

## FRANCE – PROCEDURES PLAIN PACKS

### Context

I. France has adopted the measure of plain packaging for **cigarettes and tobacco in the context of the law for the modernization of its health system.**

The legislation was promulgated on January 26, 2016, after having been validated by the Constitutional Council.

This first decision has ratified the constitutionality of the measure, in principle, in national law.

The European Directive on tobacco products (Directive 2014/40/UE) was validated by the European Court of Justice on June 17, 2016, in particular the possibility for States members to adopt the plain pack measure.

II. **The plain pack measure entered into force in France as of May 20, 2016.** Since that date, manufacturers of tobacco are required to manufacture plain packages for the packaging of packs of cigarettes and rolling tobacco intended for the French market.

A period of transition entered into force in order to allow retailers to sell their stocks of marked packs. With the transposition of the European Directive on tobacco products requiring new health warnings, **plain packs became standard** on the French market **as of January 1, 2017.**

III. **Three kinds of legal texts are associated** with the provisions concerning plain packs :

- The law that determines the principle, of the Order of May 20, 2016 led to the recodification of all articles in the Code of Health concerning tobacco:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032547462&categorieLien=id>

Thereupon, the Government specified the procedures for the implementation of these provisions by two Decrees of March 21, 2016, and August 11, 2016, as well as by two Administrative Orders of March 21, 2016, and August 22, 2016.

- the Decree that determines the rules for implementation,

<https://www.legifrance.gouv.fr/eli/decret/2016/8/11/AFSP1612356D/jo>

- the Administrative Order that specifies the technical details.

<https://www.legifrance.gouv.fr/eli/arrete/2016/3/21/AFSP1607269A/jo/texte>



## Appeals against the measure

### I. Appeal before the Constitutional Council

The appeal was filed by members of parliament who can directly appeal to this Council (as long as there are 60 deputies or 60 senators wishing to appeal in this jurisdiction).

The decision of Constitutional Council concerns the entirety of the Law for the Modernization of the Health System. This law consists of numerous articles and is not confined to issues of tobacco control, it concerns the entire health system.

A number of measures were challenged, in particular the plain pack measure and this, on several levels:

1. with regard to the legislative process,
2. with regard to the rights manufacturers with respect to property and free enterprise,
3. with regard to the proportionality of the measure.

**By a decision on January 21, 2016, the Constitutional Council declared the plain pack measure to be in accordance with the Constitution and all of the texts comprising the corpus of constitutionality in France.**

The [decision](#) is short. The highlights are as follows:

1. In the appeal, issue was taken with the adoption of the plain pack measure without an impact study having been conducted ahead of time. Also, in the absence of an impact study, the decision was claimed to have been taken without "clarity and truthfulness."

The Constitutional Council found that the debates in Parliament and the process for the adoption of the measure had involved numerous discussions and that the decision on this matter had not been taken without "clarity and truthfulness."

2. It was also asserted that the measure has addressed the question of property, whereas infringements of property rights can only be determined by the legislature. Now then, the measure regarding the plain pack held that the law was supposed to be completed by a Decree.

In this matter, the Constitutional Council finds that the law has defined the principle and the context for the implementation of the plain pack. This context for the regulation of such packs is thus strictly demarcated, and accordingly, the constitutional principle has indeed been respected.

3. Finally, it was asserted that the plain pack violated rules concerning trademark rights and rights of intellectual property as well as free enterprise.

The Constitutional Council indicated that

- the brand name is to be applied to packages, thereby allowing for a clear identification of the product for the consumer,

- the rights of the owner of the trademark are still respected : the existence of these rights remains preserved (in particular with regard to use of the brand by a third party) but these rights will simply be limited in their use.

Thus an expropriation is not at issue here, in the sense of the Declaration of the rights of man and of the citizen of 1789, but a limitation of the rights of property justified by the objective of protecting public health, the plain pack measure making it possible to prevent the pack from becoming a piece of advertising. Moreover, this measure does not prohibit the production, distribution or otherwise the sale of tobacco products.

Accordingly, this infringement is not tantamount to an infringement of the rights of commerce and free enterprise.

Finally, the Constitutional Council stated at the end of its analysis of the constitutionality of the measure that Article 27 of the legislation concerning plain packs does not disregard any other constitutional requirement, and was thus declared to be in accordance with the Constitution.

## II. Council of State

**A number of legal actions** have also been filed against the plain pack at the level of the Council of State, the highest administrative jurisdiction in France.

These latter actions concern all of the regulations of the measure (the Decree and Administrative Order) but not the legislation itself, thereby signifying that the principle of the plain pack could no longer be contested. From this point on, the appeals have addressed points involving the regulations concerning its implementation.

- 4 appeals were filed by the major companies : JTI, Imperial Tobacco SEITA, Philip Morris and British American Tobacco.
- 1 Intervenor: Tannpapier GmbH has joined in support of the conclusions of the manufacturers JTI and BAT

- The National Confederation of Tobacconists of France (*Confédération Nationale des Buralistes de France*) has also filed an appeal for the nullification of these regulatory texts
- The last action comes from a company that manufactures cigarette papers for rolling tobacco, République Technologie, (the appeal concerned a part of the regulations and was essentially concerned with a problem of competition).

**By the decision of December 23, 2016, the Council of State rejected all of the appeals**

The challenged provisions in particular called for the following things:

- that "packaging units and external packages of cigarettes and rolling tobacco are to be of one single shade of color, and they can exhibit bar codes,"

- that "all actions are prohibited that seek to infringe the neutrality and uniformity of packaging units, external packages or outer wrappings, in particular those seeking to confer specific auditory, olfactory or visual characteristics,"

- and that "in addition to the health warnings indicated in Article L. 3511-6 of the same Code, only the following statements are to be inscribed in a legible and uniform fashion on a packaging unit or external package of cigarettes or rolling tobacco :

1° The name of the brand;

2° The name of the commercial title;

3° The name, mailing address, e-mail address, and phone number of the manufacturer ;

4° The number of cigarettes contained or the indication of the weight in grams of the rolling tobacco content."

The petitioners raised all sorts of technicalities as well as substantive issues to nullify the regulatory provisions.

With regard to technicalities, they challenged the requirement that the text reported to the European Union and text in force at the end should be the same, they challenged the competency of the regulatory authority to intervene in this domain, they challenged the fact that the Decree is not to be signed by the Minister of the Budget who is also concerned, etc.

In substantive terms, they contended that these provisions constituted an infringement of fundamental rights relating to property rights, that they disregarded the principle of free enterprise, that the provisions moreover concerning the marking of products constituted an infringement of the constitutional principle of clarity and intelligibility of the law, that they violated the provisions of trademark rights and intellectual property, that it constitutes an assault on France's international commitments under the European Convention of Human Rights, on the free circulation of products within the European Union, on the Convention of Paris of March 20, 1883 , for the protection of industrial property and the agreement on issues of trade-related aspects of intellectual property rights (TRIPS) adopted on April 15, 1994.

**[Decision of the Council of State](#)**

The appeals filed were all directed against provisions of the same Decrees and Administrative Orders and the decision. They were joint actions, and the Council of State ruled on the matter with one single decision.

The Council of State recalled decision n° 2015-727 DC of the Constitutional Council, of January 21, 2016, stating that Article 27 of the Law for the Modernization of the Health System of January 26, 2016, concerned the regulatory component for the implementation of the measure for neutralization of packaging for packs of cigarettes and rolling tobacco, and did not authorize the regulatory authority to prohibit the inscription of the brand or the commercial title. The latter were considered to be necessary for the identification of the product.

**On the other hand, the legislature has not prohibited regulatory texts from prohibiting the inscription of figurative and semi-figurative logo marks on such packages, and that they are susceptible to constituting a kind of advertising, and thus go against the purpose of the law.**

The challenged provisions, which set the conditions that packages of tobacco products sold on the French market must adhere to, comprise a measure with an effect equivalent to a quantitative restriction in the sense of Article 34 of the Treaty on the Functioning of the European Union (TFEU).

**Article 36** of the Treaty on the Functioning of the European Union (TFEU) however, allows for the maintenance of **restrictions on the free circulation of goods justified for reasons of the protection of the health and life of persons**, which constitute fundamental requirements recognized by the law of the European Union, as long as they are intended to ensure the accomplishment of the legitimate purpose sought, and do not go beyond what is necessary for its accomplishment.

Moreover, in consideration of respect for the principle of proportionality in the domain of public health, it is appropriate to bear in mind the fact that **States members can decide on the level they deem to ensure the protection of public health and on the way in which such level should be achieved**. This level may vary from one State member to the next, a margin of latitude is allowed for States members and the fact that one of them may impose rules that are less strict than those imposed by another State member shall not signify that the latter are disproportionate.

In the case in point, the challenged provisions must be looked upon as only being able to contribute to **reducing in time the consumption of tobacco products**.

Furthermore, **it does not emerge** from the evidence in the case file that a package complying with the minimal rules set by **Directive 2014/40/UE would reduce the attractiveness**, and consequently reduce the consumption of tobacco products, more than a package also in compliance with these rules, but otherwise not entirely neutralized, presented in a neutral, uniform color, without any figurative or semi-figurative mark.

**As far as provisions prohibiting the inscription of figurative or semi-figurative marks on packaging units, external packages and outer wrappings of tobacco products are concerned**, the Council of State declares:

Such provisions **do not have the effect of depriving companies commercializing tobacco products of their right of property of the trademarks they hold, but of regulating the use of the latter.** The existence of rights attaching to trademarks does not prevent the legislature and the regulatory authority from intervening.

In the case in point, there is indeed an **infringement of the right of property** but **it is none the less justified in light of the aim pursued.**

Furthermore, the challenged provisions have the effect of prohibiting, in the geographic area that they cover, the inscription of any figurative sign on packages and wrappings of cigarettes and rolling tobacco, **they do preserve the right to make the name of the brand and the name of the commercial title appear there.** In addition, figurative and semi-figurative trademarks can continue to be inscribed on strictly professional publications and on line communication services.

Similarly, if the ability to use these trademarks is regulated by the challenged provisions, the holders of property rights over the latter also retain the ability, as appropriate, to make use of them. The right of property over trademarks for tobacco products is thus **not affected in its actual substance, but only in the conditions for its exercise.**

With regard to Article 1 of the first additional protocol to the **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**, the judges recall that it poses no obstacle to the enactment by the competent regulatory authority of regulation of the use of goods in the public interest, and that the effect and proportionality of the measure fall within the discretion of the courts.

In the case in point, **on the one hand, taking into account the effects of the consumption of tobacco products, these provisions seek the objective of protecting public health.** They also contribute to the accomplishment of the **objective of controlling health expenditures; on the other hand,** while the effects of regulations imposing a maximum standardization of packaging on tobacco consumption and on the illegal trade in tobacco products are hard to quantify *a priori*, such regulations must nonetheless be regarded as **unable to do anything other** than in time reduce the consumption of tobacco products and, consequently, are intended to ensure the accomplishment of the objective of protecting public health sought by the legislature.

**Taking into account the importance of this objective, it does not emerge from the evidence in the case files that the challenged provisions would cause the petitioners, in light of their overall situation, to have to bear an excessive and disproportionate cost.**

Accordingly, in light of the particular importance attached to the protection of public health, while **no mechanism for indemnification has been provided,** neither the legislature nor the regulatory authorities have, in adopting the provisions subject to challenge, disregarded a fair balance between the requirements of the public interest and the protection of the right of property ensured by Article 1 of the first additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.