging laws:

As of June 2019, all the legal challenges that have been decided, have upheld the legality of plain packaging of tobacco products:

**AUSTRALIA**

Constitutional challenge in the Australia High Court[[1]](#endnote-1) — **dismissed** August 2012

International investment arbitration claim[[2]](#endnote-2) — **dismissed** December 2015

Complaint before the WTO dispute panel[[3]](#endnote-3) — **dismissed** June 2018

**UNITED KINGDOM**

Five claims in the High Court of England and Wales[[4]](#endnote-4) — **dismissed** May 2016

Ruling upheld by Court of Appeal in December 2016

**FRANCE**

Challenge in the The Conseil Constitutionnel[[5]](#endnote-5) — **dismissed** January 2016

Six challenges in the Conseil d’État[[6]](#endnote-6) — **dismissed** December 2016

**IRELAND**

Challenge in the High Court[[7]](#endnote-7) — **struck out** November 2016

**NORWAY**

Swedish Match challenge to prevent

plain packaging for snus tobacco[[8]](#endnote-8) — **dismissed** November 2017

**ISRAEL**

JUUL challenge to block plain packaging of e-cigarettes — Filed February 2019. Case pending.

**EUROPEAN UNION**

Challenge to the EU Tobacco Products Directive

in the EU Court of Justice[[9]](#endnote-9) — **dismissed** May 2016

Will the tobacco companies try to sue every government that introduces plain packaging?

Litigation, and the threat of legal suit, is one of the strategies used by the tobacco industry to try to delay or prevent governments from introducing effective tobacco control policies. But each country has a different legal system, and not every government introducing plain packaging has faced a legal challenge.

Hungary, Slovenia, Thailand, Saudi Arabia, Uruguay and New Zealand have adopted plain packaging laws, but there has been no legal challenge in those countries to date.

The tobacco industry continues to assert aggressively that plain packaging is unlawful in countries considering the policy, even though every industry legal challenge has so far been defeated. Governments should therefore be prepared.

Does plain packaging of tobacco products breach intellectual property laws?

The tobacco companies argue that once they have registered their trademarks they have a ‘right to use’ those trademarks. But intellectual property rights deal with registration and trade mark owners' right to stop others from using their marks. International rules do not give the owners of registered trademarks a ‘right to use’ them that overrides a states’ powers to regulate for the public good.

**The World Trade Organization** (WTO) dispute panel that ruled on the complaint against Australia’s plain packaging, ruled that the WTO TRIPS agreement (that sets rules for intellectual property), gives no positive ‘right to use’ a trademark and that plain packaging does not interfere with international trademark rights.

Court rulings dismissing the legal challenges in Australia, France and the United Kingdom were also clear - plain packaging does not breach either domestic, constitutional, human rights or international intellectual property laws and obligations.

The High Court in Australia pointed out that plain packaging is no different in kind from other packaging or labelling requirement.

As far back as 1994, disclosed internal industry documents show that the tobacco companies had advice from their own lawyers and from the World Intellectual Property Organization (WIPO), that plain packaging would not contravene the international IP rules.[[10]](#endnote-10)

What do the tobacco companies claim, and what have the courts in other countries ruled?

Below are just some examples of what the courts have said in dismissing the tobacco companies’ legal claims against plain packaging. More detailed summaries and analysis are available [paragraph numbers from judgments given in square brackets].

1. Plain packaging is not “justified,” “necessary,” or “proportionate” because the evidence does not support that the policy will work to reduce smoking rates.

**UK High Court**: “*In my judgment the qualitative evidence relied upon by the [Government] is cogent, substantial and overwhelmingly one-directional in its conclusion*” that plain packaging will be effective. [¶592]

**Australia High Court**: Plain packaging requirements “*are no different in kind from any legislation that requires labels that warn against the use or misuse of a product*.” [¶181]

**WTO dispute panel:** The evidence supports the conclusion that "Plain packaging measures, in combination with other tobacco control measures maintained by Australia ... are apt to and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products" [¶7.1025]

1. Plain packaging is an “expropriation,” “deprivation,” or “acquisition” of the property rights in their trademarks.

**France Constitutional Court**: “*Thus an expropriation is not at issue here . . . but a limitation of the rights of property justified by the objective of protecting public health.*” [¶20 translated]

**Australia High Court**: “*Neither the Commonwealth nor any other person acquired any property.*” [Official court summary]

1. Plain packaging is incompatible with intellectual property laws and the “right to use” a trademark.

**WTO dispute panel:** TRIPS Article 16 only provides a right for trademark owners to prevent others from using their marks but gives no positive right to use a trademark. [¶7.2015 and 7.1031]

**UK High Court**: “*It is no part of international, EU or domestic common law on intellectual property that the legitimate function of a trade mark (i.e., its essence or substance) should be defined to include a right to use the mark to harm public health*.” [¶40]

1. JT International SA *v.* The Commonwealth of Australia [2012] HCA 43, High Court of Australia, Order August 15, 2012, Reasons October 5, 2012. [↑](#endnote-ref-1)
2. Philip Morris Asia Limited *v.* The Commonwealth of Australia. PCA Case No. 2012-12. [↑](#endnote-ref-2)
3. DS435, DS441, DS458, DS467 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to

   Tobacco Products and Packaging. Report: <https://www.wto.org/english/news_e/news18_e/435_441_458_467r_e.htm> [↑](#endnote-ref-3)
4. R (British American Tobacco & Ors) *v.* Secretary of State for Health [2016] EWHC 1169 (Admin). [↑](#endnote-ref-4)
5. Le Conseil Constitutionnel Décision n° 2015-727 DC. [↑](#endnote-ref-5)
6. CE, December 23, société JT International SA, Société d'exploitation industrielle des tabacs et des allumettes, société Philip Morris France SA et autres. [↑](#endnote-ref-6)
7. JTI *v.* Minister for Health, Ireland and the Attorney General is 2015/2530P. [↑](#endnote-ref-7)
8. Swedish Match v. The Ministry of Health and Care Services. Commercial Court case No 17-110415TV-OBYF. [↑](#endnote-ref-8)
9. Philip Morris Brands SARL and Others *v.* Secretary of State for Health C-547/14. [↑](#endnote-ref-9)
10. A full history and explanation of the disclosed documents relating to plain packaging is produced by Smoke-Free Canada and can be found here: <http://www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr1'.pdf>. [↑](#endnote-ref-10)