CHALLENGES IN DOMESTIC COURTS TO PLAIN (STANDARDISED) PACKAGING (WHO FCTC ARTICLES 11 AND 13)

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This page looks at common arguments in challenges to plain packaging (or standardised packaging) in domestic courts. You can also view our updates on challenges to plain packaging, which cover challenges under trade and investment law as well as in domestic courts, including the ongoing WTO plain packaging case against Australia.
Plain (or standardised) packaging is a measure which requires tobacco products to be sold in packages with a standardised design, without images, colours, fonts, textures, finishes, scents, or other such design features, other than those explicitly permitted by the legislation. Usually, plain packaging measures will allow a brand and variant name in standard font and size to be placed on the pack. They also specify particular colours and finishes to be used, require the pack to be in a standardised shape, mandate the inclusion of certain manufacturer information and consumer disclosures on the pack. Plain packaging is generally implemented in combination with large graphic health warnings on the principal display areas of the pack.

Plain packaging aims to implement article 11 of the WHO FCTC by reducing the ability of the pack to mislead under art 11.1.a and increasing the salience of health warnings under art 11.1.b, and article 13 of the WHO FCTC by removing advertising, promotion, and sponsorship on tobacco product packaging. It is recommended under the Article 11 and 13 guidelines. The article 11 guidelines note that plain packaging ‘may increase the noticeability and effectiveness of health warnings and messages, prevent the package from deterring attention from them, and address industry package design techniques that may suggest that some products are less harmful than others’ (para 46). The article 13 guidelines note that ‘[p]ackaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements, to eliminate the effects of advertising and promotion on packaging’ (para 17, recommendation).

Typically, plain packaging measures are challenged on the basis of protection of trademarks, either as a standalone ground or under constitutional or regional protections for private property. They may also be challenged on the grounds of freedom of commercial expression, or under protections for trade or the free movement of goods. States can respond to these arguments by arguing that:

- There is no right to use a trademark, design or geographical indication (see Australia, UK and France challenges)
- The measure does not infringe constitutional protections for property because it does not acquire the property (see Australia challenge)
- The measure does not deprive an investor of property but simply controls where it is to be used (see the UK and France challenges)
- Constitutional or regional protections for property, commercial speech, or free movement of goods are not absolute – interferences can be justified on public health grounds (see the UK, France and Norway challenges).

The arguments advanced in domestic courts are substantially similar to those under international
The cases below illustrate the key challenges to plain (standardised) packaging in domestic courts so far.

**British American Tobacco v Secretary of State for Health** ([High Court and Court of Appeal of England and Wales, 2016](https://www.gov.uk/government/cases/british-american-tobacco-v-secretary-of-state-for-health)

The [High Court](https://www.gov.uk/government/cases/british-american-tobacco-v-secretary-of-state-for-health) and [Court of Appeal](https://www.gov.uk/government/cases/british-american-tobacco-v-secretary-of-state-for-health) of England and Wales rejected challenges to the UK’s standardized packaging regulations. The High Court found that standardized packaging did not violate the right to property, that there was no right to use a trademark, that the measure was consistent with the EU Tobacco Products Directive, that the measure was otherwise proportional, and that the UK had the competence to adopt plain packaging. The High Court also extensively considered evidence about the efficacy of plain packaging. The Court of Appeal largely confirmed these findings. On 12 April 2017, the Supreme Court of the UK declined to hear an appeal from the Court of Appeal decision, finding that it was ‘clear’ that ‘the courts below correctly identified the legal principles relevant to the determination of the applicant’s case’. For more on these decisions, see our paper on [The High Court of justice decision on UK standardized packaging: Key points for other jurisdictions](https://www.gov.uk/government/cases/british-american-tobacco-v-secretary-of-state-for-health) and our blog post [Court of Appeal of England and Wales upholds UK plain packaging judgment](https://www.gov.uk/government/cases/british-american-tobacco-v-secretary-of-state-for-health). See also the challenge to related provisions of the [EU Tobacco Products Directive](https://www.gov.uk/government/cases/british-american-tobacco-v-secretary-of-state-for-health).


The [Constitutional Council of France](https://www.gov.uk/government/cases/british-american-tobacco-v-secretary-of-state-for-health) rejected the challenge to plain packaging, finding that there was no violation of any procedural obligation, that there was no violation of the right to property or freedom of enterprise, and that the legislature did not exceed its competence. The Constitutional Council held that the amendments did not deprive trademark holders of their property, because the trademarks could still be used to identify the product, and trademark holders could continue to prevent third parties from using them. Restrictions on the use of property and on freedom of enterprise were justified by public health objectives: the legislation was proportional to the aim of protecting health by preventing the advertising of products known to be harmful to health.

The French State Council rejected a series of challenges to French plain packaging legislation. It found that there was no right to use a trademark that could be asserted against state regulation; that the provisions of TRIPS, the Paris Convention on Industrial Property, the EU trademarks directive, and the French intellectual property code invoked by the tobacco industry did not affect the state’s ability to regulate for public health; that there was no violation of the right to property because the measure was proportionate to its public health objectives; that the measure’s effect on the free movement of goods could be justified on public health grounds; that there was no unjustified infringement of the right to freedom of commercial expression or of freedom of business; that the legislature had the power to implement the legislation; that the legislation was not uncertain or retrospective; and that the legislation was not inconsistent with the EU Tobacco Products Directive.


The High Court of Australia dismissed a constitutional challenge to Australia's *Tobacco Plain Packaging Act 2011* by British American Tobacco, Japan Tobacco, Imperial Tobacco and Philip Morris. The Court held that the Act did not constitute an 'acquisition of property', and therefore the provision of compensation on just terms to the tobacco manufacturers was not required. The Court held that although the Act regulated the tobacco manufacturers' intellectual property rights and imposed controls on the packaging and presentation of tobacco products, it did not confer a proprietary benefit or interest on the Australian Government or any other person. For related cases, see our posts on the [investor-state dispute](#), the [WTO panel decision](#) and the [WTO Appellate Body decision](#).

**Swedish Match v Ministry of Health and Care Services (Petition for Temporary Injunction), Case no 17-110415TVI-OBYF, 6 November 2017** (*Oslo District Court* and *Court of Appeal*, 2017)

Swedish Match, a manufacturer of snus, a Scandinavian smokeless tobacco product, sought a preliminary injunction against the application of Norway's plain packaging laws to snus. Swedish Match argued that the law violated article 11 of the European Economic Area Agreement (in that it was a measure equivalent to a quantitative restriction on trade), and that it could not be justified under the public health exception in article 13 because it was not appropriate or necessary to apply plain packaging to snus. The Oslo District Court denied the injunction, finding that the measure was suitable, appropriate and necessary for protecting public health. The District Court's decision was upheld by the Court of Appeal.

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- Guidelines for implementation of Article 11 (packaging and labelling of tobacco products)
Guidelines for implementation of Article 13 (tobacco advertising, promotion and sponsorship)
http://www.who.int/fctc/guidelines/adopted/article_13/en/

Court of Appeal of England and Wales upholds UK plain packaging judgment

The High Court of Justice decision on UK standardized packaging: Key points for other jurisdictions

See also challenges to Australia’s plain packaging laws under trade and investment law

WHO, Plain Packaging: Evidence, Design and Implementation


The post-implementation review of Australia’s plain packaging laws evaluates the effectiveness of the measure in Australia following its entry into force in 2012.

Cancer Council Victoria publishes a website called ‘Plain Facts’, which collates evidence about the efficacy of plain packaging and counters common tobacco industry misinformation about such measures.

The Campaign for Tobacco Free Kids publishes a Plain Packaging Toolkit which includes resources, fact sheets, and how-to guides for the development and defence of plain packaging laws

Jonathan Liberman, ‘Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia’