



## Plain Packaging Questionnaire

### TURKISH NATIONAL GROUP

#### Prepared by

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### Questions

*Please answer the following questions. For each of questions 1) – 10) below, please answer in relation to your country's national laws including any constitutional law.*

1) If the general conditions of registrability are met, does the product or service in relation to which a trade mark is used or proposed to be used have any affect on the ability to:

(a) register the trademark; and

No.

(b) use it once so registered?

No.

2) What rights are derived from trademark registration?

Right to exclusive use of and right to prevent others to use that trademark.

3) What rights exist in relation to a sign used as a trademark but not registered? What is the basis of any such right?

Use of an unregistered sign gives right to file opposition against registration attempts of that sign and to file cancellation action against registration of that sign, according to Articles 8/3 and 42/1 (b) of Turkish Trademark Law, Decree Law No. 556. Further, use of an unregistered sign gives right to prevent others from using that sign, within the provisions related to unfair competition in Turkish Trade Law.

4) Is it possible to:

(a) obtain; or

(b) maintain;

registration for a trademark that is not:

- (i) used; or
- (ii) intended to be used?

(a) Yes.

(b) Yes, provided that no non-use cancellation action is received after 5 years from registration. The starting date of 5 years is the issue date of the trademark registration certificate.

5) If yes to 4) above, are the rights derived from such trademark registration the same or different to registered trademarks that are used?

Yes, the rights derived from such trademark registration are the same with the registered trademarks that are used.

6) Are rights in unregistered trademarks dependent on use? Whether yes or no, please explain the basis for your answer.

Rights in unregistered trademarks are dependent on use. Rights on a trademark are acquired either with registration or use. If the trademark is not registered, the only way out to acquire right on that trademark is use thereof.

7) Is there any basis to restrict the use of:

- (a) a registered trademark; or
- (b) a sign used as a trademark?

If yes, please explain any relevant laws or precedents.

There are no restrictions of the use of a trademark or a sign used as a trademark. However, there are some restrictions on marketing, advertisement and use of trademarks in certain product categories such as tobacco products and alcoholic beverages. For example, according to Law 4207 on the Prevention of the Harmful Effects of Tobacco Products and Tobacco Control, the usage of text, name, brand, type name, metaphor, figure, sign, color or color combinations implying that a particular tobacco product is less harmful than another or inducing or encouraging its consumption, or misleading the consumer or making the product attractive, is banned on tobacco products and on their packaging.

Again, according to Law 4207; name, brand, emblems, logo or other names and symbols which are directly reminiscent of those of tobacco products manufacturer, importer, and distributor companies and tobacco products, may not be associated with non-tobacco goods and services sector companies or non-tobacco products; may not be used in a way giving an impression that a tobacco product is related to a non-tobacco product or service. In a similar fashion; name, brand, emblem, logo, or symbols which are directly reminiscent of those of non-tobacco goods and services sector companies or non-tobacco products may not be

associated with tobacco products or companies; may not be used in a way giving an impression that product or service is related to a tobacco product; any emblem or color which are reminiscent of tobacco products may not be used upon any product.

Procedures and principals about the implementation of this clause (namely, “brand stretching ban”) are set forth by a Tobacco and Alcohol Market Regulation Authority (TAPDK) Board Resolution (No:7055), dated November 12, 2012.

- 8) Is there any basis for the state or any state-controlled body to expropriate?
- (a) a registered trademark;
  - (b) a sign used as a trademark; or
  - (c) the rights deriving from either (a) or (b)?

If yes, please explain any relevant laws or precedents.

The answer is NO, to all three.

- 9) If yes to 7) or 8) above, do public interest considerations provide any basis for such restriction or expropriation ("Restriction/Expropriation")? If yes, please explain any applicable public interest considerations, and any relevant laws or precedents.

In some cases, public interest considerations form the basic ground for such restrictions. However, according to art. 35 of the Constitution, everyone has the right to own and inherit property. These property rights may be limited by law only in view of public interest.

- 10) If yes to 7) or 8) above, are trademarks different from other intellectual property rights in this regard?

The restrictions explained under question 7 are specifically for trademarks and include no reference and/or relation to other intellectual property rights.

- 11) If yes to 7) or 8) above, are any treaty or other international obligations relied on to provide a basis for such Restriction/Expropriation (as applicable)? If yes, please explain the international obligations, and how those obligations are reflected in or received into your country's law.

Although Law 4207 dates back to 1996, many amendments to the Law in recent years are made relying on the provisions and/or guidelines of the FCTC. Accordingly, some of the restrictions on trademark use (as explained under question 7) can also be considered to rely on the FCTC.

- 12) Is your country a signatory to the WHO Framework Convention on Tobacco Control ("FCTC")? If yes, has your country ratified the FCTC?

Turkey signed FCTC on 28th April 2004, ratified it on 31st December 2004. FCTC entered into force in Turkey on 31st March 2005.

13) If yes to 12) above, has the FCTC been implemented in your country? If yes, please explain its legal impact, if any, including by reference to the Guidelines for Implementation of Articles 11 and 13 of the FCTC.

Article 11 is mainly related to “health warnings” on tobacco products, monitoring and evaluating packaging and labeling measures, and enforcements thereof. Article 13 is mainly related to advertisement, promotion and sponsorship of tobacco products.

Turkey has filed its third implementation report on May 5th 2012 to WHO ([http://www.who.int/fctc/reporting/party\\_reports/Turkey\\_2012\\_report\\_final.pdf](http://www.who.int/fctc/reporting/party_reports/Turkey_2012_report_final.pdf)):

On pages 30-31 of that report, it may be concluded that Turkey has met article 11 of the FCTC. On page 35 of the same report, it may be concluded that Turkey has met article 13 of the FCTC. In fact the Law 4207 on the Prevention of the Harmful Effects of Tobacco Products and Tobacco Control meets the requirements of Article 11 and 13 of FCTC.

Law on Prevention and Control of Harmful Effects of Tobacco Products, Law No. 4207, is the primary law governing tobacco control. Law No. 5727 of 2008 substantially amended Law No. 4207 and regulates, among other things, prohibitions on public smoking; tobacco advertising, promotion and sponsorship; packaging and labeling of tobacco products; education campaigns; and penalties for violations. Regulations on Changes to Be Made to the Regulations Regarding the Procedures and Principles on the Sale and Presentation of Tobacco Products and Alcoholic Beverages (Official Journal dated 07/01/2011 and numbered 27808) comprises provisions regulation the sponsorship and promotion of tobacco products.

Law No. 6487 of 2013 also contained amendments to Law No. 4207. Numerous regulations, circulars, and other administrative guidance have been issued pursuant to Law No. 4207 setting out specific requirements on implementation. Regulation on Methods and Essentials concerning the Manufacture Type, Labeling and Surveillance for the Protection from the Damages of Tobacco Products sets forth packaging and labeling requirements, with additional specifications set forth in Decision No. 4721 of the Tobacco & Alcohol Market Regulation Authority (TAPDK). Circular 2009/13 (which repealed the previous Circular 2008/6) sets forth specifications for designated smoking areas in places where such areas are permitted by law. The Tobacco & Alcohol Market Regulation Authority’s Decision No. 4201 specifies the content and form of signs required by law. (ref: <http://www.tobaccocontrollaws.org>).

Accordingly, Turkey has a national ban on smoking in all indoor workplaces and public places. There are a few exceptions to the comprehensive ban where ventilated designated smoking areas are allowed, including care facilities for the elderly, psychiatric hospitals, prisons, and hotel rooms. Smoking is also restricted in certain outdoor areas where cultural, artistic, sports, or entertainment activities are held.

Smoked tobacco products must have a composite warning including both full-color pictorial warnings and texts, occupying 65 % of the surface area. Law 4207 requires a text-only warning, which must cover 30% of the back of packages. These warnings are displayed covering 43% of the back of the packages. Accordingly, the law meets FCTC Art. 11 with respect to the size of the warnings. Currently, type of Warnings/Messages Required: 65% of front, 43% of back (text-only warning) on smoked tobacco packages is met.

Turkey has a comprehensive ban on tobacco advertising, promotion and sponsorship. The supporting of any event and the use of manufacturing company name, logo, emblem or trademark is prohibited. Internet sales are prohibited, except by authorized dealers. Publicity of tobacco sponsorship is restricted, whereby sponsorship to international events and/or attendees is not allowed. Conducting consumer searches (even for informative purposes) either via mail, tele marketing is not allowed and any competitions related to tobacco products or tobacco product trademarks are prohibited.

- 14) Is the FCTC received directly into your country's domestic law or is domestic legislation required to give it effect in your country's law?

Domestic legislation is required to give FCTC effect in our country's law.

- 15) If there is presently a legal basis in your country for permitting any Restriction/Expropriation, please answer the following questions in relation to both registered trademarks and unregistered trademarks (if your country recognizes/protects the latter).

- (a) What are the parameters for such Restriction/Expropriation? For example, the nature of any stated public interest considerations, the proportionality of the proposed measure to the Restriction/Exploration.

For tobacco products, the main consideration regarding the restriction is related to public health. The usage of a trademark (registered or unregistered) may be restricted if it implies that (i) a particular tobacco product is less harmful than another or (ii) inducing or encouraging its consumption, or (iii) misleading the consumer or (iv) making the product attractive.

However; public interest and public health could cover subjective interpretations, which require careful consideration. Public interest and health may be considered as a reason for restriction of other fundamental rights. But it shall be noted that before restricting other rights in favor of public health, it shall be examined whether the measures adopted can really achieve the postulated purpose or are really appropriate and necessary for the purpose. The principle of proportionality shall be fulfilled, because a fundamental right can only be restricted if there is public welfare that the measure is necessary and proportional for the purpose.

- (b) Is it relevant that such Restriction/Expropriation only applies in relation to a particular class of products, eg tobacco products, foods deemed to be unhealthy or alcohol?

Yes, it currently mainly applies to tobacco products and alcoholic beverages in Turkey. However, there are various debates about broadening the restrictions to other products, such as foods deemed to be unhealthy.

- (c) What are the financial consequences for the state and the trademark rights holder respectively? For example, is a rights holder entitled to or eligible for any compensation in respect of the Restriction/Expropriation? If yes, what type of rights holders are so entitled or eligible? If not, why is no compensation available?

There is no specific provision under the national laws, which gives the possibility to ask for compensation in the event of a restriction. To the best of our knowledge, no claim has been filed by those who may be affected by such restrictions.

- (c) If compensation is available, how is it calculated?

Compensation is not available.

- (e) Does a trademark rights holder affected by Restriction/Expropriation have any other claims or remedies against the state? If yes, please explain the basis and nature of any claims or remedies.

The trademark owner has the right to challenge the administrative decision which causes such restriction in administrative courts (*i.e.* file an annulment case in administrative courts).

- (f) In the event of Restriction/Expropriation, could a trademark remain registered?

In the event of restriction, experience shows that the trademark may remain registered.

- (g) If yes, what is the consequence of any Restriction/Expropriation on a well-known trademark that was registered prior to the Restriction/Expropriation?

- 16) If there is presently no legal framework in your country permitting Restriction/Expropriation, please answer the following questions in relation to both registered trademarks and unregistered trademarks (if your country recognizes/protects the latter).

- (a) What legislative changes would be necessary in your country to implement a plain packaging regime for a specific class or classes of products such as those previously mentioned? For example, amendments to existing domestic trademark legislation, changes to your country's constitution, multilateral or supranational treaty obligations.

A trademark expropriation such as "plain packaging" legislation would require significant amendments related to trademark law and other national laws in Turkey. Under Turkish law system, according to the principle of the hierarchy of legal norms, laws cannot be contrary to the Constitution; the provisions of international treaties related to fundamental rights and freedoms shall prevail in case of conflict with the provisions of laws; and lastly, the administrative actions cannot be contrary to laws.

It should be born in mind that plain packaging would result in an indirect expropriation of a trademark right. Plain packaging would hence lead to a practice contrary to existing trademark laws, fundamental rights, Turkish Constitution and multilateral supranational treaties.

In order to establish plain packaging for a specific class or classes of products, Turkey would have to amend its national laws and would in any case contradict some international treaties, as stated below:

- Plain packaging implies extinction of a trademark and makes the registration redundant. According to trademark laws and treaties, every person has the right to register a trademark and use it. But in case of plain packaging, the registration would not result in use, because usage of the trademark as registered would be forbidden. This would be contrary not only to national and international regulations, but also to the “trademark” concept as such.
- Paris Convention article 6quinquies/1: *“Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article”*. The protection of a trademark “telle quelle” is required by Paris Convention and every registered trademark gives the right to its holder to use it.
- Paris Convention article 7 states that *“The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark”*, which means that, the product on which the trademark shall be registered is not an obstacle for registration. Hence, registration of a trademark cannot be prevented on a basis that the trademark will be used on a specific class of product, including tobacco products or others. The registration of a trademark gives the right to use it. If plain packaging is implemented, the trademark owners will not be able to use their trademark as registered. TRIPS art. 15/4 also states, as in Paris Convention art. 7, that *“The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark”*.
- TRIPS art.17 indicates that *“Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.”* In this case, before prohibiting the usage of a trademark, there should be a concrete proof of the legitimate interest in prohibiting the usage of a trademark. Mere claims, allegations or anticipations cannot be legal basis for prohibiting usage of trademarks.
- TRIPS art. 20 states that *“The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings”*. It is well known that the basic function of a trademark is distinction between different products. By prohibiting the usage of a trademark, there will be no distinction between different products.
- TBT (Agreement on Technical Barriers to Trade) art. 2/2 states that *“Members shall ensure that technical regulations are not prepared, adopted or applied with view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information related processing technology or intended end-uses of products”*. While public health is a legitimate objective, it is necessary to prove that the prohibition of the usage of a trademark is imperative for this objective. As noted above, mere claims, allegations

and anticipations cannot be legal basis for such a comprehensive and extreme prohibition.

It may also be considered that plain packaging would also contradict the Turkish Constitution and constitutional principles, such as the right to property, the freedom of enterprise and the freedom of commercial speech:

- Turkish Constitution art. 35 states that everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest.
- According to the Turkish Constitution and to the Decisions of European Court of Human Rights, trademark right is a proprietary right. In this case, trademark right cannot be prohibited simply on claims, allegations or anticipations, but public health benefit and public interest shall be proven without doubt.

Separately, according to Decree Law no. 556, a person who registers a trademark has not only the right but also the obligation to use it. Art.14 states that if, within a period of five years following the registration. According to Art. 14 the registered trademark must be used in a form differing in elements which do not alter the distinctive character of the trademark. So, plain packaging will prevent the owner of the trademark to use his trademark as registered.

- (b) Could a plain packaging regime be implemented in your country without providing compensation to affected trademark rights holders? If no, what type of rights holders would be entitled to or eligible for compensation? If yes, why would no compensation be payable?

Turkish Constitution and Turkish trademark law do not specifically regulate the expropriation of intellectual property rights. The Constitution and the Expropriation Law No. 2942 specifically deal with the expropriation of real estate.

On the other hand; expropriation of foreign investments is regulated in Turkish law under the Direct Foreign Investments Law No 4875 (the "Foreign Investment Law"), which provides a broad definition of foreign investment. Accordingly, any contribution from outside of Turkey of funds in convertible currency, corporate securities (except foreign sovereign bonds), machinery and equipment or industrial and intellectual property rights constitute foreign investment.

The Foreign Investment Law provides that expropriation is only permitted where required for the public benefit and only in return for adequate compensation. The Foreign Investment Law also provides the well-established principle that foreign investors are to be granted equal treatment with local investors.

If plain packaging is implemented in Turkey, it is believed that the affected companies (including tobacco industry) should have legal grounds to claim compensation of their damages before administrative courts in the form of a compensation lawsuit (regardless of whether or not such action qualifies an expropriation in its technical sense). But it not certain that the court will decide any compensation.



- (c) Would a trademark rights holder affected by Restriction/Expropriation have any other claims or remedies against the state? If yes, please explain the basis and nature of any claims or remedies.

In case of an expropriation, **rights holders may claim their damages based on the international agreements** (i.e. *Bilateral Investment Treaty*), if any, between Turkey and their origin country.