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Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law and Commercial Regulation: http://scholarship.law.unc.edu/ncilj/vol38/iss4/1
The Impact of Plain Packaging Regulation on Illicit and Non-Illlicit Tobacco Products in the European Union

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&

Robert C. Bird††

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I. Introduction

The existence of the global public health epidemic of tobacco consumption is a fact nearly beyond need of citation. Tobacco consumption kills up to half of its users, causes almost six million deaths of current and ex-consumers each year, and is globally still on the rise. In the United States, tobacco consumption generates

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1 See WORLD HEALTH ORG., TOBACCO FACT SHEET NO. 339 (May 2012),
an estimated $96 billion of healthcare costs annually.\(^2\) Globally, tobacco consumption creates an annual net economic loss of an estimated $200 billion.\(^3\)

Tobacco consumption is a particularly pressing concern for the nations of the European Union ("EU"). In spite of increasingly negative public opinion and declining consumption, tobacco use "remains the single largest cause of preventable death and disease."\(^4\) Tobacco consumption is responsible for the deaths of 650,000 citizens every year, accounting for more than fifteen percent of all deaths in the EU.\(^5\) Tobacco is also the leading contributor to disease and other chronic health problems in the EU, responsible for 12.3% of total years of life lost due to premature death and disability.\(^6\) The direct and indirect costs of smoking in the EU have been estimated to be as high as €97.7 to €130.3 billion, which corresponds to 1.04% to 1.39% of the EU's

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Annual public and private health care expenditures associated with smoking were $96 billion, with $67.9 billion or 70.7 percent paid by Medicare ($27.4 billion), Medicaid ($30.9 billion—$17.6 billion federal and $13.3 billion state), and other federal government programs, such as through the Veterans Administration ($9.6 billion). These estimates do not include another $5 billion in health care expenditures solely from secondhand smoke exposure, another $97 billion a year in lost productivity from work lives shortened by smoking-caused deaths, an undetermined amount in lost productivity from smoking-caused disability, or $2.6 billion in Social Security Survivors Insurance for more than 300,000 children who lost at least one parent from a smoking-caused death. The estimated total taxpayer burden annually was $70.7 billion in spending, or $619 per U.S household.

Id. at 187.


\(^5\) Id.

\(^6\) WORLD HEALTH ORG., EUROPEAN TOBACCO CONTROL REPORT 23 (2007).
GDP.\textsuperscript{7} The EU and its member nations have responded to these costs by engaging in a variety of regulatory initiatives designed to discourage the consumption of tobacco products. In 1998, European Council directive 89/552/EEC required member states to ban all tobacco advertising and prohibit brand name sponsorship and promotion at public events.\textsuperscript{8} French law prohibits the sale and distribution of cigarettes that are given a sweet or citrus flavor to encourage consumption.\textsuperscript{9} Other EU initiatives include controls on smoke-free environments, reports on tobacco product ingredients, mandatory health warnings, and product placement regulations.\textsuperscript{10}

One of the most controversial, and perhaps most invasive, regulatory initiatives is the growing movement to impose plain packaging requirements on all cigarette packs.\textsuperscript{11} Plain packaging requires the removal of all colors, brand images, trademarks, and logos, permitting manufacturers to print the brand name of the product only in a specific size, font, and location on the cigarette pack.\textsuperscript{12} Plain packaging regulations may also impose mandatory placements of health warnings and other product information on

\textsuperscript{7} Id. at 28. In Sweden, for example, one of the lowest per capita consumers of smoking products, the annual costs of healthcare from smoking were estimated to exceed its entire annual contribution of international aid or the entire functioning of its judiciary. Id.


\textsuperscript{11} See Alberto Alemanno & Enrico Bonadio, Do You Mind my Smoking? Plain Packaging of Cigarettes Under the TRIPS Agreement, 10 J. MARSHALL REV. INTELL. PROP. L. 450, 454 (2011) (explaining there are other industries besides the tobacco industry against plain packaging because plain packaging may not be an effective deterrent).

\textsuperscript{12} See Becky Freeman, Simon Chapman & Matthew Rimmer, The Case for the Plain Packaging of Tobacco Products, 103 ADDICTION 580, 581 (2008).
the pack. To prevent novelty, plain packages are constructed with a standard texture and limited wrappers. Perfuming, audio chips, modifications to pack interiors, and the use of inserts are also banned under plain packaging regulations. The result is a tobacco package that is almost completely standardized, devoid of any branding or adornment that cigarette packs typically possess.

In 2012, Australia became the first country to make plain packaging legislation a reality. Australian legislation prohibits the use of brand images, logos, symbols, colors, or other promotional imagery on tobacco product packaging. All tobacco packaging must remain a “drab dark brown colour,” and trademarks must follow a standard font and style. Graphic health warnings encompass “75% of the front and 90% of the back of tobacco packaging.” The legislation effectively debrands cigarette products packaged in Australia.

Following in Australia’s footsteps, plain packaging regulation in the EU is intended to advance an important public health goal. Plain packaging is expected to make smoking less attractive, thereby discouraging non-smokers. This is especially important in dissuading young people, who may be especially susceptible to the lure of branded packaging and will subject themselves to a

13 See id.
14 Id.
15 Id.
16 See Alemanno & Bonadio, supra note 11, at 450.
19 Id.
20 Id.
21 See, e.g., id. (explaining the legislation “bans the use of logos, brand imagery, [and] symbols”); see also Alemanno & Bonadio, supra note 11, at 451 (stating plain packaging limits tobacco branding to “simple unadorned text”).
22 See Alemanno, supra note 4, at 197.
lifetime of tobacco consumption if they begin the habit. Plain packaging can further benefit the environment by requiring the use of biodegradable products and by regulating the use of harmful foil wrappings, inks, and package finishes. The result of this simple measure could be a dramatic decrease in cigarette consumption in the EU, alleviating the enormous burden that cigarette consumption places on health, the economy, and society.

The imposition of plain packaging requirements, however, may not be without consequence. Young consumers may be more attracted to plain packaging because it would be, in the words of the one tobacco-supported publication, “more risky and antiauthoritarian.” Opponents of plain packaging question whether sufficient evidence exists that proves such packaging would actually discourage consumption. Further, some opponents argue that such a measure would increase smoking by driving down costs. Tobacco companies would compete only on price rather than by brand. This would increase affordability, and therefore increase consumption amongst consumers.

These arguments merit attention—most importantly in the context of their impact on the production and consumption of illicit cigarettes. The sale of illicit goods is an invidious practice that can have a startling impact on human health and global economics. The global trade in counterfeits, for example, is estimated at approximately $600 billion annually and comprises

26 Freeman et al., supra note 12, at 585 (quoting PLAIN PACKAGING AND THE MARKETING OF CIGARETTES (J. Luik ed., 1st ed. 1998)).
27 See CHRISTOPHER SNOWDON, COMMERCIAL EXPRESSION, ANTI-SMOKING EXTREMISM AND THE RISKS OF HYPER-REGULATION 5 (2012) (“As plain packaging has yet to be tried anywhere in the world, there is no solid evidence of its efficacy or unintended consequences.”). Snowdon also critiques the soundness of the scientific literature that claims to support the connection between plain packaging and consumption. Id. at 18-22.
28 See Alemanno & Bonadio, supra note 11, at 455.
29 See id.
five to seven percent of global trade.\footnote{Id. at 678; About Counterfeiting, INT’L ANTI-COUNTERFEITING COALITION, http://www.iacc.org/about-counterfeiting/ (last visited Apr. 10, 2013).} Counterfeit goods are responsible for thousands of deaths,\footnote{See Robert Bird, Counterfeit Drugs: A Global Consumer Perspective, 8 WAKE FOREST INTELL. PROP. L.J. 387, 389-90 (2007).} deny governments badly needed taxation,\footnote{See Elizabeth Ferrill, Clearing the Swamp for Intellectual Property Harmonization: Understanding and Appreciating the Barriers to Full TRIPS Compliance for Industrializing and Non-Industrialized Countries, 15 U. BALT. INTELL. PROP. L.J. 137, 145 (2007).} and prevent workers in counterfeiting factories from benefiting from the protection of labor laws.\footnote{See id.} Such goods also erode the profitability of legitimate industries\footnote{See Bird, supra note 32, at 387.} and facilitate terrorist organizations.\footnote{See Earle et al., supra note 30, at 679.}

Illicit tobacco has the potential to cause all of these harms. One author reports that the trade in counterfeit cigarettes through a Los Angeles, California port alone was estimated at $1 billion annually and generated a profit margin that rivaled the sale of narcotics.\footnote{Daniel C.K. Chow, Why China Does Not Take Commercial Piracy Seriously, 32 OHIO N.U. L. REV. 203, 223 n.103 (2006).} A member of the European Parliament estimates that illicit cigarettes cost the EU budget €1 billion of uncollected tax revenue and up to €9 billion of uncollected revenue by EU member states.\footnote{Stephen Castle & Doreen Carvajal, Europe’s Downturn Creates Unlikely Smugglers, N.Y. TIMES, July 11, 2012, http://www.nytimes.com/2012/07/12/world/europe/europes-downturn-creates-unlikely-cigarette-smugglers.html (interviewing Jens Geier, a German member of the European Parliament).} In parts of Spain and Ireland, illicit cigarettes now command twenty and seventeen percent, respectively, of the market.\footnote{Id.} In Bulgaria, the deputy prime minister and finance minister report that “the market share of smuggled cigarettes more than doubled between 2008 and 2010.”\footnote{Id.} This demand may be in part due to a weak economic climate and a desire for cheaper alternatives, but it still remains an important indicator illustrating the pervasiveness of the market for illicit cigarettes throughout
Any plain packaging regulations must take into account the potential impact on this destructive industry.

While other law review articles have discussed the legality of plain packaging measures under TRIPS and international investment law, there has been little dedicated discussion on the impact of plain packaging on the illicit and non-illicit cigarette market, which is the focus of this article. Part II of this article examines the international and European legislation underlying plain packaging regulation. Part III explores the impact of plain packaging legislation on illicit and non-illicit cigarettes in the EU. Part III also examines what impact plain packaging legislation is likely to have on consumer behavior, the potential role of price changes arising from such legislation, and the reaction of illicit smuggling to the new regulatory environment. Finally, Part III shows that, while plain packaging will almost certainly have a suppressive impact on cigarette consumption, regulators must be careful to implement such legislation to avoid any unexpected spillover effects. Part IV concludes and poses additional questions for consideration.

II. Plain Packaging Regulation in the EU

This Part reviews the development of tobacco and plain packaging regulation in the EU. It first describes the Framework Convention on Tobacco Control ("FCTC") administered by the World Health Organization ("WHO"). It then focuses on the Tobacco Products Directive ("TPD") and its pending and

41 The enlargement of the EU to Eastern Europe may also be a factor. See generally Graeme P. Herd & Anne Aldis, EU Enlargement and Organized Crime: Transdniestria as a Case Study, in THE SECURITY DIMENSIONS OF EUROPEAN UNION ENLARGEMENT 69 (David Brown & Alistair J. K. Shepherd eds., 2007) (explaining how organized crime, including the sale of counterfeit cigarettes, may be hindering the implementation of "EU enlargement policy").

42 E.g., Alemanno & Bonadio, supra note 11; Mitchell, supra note 17, at 414-21.


44 See infra Part III.


controversial Revised Tobacco Products Directive ("RTPD"), which is in draft form as of this writing. While plain packaging is not yet a reality across the EU, increasing regulation of tobacco and the explicit encouragement of EU governments to enact such legislation suggest that plain packaging will likely be a component of future EU legislation.

A. Framework Convention on Tobacco Control

The road to plain packaging regulation in Europe and around the world began with the FCTC. Adoption of the FCTC represents a significant regulatory achievement because the FCTC is the first public health treaty in the world. Moreover, the FCTC is also the first treaty specifically designed to reduce disease and deaths related to tobacco.

Independent of its substantive goals, the novel structure of the FCTC also represents a remarkable accomplishment. The FCTC represents the first time the WHO has adopted a formal convention. Before this convention, the WHO had largely relegated itself to "soft law instruments," such as recommendations and regulations.

The FCTC does not, however, follow a traditional treaty structure. The FCTC is a "framework convention" due to its hybrid structure between a purely voluntary instrument and a full


48 See Alemanno, supra note 4, at 204-41 (examining incentives for EU to adopt plain packaging regulation).

49 See FCTC, supra note 45.


52 Vadi, supra note 17, at 100.

53 Id.

54 See id. at 101-02 (describing the FCTC's unique structure, specifically regarding the fact the FCTC is "unusually specific—for a framework convention").
and final convention. The FCTC is structured such that the initial convention sets broadly stated goals and calls for cooperation in realizing those goals. Subsequently, parties to the convention negotiate separate protocols under the umbrella of the broader framework. This “framework-convention-protocol” method has been successful in forging international pollution control measures that overcame resistance from powerful interests.

The FCTC is also noteworthy for its specificity. The instrument represents a broad scientific consensus on the harmful effects of tobacco. Articulating more than mere aspirations of tobacco control, the FCTC delivers an evidence-based regime that can provide a foundation for national laws consistent with World Trade Organization (WTO) agreements. This helps break what is known as “regulatory chill,” the hesitance by governments to address problems of public health out of concern for instigating a trade dispute.

Adoption of the FCTC, indeed the very idea of global tobacco regulation, did not follow a speedy path. The idea was first raised in 1970 by an anonymous Russian researcher, who published a technical report on smoking health and recommended an international treaty to coordinate transnational issues related to tobacco control. The idea lay dormant until pioneering work by

55 See id. at 101 n.47 ("Framework Conventions are regularly used in the international environmental and human rights systems, establishing a discourse on a specific issue, setting general objectives and instituting a structure for a further course of action.").


57 See id.

58 See Vadi, supra note 17, at 100-01.


60 Magnusson, supra note 59, at 499.

61 Tackling Big Tobacco: The Establishment of the Framework Convention on Tobacco Control, MULTINATIONAL MONITOR, May-Jun. 2005, at 16 [hereinafter Tackling Tobacco]. This article includes an interview with Derek Yach, who actively participated in FCTC negotiations and established the Tobacco Free Initiative at the WTO. Id.
Allyn Taylor and Ruth Roemer advocated for an international regulatory regime of tobacco control during the 1990s. Roemer, a prominent professor of public health from UCLA, stated in 1993 that the WHO should make use of its unused treaty-making power to address the public health problems related to tobacco consumption. Roemer introduced to delegates at the 9th World Conference on Tobacco and Health a resolution, which was successfully adopted, that advocated for the creation of a tobacco control instrument. The World Health Assembly ("WHA"), the decision making body of the WHO, subsequently adopted Resolution 48.11, which requested the Director-General to "report... on the feasibility of developing an international instrument... or an international convention on tobacco control..."

As these efforts gained momentum, they were met with some resistance. Some WHO officials opposed the measure, doubting in particular the feasibility of a treaty-making power that had lain dormant for nearly fifty years. One official criticized the proposal as "ambitious to a fault" and argued that it was "important to be realistic." Some officials recommended instead that a non-binding instrument be adopted as a resolution by the

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64 See id.


67 See Roemer et al., supra note 62, at 937.

68 Id.
WHA or a treaty adopted under the United Nations.\textsuperscript{69} In spite of this resistance, the original recommendation of a binding treaty forged through the WHO remained.\textsuperscript{70}

The tobacco industry and supporting interests also resisted negotiations.\textsuperscript{71} Industry representatives opposed a comprehensive treaty, instead preferring regulation of the issue by the market and purely voluntary initiatives.\textsuperscript{72} Their proposed alternatives, such as production of tobacco products with fewer contaminants and carcinogens, were believed to have little impact on youth and adult consumption of tobacco.\textsuperscript{73} The industry also attempted to preempt the negotiations with their own corporate responsibility campaign that would eliminate the need for the new regime.\textsuperscript{74}

In spite of this opposition, more than three years of negotiations produced a final text that was unanimously adopted by WHO member states at the 56th World Health Assembly.\textsuperscript{75} The FCTC entered into force on February 27, 2005.\textsuperscript{76} As of 2012, 176 countries have signed the FCTC.\textsuperscript{77} With the vast majority of the world’s population represented, the FCTC is poised to have substantial and long-term influence on the global consumption of tobacco.

The FCTC is comprised of thirty-eight articles, a number of which are relevant to the plain packaging issue.\textsuperscript{78} Further, the FCTC is supported by a number of “Guidelines for Implementation” that build upon the broad mandates of the

\textsuperscript{69} See id.
\textsuperscript{70} See id.
\textsuperscript{71} See id.
\textsuperscript{72} See id. at 938; see also Tackling Tobacco, supra note 61, at 17 (“Philip Morris, BAT and others worked hard to see whether they could preempt the FCTC by offering some voluntary concessions, particularly in the area of marketing.”).
\textsuperscript{73} See Halabi, The World Health Organization, supra note 63, at 130-31.
\textsuperscript{74} See id. at 131.
\textsuperscript{77} See Parties to the WHO Framework Convention on Tobacco Control, WORLD HEALTH ORG., http://www.who.int/fctc/signatories_parties/en/ (last visited Apr. 10, 2013). The United States has signed, but not ratified, the FCTC. See id.
\textsuperscript{78} See Halabi, The World Health Organization, supra note 63, at iv.
articles. The legal status of these guidelines remains unclear. While some opponents perceive the guidelines as merely "non-binding recommendations," FCTC supporters call them "principles and recommendations to assist Parties in best practice implementation of their treaty obligations." Regardless of the specific language, the guidelines likely will be important metrics in fulfilling the goals of the FCTC.

Article 5 of the FCTC presents a broad mandate for signatories to establish a national coordinating mechanism for tobacco control. This article also mandates that signatories implement effective legal measures to prevent or reduce tobacco consumption. Additionally, Article 5 encourages cooperation in formulating future guidelines for implementing the FCTC; the drafters expected that these guidelines would arise from collaborations and would help to implement and clarify the treaty provisions.

Article 11 of the FCTC directly addresses the packing and labeling of tobacco products by requiring members to implement measures ensuring that packaging and labeling do not promote a tobacco product through deceptive means. This includes misleading impressions about health characteristics, hazards, or emissions that can arise from a trademark or other descriptor that indirectly or directly creates false impressions. Article 11 also requires that tobacco packaging contain health warnings describing the harmful effects of tobacco that are large, clear, and comprise at least thirty percent of the principle display areas on

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79 See id.
80 Id. at 126 (quoting a 2009 annual report of Philip Morris International).
81 Id. (quoting a report from Framework Convention Alliance, a civil society group).
82 See FCTC, supra note 45, art. 5(2)(a)-(b).
83 See id.
84 See id. art. 5(4).
86 See FCTC, supra note 45, art. 11(a).
87 See id.
88 See id.
the package.89

Guidelines to Article 11 further develop these principles by offering specific suggestions for appropriate packaging design elements, including warning location, size, color, rotation, content, language, source attribution, and the use of pictorials.90 These guidelines offer remarkable detail, relying on scientific studies to recommend the ideal presentation of packaging warnings for maximum effect.91 They also address possible obstructions, such as tax stamps and other markings, and state that such markings should not obstruct any of the health warnings or messages.92 The guidelines recommend pictorials because they are more effective than text alone and can reach low literacy consumers in addition to those who cannot read the language in which the warning is written.93

Leaving little to chance, the guidelines also suggest methods for the process of developing effective packaging and labeling requirements.94 The Article 11 guidelines exhort signatories to be aware of the different types of tobacco packaging and a wide variety of potential methods for applying health warnings, including tins, boxes, pouches, shell packages, cartons, and the like.95 Pre-market testing is also recommended to ensure that the warnings are effective, and signatories are encouraged to invite civil society organizations unaffiliated with the tobacco industry to contribute to this process.96

The Article 11 guidelines discuss, in a practical manner, the drafting and administration of legal measures associated with new packaging rules.97 The measures include clear provisions for legal liability as well as enforcement powers and a range of fines and penalties that may be assessed against non-compliant tobacco

89 See id. art. 11(b).
90 See FCTC Guidelines, supra note 85, at 53-57.
91 E.g., id. at 52-23 ("Research indicates that health warnings and messages are more visible at the top rather than at the bottom of the front and back of packages.").
92 See id. at 53.
93 See id. at 54.
94 See id. at 51.
95 See id. at 58.
96 See FCTC Guidelines, supra note 85, at 58.
97 See id. at 60.
firms. Once these measures are put in place, signatories should assess their effectiveness and make revisions at regular intervals as needed to ensure maximum compliance.

Article 11 also encourages plain packaging, stating that:

Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.

Additionally, the guidelines note that plain packaging can neutralize the effects of advertising and promotion generally. Packs under a plain packaging system might be limited to a few colors, the brand name and manufacturer’s name, and the quantity of product in the package. Logos, special fonts, or non-standardized shape, size, and materials would not be permitted on the pack.

Of some additional relevance is Article 13, which regulates “tobacco advertising, promotion, and sponsorship.” Article 13 states that each signatory “shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion, and sponsorship.” Nations restricted from doing so because of constitutional limitations shall apply appropriate restrictions. These restrictions shall be, at a minimum, the prohibition of false and deceptive advertising, imposition of warnings to accompany all advertising, restriction of purchase incentives, a prohibition or restriction of public event

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98 See id. at 62.
99 See id. at 63-64.
100 See id. at 59.
101 See id. at 95.
102 See FCTC Guidelines, supra note 85, at 95.
103 See id.
104 Id. at 91.
105 FCTC, supra note 45, art. 13(2).
106 See id.
sponsorship, and a disclosure of advertising expenditures by tobacco firms to government authorities.\textsuperscript{107} Restrictions on advertising, if an outright ban is not possible, should be implemented within a period of five years.\textsuperscript{108}

The guidelines to Article 13 are even more extensive than their Article 11 counterpart. The Article 13 guidelines offer comprehensive guidance and recommendations on most aspects of an advertising ban, including retail sales and displays, internet sales, brand extensions, and packaging.\textsuperscript{109} The guidelines even recommend prohibiting tobacco firms from promoting corporate social responsibility initiatives because the likely effect would be to promote tobacco use.\textsuperscript{110} There is also extensive discussion on cross-border consistency, entities responsible throughout the marketing chain, domestic enforcement, and public education and awareness.\textsuperscript{111} The Article 13 guidelines also take care to avoid constitutional restrictions on freedom of speech, noting that any such ban should not prevent legitimate journalistic, social, or political commentary.\textsuperscript{112}

Of particular interest here is Article 15, which addresses the illicit trade in tobacco products.\textsuperscript{113} Article 15 recognizes that the elimination of illicit trade and the development of appropriate legal measures are “essential components of tobacco control.”\textsuperscript{114} This article requires signatories to adopt packaging and labeling rules so that domestic tobacco contains the statement, “Sales only allowed in (insert name of the country, subnational, regional or federal unit).”\textsuperscript{115} Alternatively, the pack could contain other destination-related marketing rules that enable authorities to determine whether the product can be legally sold in that unit.\textsuperscript{116} Countries must also consider a tracking and tracing program that

\begin{footnotes}
\textsuperscript{107} See id. art. 15(4).
\textsuperscript{108} See id. art. 15(4)(e).
\textsuperscript{109} See FCTC Guidelines, supra note 85, at 92-96.
\textsuperscript{110} See id. at 97.
\textsuperscript{111} See id. at 102-08.
\textsuperscript{112} See id. at 98.
\textsuperscript{113} See FCTC, supra note 45, art. 15(1).
\textsuperscript{114} Id.
\textsuperscript{115} Id. art. 15(2)(a).
\textsuperscript{116} Id.
\end{footnotes}
would secure distribution and assist in investigation of the illicit market.\textsuperscript{117}

Article 15 also lists further measures to fight illicit trade.\textsuperscript{118} These measures include collecting data on legal and illicit trade, enacting stronger penalties and remedies, destroying contraband tobacco and equipment, monitoring tobacco storage and distribution, and adopting measures to enable the confiscation of proceeds.\textsuperscript{119} Article 15 further requires information on reporting, sharing across jurisdictions, and law enforcement cooperation.\textsuperscript{120}

The scope and structure of Article 15 speaks to its drafters focus. First and perhaps foremost, Article 15 does not possess accompanying guidelines for implementation.\textsuperscript{121} Such guidelines, as described earlier, provide important guidance for implementation of the broad principles articulated in the FCTC.\textsuperscript{122} For example, the guidelines in Article 11 ("Packaging and Labeling of Tobacco Products") explore how packaging should be pre-marketed, targeting of subgroups with warnings, regulation of tobacco emission yields, and a list of topics for implementing detailed legal specifications.\textsuperscript{123} This granularity helps bring the guidelines to fruition, minimizes ambiguity for regulators, and deters challenges from opponents as to the appropriate scope and meaning of FCTC language.\textsuperscript{124} The guidelines are intended to "reflect the consolidated views of the Parties," developed through a "wide consultative process."\textsuperscript{125} This intent gives the guidelines real legitimacy and not merely the interpretive hopes of a select interest group involved in the drafting.

Article 15 lacks these legitimized interpretive supports.\textsuperscript{126} In fact, the lack of Article 15 guidelines reflects a thematic preference by the drafters—that of reducing demand for tobacco

\textsuperscript{117} See id. art. 15(2)(b).
\textsuperscript{118} See id. art. 15(4).
\textsuperscript{119} See FCTC, supra note 45, art. 15(4)(a)-(e).
\textsuperscript{120} See id. art. 15 (5)-(6).
\textsuperscript{121} See id.
\textsuperscript{122} See supra notes 79-81, and accompanying text.
\textsuperscript{123} See FCTC Guidelines, supra note 85, at 57-61.
\textsuperscript{124} See id. at 3-12.
\textsuperscript{125} Id. at v.
\textsuperscript{126} See id. at iii.
products rather than its supply. Part III of the FCTC, which addresses demand reduction measures, contains nine separate articles. The FCTC’s supply reduction equivalent contains only three articles in Part IV of the convention. Furthermore, of the nine articles addressing demand reduction, seven are buttressed by detailed guidelines for implementation. None of the three supply-focused articles, by contrast, have implementation guidelines.

This is not to say, however, that supply issues must predominate questions of tobacco demand. Decreasing tobacco demand is the lynchpin to minimizing the pervasive global health problems that arise from tobacco consumption in the EU. If consumer demand for tobacco erodes due to the absence of colorful packaging and an abundance of graphic warnings, supply of tobacco would theoretically wither as a result, as tobacco products would simply remain unsold.

On the other hand, the FCTC should not neglect tobacco supply issues. Article 15, though helpful, is not necessarily on the cutting edge of innovation. Article 15 essentially advocates three regulatory strategies: impede illicit supply, require statements of origin, and encourage cooperation across jurisdictions. Nations are only required to “consider, as appropriate” the tracking and tracing requirement. Other exhortations to strengthen penalties, destroy contraband, and cooperate across borders do not necessarily represent novel strategies that will more effectively interdict supply. As a result, the issue of illicit tobacco is certainly acknowledged, but because it contains only general exhortations, the FCTC’s provisions could be substantially improved through further development of specific controls of the illicit tobacco supply. Fortunately, the FCTC is not a static

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127 See id.
128 See id.
129 See FCTC Guidelines, supra note 85, at iii.
130 See id.
131 See id.
132 See id. at 115.
133 See FCTC, supra note 45, art. 15.
134 Id. at 49, art. 15(2)(b).
135 Id. art. 6-7.
document. Article 23 establishes a Conference of the Parties ("COP"), whose purpose is to periodically review the FCTC and adopt protocols, annexes, or amendments to the FCTC as necessary to improve its implementation. The COP also engages in information sharing, research and data collection, promotion and evaluation of policies, evaluation of reports, and cooperation with the U.N. and other organizations.

Through the COP forum, national representatives have been crafting a Protocol to Eliminate Illicit Trade in Tobacco Products ("Illicit Tobacco Protocol"). The need arose from earlier COP sessions, where attendees concluded that a protocol was necessary to build upon and complement Article 15 of the FCTC. After much negotiation, delegates of over 140 parties adopted the Illicit Tobacco Protocol as a new international treaty in November of 2012. The Illicit Tobacco Protocol will now be open to signature for parties for one year and then be subjected to national ratification, entering into force ninety days after forty ratifications.

Unlike the FCTC, the Illicit Tobacco Protocol examines the illicit trade issue in significant depth. Illicit trade is defined broadly to include not just illicit tobacco but any practice or conduct related to the sale or purchase of tobacco products,
including any practice designed to facilitate illegal conduct.\textsuperscript{143}

A main focus of the Illicit Tobacco Protocol is regulation of the supply chain, requiring that signatories adopt effective measures that will prevent illicit tobacco from reaching its destination and requiring that parties cooperate in this endeavor.\textsuperscript{144} Parties must take any necessary measures to increase effectiveness of enforcement of their national laws.\textsuperscript{145} Parties must also develop a licensing system that regulates the manufacture, import, export, and retail sale of tobacco products.\textsuperscript{146}

Parties to the Illicit Tobacco Protocol also commit to establish a global tracking and tracing regime.\textsuperscript{147} This tracking and tracing system must monitor all tobacco products manufactured or imported to the signatory nation.\textsuperscript{148} Signatories shall require unique, secure and non-removable identification markings to be placed on all packages and unit packets.\textsuperscript{149} These markings must convey a variety of readily accessible information such as the date and location of manufacture, payment records, product description, and intended market for retail sale.\textsuperscript{150} The Illicit Tobacco Protocol expressly contemplates internet sales to be governed by the same rules as brick and mortar transactions.\textsuperscript{151} The Illicit Tobacco Protocol also emphasizes international collaboration through information sharing, scientific and technical assistance, and direct cooperation of law enforcement.\textsuperscript{152} Though the Illicit Tobacco Protocol is not free from criticism,\textsuperscript{153} the result of the negotiations is a well-developed protocol for increasing enforcement, enhancing cooperation, and facilitating technical

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\textsuperscript{143} See Illicit Tobacco Protocol, supra note 138, art. 1(6).

\textsuperscript{144} See id. art. 4(1)(a).

\textsuperscript{145} See id. art. 4(1)(b).

\textsuperscript{146} See id. art. 6.

\textsuperscript{147} See id. art. 8(1)-(2).

\textsuperscript{148} See id. art. 8(2).

\textsuperscript{149} See Illicit Tobacco Protocol, supra note 138, art. 8(3).

\textsuperscript{150} See id. art. 8(4.1).

\textsuperscript{151} See id. art. 11.

\textsuperscript{152} See id. arts. 20-24, 27-29.

measures that will impede the trafficking of illicit tobacco products.

B. The EU Tobacco Products Directive and its Emerging Revision

The primary tool developed by the EU to regulate tobacco products has been the Tobacco Products Directive ("TPD"). Issued in 2001, the TPD introduced broad regulatory measures designed to clarify and amplify relevant product warnings. The TPD established maximum tar, nicotine, and carbon monoxide yields for cigarettes. The TPD also increased the minimum size for health warnings and imposed rules for using color photos depicting the health consequences of smoking. Manufacturers can no longer use terms or symbols that imply that a particular tobacco product is less harmful than others.

As years passed, questions were raised regarding the TPD's effectiveness in fully achieving its original objectives to maintain both a smoothly functioning internal market for tobacco while ensuring strong protection of public health. This prompted the development of a revised TPD ("RTPD") by the European Commission, which would better facilitate these goals and update regulation according to the recent science and public policy developments. The RTPD was published in proposal form in December 2012. It now is under discussion in the European

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155 See id.

156 See id. art. 3(1).

157 See id. art. 5(2)-(3).

158 See id. art. 7. There is evidence that even after ten years of public health warnings, a substantial number of consumers still believe that certain cigarettes are less harmful and less addictive than others due to tar or nicotine yields, taste, and terms on packs such as "smooth" or "ultra." See Abraham Brown et al., Do Smokers in Europe Think That All Cigarettes are Equally Harmful?, 22 EUR. J. PUB. HEALTH 35, 35 (2012).

159 See Alemanno, supra note 4, at 203 (citing Tobacco Products Directive, supra note 154, at Recitals).

160 See id.

Parliament and in the Council of Ministers. The proposed directive is expected to be adopted in 2014, potentially becoming effective in 2015 or 2016.162

The product of extensive negotiations and public consultations,163 the RTPD retains the TPD’s overall goal of improving the function of the EU’s internal market.164 For member states that have already harmonized tobacco regulatory regimes, the RTPD is intended to update national legislations so that they conform to the latest market, scientific, and international tobacco developments.165 For example, a successfully implemented RTPD would enable member states to change the location of health warnings on packages.166 Member states would be able to modify the display of tar, nicotine, and carbon monoxide levels as well.167 The RTPD also focuses on measures not yet addressed by the TPD, such as implementation of pictorial health warnings and the regulation of ingredients, regulations of which differ across member states.168 Additionally, the RTPD is designed to strengthen anti-circumvention efforts to reduce the introduction of non-compliant products on the EU market.169 Drafters of the RTPD are also mindful that a successful directive should be harmonized with the FCTC and be consistent with non-binding FCTC commitments.170

The RTPD substantially extends the scope and depth of its 2001 predecessor. Non-tobacco products that contain nicotine and

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164 See id. at 2.
165 See id.
166 See id. at 2 n.4.
167 See id.
168 See id. at 2 n.5.
170 See id.
herbal products for smoking are now covered. The regulatory focus is on products particularly attractive to young people rather than cigars, cigarillos, and pipe tobacco, which are mainly used by older consumers. If manufacturers plan to introduce novel tobacco products into the market that are outside the scope of the RTPD, manufacturers and importers must notify governments six months in advance of any introduction of the novel product into the market. Such notifications must include studies on toxicity and addictiveness, as well as market research on consumer preferences, including those of young people. They also must include a product risk/benefit analysis and explain the expected effects on the cessation and initiation of tobacco consumption.

The RTPD also applies to ingredients and additives. The RTPD prohibits the inclusion of vitamins or any other additive that gives the impression that a tobacco product delivers a health benefit or reduces the health hazards of consumption. Caffeine, taurine, and other compounds that are associated with energy and vitality are also prohibited. Additionally, covered tobacco products cannot have colored emissions or use any flavorings or other features that modify the tobacco flavor or smoke intensity.

In order to deter illicit trade, the RTPD introduces traceability and security features. All tobacco products must be marked with a unique identifier, which should be able to reveal a wealth of information about the products origins and intended market for the product. In addition to this identifier, all packets must display a visible and tamper proof security feature that cannot be removed and is not obstructed by tax stamps or other features. The drafters concluded that their preferred policy
options expressed in the document “do not . . . lead to increased illicit trade.”

The RTPD also substantially focuses on packaging and labeling requirements. Each unit packet will have health warnings that shall be irremovably printed and in no way obscured by any product feature. Each unit packet will display the following warnings: “Smoking kills – quit now” and “[t]obacco smoke contains over 70 substances known to cause cancer.” The warnings have minimum size requirements and must cover half of the surface upon which they are printed.

The packets must also contain a combined disclosure containing a text warning, a color photo, and smoking cessation information. The warning should cover seventy-five percent of the surface of the packet and show the combined warning on both sides of the packet and any outside packaging. This combined disclosure also has minimum size requirements and is subject to detailed format, layout, and design requirements.

The RTPD closely regulates product description. Packaging cannot contain any feature that creates a misleading impression about its health effects or emissions. Packaging also cannot resemble a food product, suggest that certain products are less harmful than others, imply natural, healing, or other positive health effects, or refer to taste and flavoring of the product. The result is a uniform tobacco package design that is tightly regulated, predominated by health warnings, and devoid of product differentiating characteristics such as color, names, symbols or trademarks.

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182 See id. at 5 n. 15.
183 See id. art. 7.
184 See id. art. 8(1)-(2).
185 See Revised Tobacco Products Directive, supra note 161, art. 8(3).
186 See id. art. 9(1).
187 See id.
188 See id. art. 9(1)(f). The RTPD has separate labeling requirements for smokeless and non-cigarette tobacco products. See id. art. 10-11.
189 See id., art. 12.
190 See id. art. 12(1)(b)-(d).
What is notable about the RTPD for purposes of this article is that it does not entirely mandate the imposition of plain packaging on all tobacco products.\(^\text{192}\) The original TPD places significant restrictions on packaging and recommends that “[p]arties should consider adopting plain packaging requirements” to negate the effects of packaging advertising and promotion.\(^\text{193}\) The RTPD, with perhaps slightly stronger language, explicitly permits the introduction of plain packaging legislation as long as it is compatible with the Treaty of the Functioning of the European Union\(^\text{194}\) and complies with relevant prior notification requirements.\(^\text{195}\)

According to an EU question and answer memo, “Member States remain free to introduce plain packaging in duly justified cases.”\(^\text{196}\) The memo, however, does not articulate further what must be necessary for a Member State to “justify its choice” to

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\(^\text{193}\) FCTC Guidelines, supra note 85, at 95-96.


Member States should remain free to maintain or introduce national legislations applying to all products alike for aspects falling outside the scope of this Directive, provided they are compatible with the Treaty and do not jeopardise the full application of this Directive. Accordingly, Member States could, for instance, maintain or introduce provisions providing standardisation of packaging of tobacco products provided that those provisions are compatible with the Treaty, with WTO obligations and do not affect the full application of this Directive. A prior notification is required for technical regulations pursuant to Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and on rules on Information Society services.

\(^\text{Id.}\)

implement plain packaging legislation.\textsuperscript{197} Thus, it is still left up to each Member State as to whether plain packaging should be imposed as a mandatory requirement. Given the conflicting reactions from Member States on the plain packaging issue during the consultation process,\textsuperscript{198} and in absence of a mandatory EU wide solution, it is likely that individual EU Member States will adopt diverse plain packaging regulations in the future.\textsuperscript{199} Ultimately such diverse packaging requirements could have a negative impact on the intra-Community trade of tobacco products, and could be considered an infringement on the free movement of goods, one of the cornerstones of EU law.\textsuperscript{200}

Altogether, the RTPD draft proposal as it was presented in December 2012 has provoked criticism from commentators. For example, the Framework Convention Alliance, a civil society group focused on helping to implement the FCTC as a basis for tobacco control, stated that it was “very disappointing that standardised/plain packaging for tobacco products has not been made mandatory.”\textsuperscript{201} Tobacco industry representatives criticized the draft rules as illegal, amounting to “plain packaging by the back door.”\textsuperscript{202} The RTPD remains controversial, as its development was subjected to intense lobbying and was associated with the resignation of an EU Health Commissioner because one

\textsuperscript{197} Id.
\textsuperscript{198} See Report on the Public Consultation, supra note 47.
\textsuperscript{199} See Alemanno, supra note 4, at 200 (“[I]ntroduction of plain packaging schemes is currently being considered by several EU member states, such as Belgium, France, and the United Kingdom . . . .”). A proposal to introduce plain packaging in Lithuania failed in the Lithuanian parliament. See Kristina Janusauskaite, Litauen – A Proposal to Introduce Plain Packaging Requirement in the Law on Tobacco Control Fails in Parliament, 59 GRUR INT. 908, 908 (2010).
\textsuperscript{200} See Alemanno, supra note 4, at 240.
\textsuperscript{201} See Report on the Public Consultation, supra note 47.
\textsuperscript{203} Draft EU Rules Open Door to Plain Cigarette Packs, EURACTIV.COM (Dec. 18, 2012), http://www.euractiv.com/health/draft-eu-rules-open-door-plain-c-news-516730. A spokesperson for Reemstma, Europe’s biggest cigarette producer and a subsidiary of Imperial Tobacco, explained that “[plain packaging] is a deep intrusion into the intellectual property rights and trademark rights of the manufacturer. It destroys brand values that companies have built up over time.” Id.
of the minister's associates was accused of accepting bribes from a snus tobacco producer in return for lifting a sales ban on the product outside Sweden. As the RTPD is still in draft form, anti-smoking groups speculate that the RTPD could be further watered down through continued intense lobbying before a final proposal is completed. According to one author, the RTPD, once making significant progress toward completion, is now in danger of being disrupted by opposing interests.

As of this writing, the effort to impose plain packaging requirements does have some momentum in the EU. The RTPD highly restricts packaging design and explicitly authorizes member nations to impose full plain packaging legislation. Though the mandatory EU-wide introduction of plain packaging appears less likely than at the beginning of the RTPD drafting process, several European countries still favor plain packaging and are likely to argue for its imposition at an EU-wide level; however, these countries would likely implement plain packaging legislation at the national level should EU-wide regulation fail. Thus, with a European plain packaging regime on the horizon, the consequences of such legislation in the EU must be explored to avoid unwanted or costly results. The next section introduces issues related to this important question.

III. Plain Packaging and Its Implications for Legal and Illicit Tobacco Markets

The imposition of plain packaging legislation in the EU may have a profound impact on the use of illicit and non-illicit tobacco products.

204 See id. Snus is a smokeless tobacco that is placed into the user's upper lip to obtain the buzz of nicotine. Matt Schwarzfeld, How Snus Works, http://science.howstuffworks.com/sinus.htm (last visited Apr. 13, 2013). Consumers swallow the byproduct rather than spit it out. Id. At least one study claims that it is less harmful than other smokeless tobacco or cigarette products. See Jonathan Foulds et al., Effect of Smokeless Tobacco (Snus) on Smoking and Public Health in Sweden, 12 TOBACCO CONTROL 349 (2003).


206 See Martin McKee et al., The EU Tobacco Products Directive Must Not Be Derailed, 380 LANCET 1147 (2012).


208 See Alemanno, supra note 4, at 200.
This Part explores three pressing questions related to plain packaging requirements. First, it examines the impact of plain packaging on consumption and perception behavior. Second, it explores whether plain packaging has the potential to actually increase consumption through the reduction of product prices. Finally, this Part conducts a brief assessment of the potential impact of smuggler responses to plain packaging legislation through the increased distribution of cigarettes known as “illicit whites.”

A. The Impact of Plain Packaging on Consumer Behavior

While packaging design and attractiveness is important to most retail businesses, it is critical to the tobacco industry. Significant restrictions in the EU on tobacco advertising are already in place and there are no signs that future initiatives will relax these rules. Thus, until recently, the cigarette package was one of the last unregulated promotional opportunities for tobacco products.

The pack serves numerous important functions. First and perhaps foremost, it is an essential communication platform from manufacturer to consumer. The package has long been used to

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209 See infra Part III.A.

210 E.g., Olga Ampuero & Natalia Vila, Consumer Perceptions of Product Packaging, 23 J. CONSUMER MARKETING 100, 101 (2006) (“From the consumer perspective, packaging . . . plays a major role when products are purchased: packaging is crucial, given that it is the first thing that the public sees before making the final decision to buy.”); Bo Rundh, Packaging Design: Creating a Competitive Advantage with Product Packaging, 111 BRIT. FOOD J. 988, 988 (2009) (“Packaging and packaging design have become an important factor in marketing diverse ‘consumer goods’ and have a key role in communicating product benefits to the customer.”); Robert L. Underwood, The Communicative Power of Product Packaging: Creating Brand Identity Via Lived and Mediated Experience, 11 J. MARKETING THEORY & PRAC. 62, 62 (2003) (“Package imagery through design continuity and/or the social meaning attached to elements of package design (e.g., color, shape) is a critical mechanism in the shared social understanding of the brand . . . .”).

211 See, e.g., supra text accompanying notes 8-10.

212 See supra text accompanying note 11 (discussing the recent growing movement towards cigarette package regulation); see also supra text accompanying note 17 (noting that Australia became the first to regulate packaging in 2012).

promote images of “luxury, freedom, glamour, status, and [depending on the brand] masculinity or femininity.” The cigarette pack also creates a vital link between the package and other forms of marketing communication. Cigarette packages will often refer to “Formula 1 racing series, concerts, and nightclub promotions.” Tobacco manufacturers have also produced “fun packs,” limited edition packages that carry unusual brand images and invite the consumer to keep and collect them. The importance of pack marketing is well known to the cigarette industry. A Philip Morris executive reinforced this point, stating that “[o]ur final communication vehicle with our smoker is the pack itself. In the absence of any other marketing messages, our packaging . . . is the sole communicator of our brand essence. Put another way—when you don’t have anything else—our packaging is our marketing.”

The cigarette is also a badge product in that it is displayed regularly to other people in its consumption. As a result, when a smoker displays a cigarette pack and removes a cigarette for smoking, it is an implied testimonial to others about the user’s perception of the brand, the cigarette, and her relationship to both. According to one Brown & Williamson employee in 1985, “a cigarette pack is one of the few things you use regularly

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[216] Id. at 5.

[217] Id. at 4.

[218] See id.

[219] Id.


[221] See id.
that makes a statement about you. A cigarette pack is the only thing you take out of your pocket twenty times a day and lay out for everyone to see.”

In addition to marketing and promotion, packaging is a key method for building brand equity. Brand equity helps firms build loyalty and positive associations of a particular cigarette in the mind of the consumer. This loyalty is powerful, as cigarette brands command the highest product loyalty of all consumer products, with less than ten percent of consumers changing brands annually. That loyalty and positive association to the brand, in turn, generates a willingness of smokers to accept a higher price for an equivalent product. As a British American Tobacco document reports, approximately one-half of smokers are “not able to distinguish in blind (masked) tests between similar cigarettes... for most smokers and the decisive group of new, younger smokers, the consumer’s choice is dictated more by psychological, image factors than by relatively minor differences in smoking characteristics.”

Plain packaging has the potential to neutralize these effects. The removal of brand elements and brand imagery makes packs less appealing and encourages a less favorable assessment of people who smoke. Smokers who consume plain packs were rated as less young, less trendy, less stylish, and less outgoing when compared to their branded pack counterparts. Plain

222 TECHNICAL GUIDE, supra note 215, at 4.
223 See id.
224 Wakefield et al., The Cigarette Pack, supra note 220, at i73.
225 See id. (“Thus, once a consumer embraces a cigarette brand, it is quite unlikely that they will change.”).
227 TECHNICAL GUIDE, supra note 215, at 4.
packaging may also encourage some smokers to try to quit.  

Alterations in the colors of plain cigarette packages, such as removing the color or using less attractive colors, can also impact the public’s perception. While a plain brown pack may be associated with less favorable attributes, brown may actually promote tobacco products because of its “congruency between the color of the pack and the color of the product inside.” A drab color, such as gray, which could dominate a plain package, is associated across cultures with illness, disagreeability, and old age. Though reactions may vary across countries, the use of gray color plain packaging could further reinforce negative attributes due to its negative associations and disagreeable aesthetics. Plain packaging also improves the recall of health warnings placed on a plain package compared to a branded pack. When graphic pictorial health warnings are used, especially ones of a larger size, positive perceptions of cigarette packs decline. Plain packaging will almost certainly have a profound impact on consumer behavior.

Although plain packaging impedes the effects of branding and improves recall of health warnings, it does not necessarily impact the decision to purchase illegal tobacco. In a study of plain packaging perceptions, young smokers reported that packaging would not impact their decision to purchase illicit tobacco over its

230 See Janet Hoek et al., Effects of Dissuasive Packaging on Young Adult Smokers, 20 TOBACCO CONTROL 183, 186 (2011).
231 See Wakefield et al., Perceptions About Brand Image, supra note 229, at 417 (“[S]ensory perceptions of cigarettes can be manipulated simply by changing the colour or shade of colour on a pack[.]”)
232 See id. at 420.
234 Id.
235 Id.
237 Germain et al., supra note 228, at 390. For a general understanding of how pictorial warnings impact consumers, see Jeremy Kees et al., Understanding How Graphic Pictorial Warnings Work on Cigarette Packaging, 29 J. PUB. POL’Y MARKETING 265 (2010).
legitimate counterpart. Rather, the factors that appear to influence tobacco consumption for these respondents are availability and price. Indeed, a number of works have recognized the strong connection between price and the consumption of illicit cigarette products. Some research establishes the connection directly, while others establish an indirect connection through associations of low income or social strata with illicit cigarette consumption. If plain packaging causes prices to fall, thereby increasing consumption of illicit and non-illicit cigarettes, it could potentially undermine the primary goals of plain packaging legislation. The next section examines the potential interaction between price and plain packaging regulation.

B. The Effect of Plain Packaging on Cigarette Prices and Consumer Demand

The impact of plain packaging on the price of cigarettes merits investigation. As noted earlier, plain packaging would deny manufacturers an important vehicle for brand competition.

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238 Crawford Moodie et al., Young Adult Smokers' Perceptions of Illicit Tobacco and the Possible Impact of Plain Packaging on Purchase Behavior, 22 EUR. J. PUB. HEALTH 251, 253 (2011) [hereinafter Moodie et al., Young Adult Smokers].

239 Id.; see also Crawford Moodie et al., Adolescents' Awareness of, and Involvement with, Illicit Tobacco in the UK, 19 TOBACCO CONTROL 521, 521 (2010) (concluding that "even in a country that is purported to have a comprehensive, well resourced, illicit tobacco strategy, high numbers of youth are aware of and involved with the illicit tobacco trade . . . .").


242 See supra text accompanying notes 213-220.

243 Id.
Competition across manufacturers would then focus more on price, thereby triggering price wars that would result in cheaper cigarettes for consumers.\textsuperscript{244} Lower cigarette prices, some argue, would mean higher consumption of cigarettes by consumers.\textsuperscript{245} The result, according to this argument, would be that plain packaging could actually increase consumption of the very product that the regulation is trying to make less attractive.\textsuperscript{246}

The price of tobacco products exerts a substantial influence over cigarette consumption.\textsuperscript{247} A 2003 study of Taiwanese smokers found that a one-percent increase in cigarette prices more than doubled the likelihood that individuals would purchase smuggled cigarettes.\textsuperscript{248} The propensity to consume smuggled cigarettes is also greater amongst lower-income consumers who may be more sensitive to price changes in the cigarette market.\textsuperscript{249}

Illicit manufacturers have a price advantage over their legitimate counterparts.\textsuperscript{250} Manufacturers, in turn, may not have to pay taxes imposed by governments where such facilities are located.\textsuperscript{251} Illicit manufacturing facilities might not be burdened

\textsuperscript{244} BRITISH AMERICAN TOBACCO (NEW ZEALAND) LIMITED, PROPOSAL TO INTRODUCE PLAIN PACKAGING OF TOBACCO PRODUCTS IN NEW ZEALAND 10 (2012), available at http://www.batnz.com/group/sites/bat_5ljp9k.nsf/vwPagesWebLive/DO8TX6FE/SFILE/medMD8ZBUJZ.pdf?openelement.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{248} Tsai et al., supra note 240, at 32.
\textsuperscript{249} See Lee et al., supra note 240, at 26.
\textsuperscript{250} See, e.g., Farrell & Fry, supra note 240, at 2 ("[T]he Auditor General reported end users could purchase 100g of chop-chop for roughly AU$13 (US$10.92), compared to AU$36 r.r.p. (US$30.24) for an equivalent quantity of legal tobacco. This is a price ratio of illicit to licit tobacco of about 1:3.").
\textsuperscript{251} See id. ("[I]llicit tobacco is... distributed and sold outside the government’s regulation channels and taxation system.").
with substantial workplace safety, benefit payments, or minimum
wage issues.\textsuperscript{252} Outside the reach of most regulators or lawsuits,
they also need not unduly concern themselves with quality or
product safety.\textsuperscript{253} Once the product leaves the factory, they further
gain from avoiding the payment of required taxes and duties as the
cigarettes cross national borders.\textsuperscript{254} Such smuggling is particularly
fruitful in the EU where nations are in close proximity to one
another and have largely open borders with widely varying levels
of cigarette taxes.\textsuperscript{255} Balanced against these benefits are the risks
of prosecution, product seizure, and the costs of bribery necessary
to get the product to market,\textsuperscript{256} but these costs are likely
insufficient to negate the benefits of operating outside of a
legitimate market.

The prices of non-illicit and illicit cigarettes would both likely
respond to the passage of plain packaging regulation.\textsuperscript{257} If the
price of legal cigarettes falls because of increased price
competition due to debranding, this would drive down the price of
illicit products, which need to undercut their legal rivals.\textsuperscript{258} This
does not mean, however, that an illicit seller will sell products at
an optimally competitive price for the consumer. Although illegal
market competition can certainly occur, it is uncertain that a robust
and fully competitive market would drive down illegal cigarette

\textsuperscript{252} Cf. Moodie et al., \textit{Young Adult Smokers}, supra note 238, at 252 (discussing the
"extremely low manufacturing cost" of illicit tobacco).
\textsuperscript{253} See Farrell & Fry, supra note 240, at 3 ("Often, in order to increase the weight
for sale, illicit tobacco is mixed with other substances (for instance, twigs or grass
clippings). Microbiological and bacterial tests of samples show [illicit tobacco] often
contain[] numerous fungal spores and moulds.").
\textsuperscript{255} See, e.g., Suzanne Daley, \textit{Europeans Suing Big Tobacco in U.S.}, N.Y. TIMES,
suing-big-tobacco-in-us.html.
\textsuperscript{256} See generally LUK JOOSSENS, SMUGGLING THE TOBACCO INDUSTRY AND PLAIN
prod_consump/groups/cr_common/@nre/@pol/documents/generalcontent/smuggling_fu
llereport.pdf (recognizing a "risk of confiscation").
\textsuperscript{257} See Harry Clarke & David Prentice, \textit{Will Plain Packaging Reduce Cigarette
Consumption?} 2 (School of Economics, La Trobe University, Working Paper No.
\textsuperscript{258} \textit{Id.} at 7-9.
prices to an optimally competitive level.\textsuperscript{259} Illicit sellers will market their products at the highest price the market will bear, which at its theoretical highest would be just below the legitimate competitor price.

If an illicit manufacturer’s price for cigarettes is substantially lower than just below market price, it may reflect transactional and perceptual impediments that a manufacturer has to overcome in order to attract a consumer purchase. Consumers likely know that illicit cigarettes are of a lower quality.\textsuperscript{260} Illicit buyers may also know that illicit cigarettes pose health risks over and above legitimate equivalents.\textsuperscript{261} Consumers may also have a fear of or resistance to breaking the law, or a fear of being perceived as a lawbreaker by family and friends, through the purchase of illegal products.\textsuperscript{262} Illicit cigarettes might be harder or less convenient to obtain, imposing search costs to purchase the product.\textsuperscript{263} To the extent that such impediments exist, the illicit product market may deter purchases until a lower price outweighs these concerns for the consumer.

Whatever the differential might be, consumers are unlikely to articulate it with such multifactor precision, but it still can be a driver of the purchasing decision nonetheless. For example, a prospective illicit cigarette consumer faced with the choice of a $7.00 legitimate pack and a $6.90 illicit equivalent may still buy the legitimate product. The consumer might explain that buying the illegal cigarette is simply not “worth it.” However, an illicit pack priced at $6.00 just might be “worth it” to the consumer to burden herself with the additional costs in order to obtain the

\textsuperscript{259} See Moodie et al., Young Adult Smokers, supra note 238, at 252.

\textsuperscript{260} E.g., id. (noting that respondents complained that counterfeit tobacco “was considered poor quality”). As one respondent remarked, “You get some fags, they’ll say 20 Regal, but they don’t taste like 20 Regal.” Id. Another respondent concluded that “[c]ounterfeit are always worse I think.” Id.

\textsuperscript{261} Id. (“[S]everal males also reported becoming ill after smoking counterfeit cigarettes, with mention of colds, chest infections, and sore throats.”). As one respondent claimed, “You get a cold or you get ill after smoking four or five [counterfeit cigarettes].” Id. Another respondent noted that “[a]s soon as you take the first draw of [the counterfeit cigarette] you can tell it’s really bad.” Id.

\textsuperscript{262} But see Freeman et al., supra note 12, at 585 (noting tobacco industry argument that plain packaging would increase youth smoking because it makes the practice “more risky and antiauthoritarian”).

\textsuperscript{263} See Moodie et al., Young Adult Smokers, supra note 238, at 252.
lower price. As one young respondent noted in a plain packaging study, "[y]ou hear somebody in the football team or somebody at work can get them for £4 a packet or £3, I think it’s common." 264 Another respondent explained that "[t]he only way I would, like buy counterfeit stuff or like, is just if it’s offered to me, you know what I mean, someone’s got it and it’s a wee bit cheaper and saves me going to the shop." 265 These illicit smokers, however imprecisely, are reporting the differentials that must be overcome before they are willing to purchase an illicit cigarette. The first respondent presents a price difference that is sufficient to generate an illicit sale, while the second respondent describes the level of convenience necessary for him to make an illicit purchase. These factors may explain why the cost differential between legal and illicit packs can be substantial.

The differential effect does not disappear under a plain packaging environment. If plain packaging does in fact drive legal cigarette prices down, it would also drive down the price of illicit rivals. 266 A market with lower prices may make cigarettes more attractive to consumers as cigarettes will have a lower cost overall. The position of illicit cigarettes relative to their legitimate counterparts, however, would not materially change, and the same conditions with regard to purchasing behavior would remain. Impediments to purchase, to the extent that they exist in the consumer’s mind, would not change in the new, lower-price market. 267

At some theoretical point, however, there may be a price where illicit cigarette manufacturers would no longer choose to compete with their legitimate counterparts. However, that price point might be so low that it is unlikely that plain packaging regulation, or any other initiative for that matter, would drive cigarette prices to that rock bottom level. If, as some reports indicate, illicit manufacturers can profitably sell illegal cigarettes to smugglers at a price of $0.20 per pack, 268 there is little

264 Id.
265 Id.
266 See id.
267 Cf. id. at 253 ("Illicit tobacco was consumed [solely] on the basis of price and availability.").
268 E.g., Stefan Candea et al., Going Undercover: Inside Baltic Tobacco’s
possibility that such a market-exit price point would ever be reached. Perhaps the most ideal outcome would be that the profit margin in illicit cigarette production becomes so narrow that manufacturers divert their efforts to more profitable illicit activities and away from tobacco.

Ultimately, if plain packaging initiatives drive down the price of legal and illicit tobacco and cause consumption to increase, the EU or its member states could raise taxes on tobacco products to counteract any impact.269 This response is likely easy to implement given that the EU political environment is already unreceptive to the tobacco industry.270

Such an initiative, however, is not without challenge. Cigarette taxes in the EU are already a significant percentage of the product’s price.271 Smokers frustrated by incessant price increases may protest further taxation.272 Such resistance might be muted, however, because consumers are already accustomed to significant tobacco regulation.

Accordingly, to the extent that plain packaging drives prices down, such an increase would return the cigarette market to its pre-plain packaging equilibrium. In terms of price, the result would be an unchanged market compared to before plain packaging regulations were enacted.273 This is not inevitable, of


273 Moodie et al., Young Adult Smokers, supra note 238, at 252 (concluding that “it is simply not possible for plain packaging to make meaningful difference to pricing.”);
course, as it relies on a variety of factors, operating together, resulting in an environment where illicit cigarettes do not gain an advantage as a result of plain packaging regulation.

C. The Potential for a Consumer “Flight to Brands” Under a Plain Packaging Regime

Plain packaging may have an unexpected effect on a certain type of illegal cigarettes known as “illicit whites.” An illicit white is a cigarette pack that is designed exclusively for smuggling. Illicit whites are legitimately manufactured in one country and then smuggled into another for sale, typically without payment of customs or tax duties. The illicit white pack does not typically attempt to confuse consumers that the cigarettes are really a legitimate brand. Though illicit whites may imitate characteristics of established products, the pack also typically offers its own distinct brand. This pack is made solely for transportation and sale in the illicit market.

Twenty years ago, illicit whites were not especially prominent. The primary form of illegal trade in cigarettes was large-scale transport into one market, and then smuggled into a second market where the demand for the cigarettes was higher and more profitable. These cigarettes were well-known brands that somehow became “lost” during transportation because they were

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see also Clarke & Prentice, supra note 24, at 315 (“Our analysis suggests that substantial increases in unbranded or counterfeit cigarette supply are unlikely because of the less profitable market they will face after PP [plain packaging] is introduced.”).

274 See Moodie et al., Young Adult Smokers, supra note 238, at 252.


276 Id. at 5, 17.

277 Moodie et al., Young Adult Smokers, supra note 238, at 252 (finding that “[s]mokers were easily able to identify counterfeit cigarettes, not least by the pack, and buy it knowingly and in full expectation that it will be inferior in quality . . .”).

278 Id.

279 Id.

280 See Luk Joossens & Martin Raw, From Cigarette Smuggling to Illicit Tobacco Trade, 21 TOBACCO CONTROL 230, 230 (2012).

281 Id.
bought and sold by unofficial traders.\textsuperscript{282}

When large scale smuggling fragmented into smaller operations, illicit whites began to appear.\textsuperscript{283} The manufacturer may or may not comply with local laws in the place where the cigarettes are being produced.\textsuperscript{284} This enables manufacturers to purchase sophisticated equipment, operate in the open, and not worry about confiscation or fines.\textsuperscript{285} Because these manufacturers are not copying an established brand, they also insulate themselves from the legal action by global cigarette companies.\textsuperscript{286} The result is that illicit white manufacturers can produce a product at a quality level that could be similar to or possibly even match multinational competitors.\textsuperscript{287} Illicit whites have the potential to be the illegal manufacturers' primary method of selling illegal cigarettes in the coming decades.

One of the most popular illicit whites is Jin Ling.\textsuperscript{288} Jin Ling is a truly global cigarette brand.\textsuperscript{289} Jin Ling is openly manufactured in Russia, Ukraine, and Moldova, has a Chinese brand name, and has a pack design and taste similar to Camel, a popular American cigarette.\textsuperscript{290} Jin Ling has captured twenty percent of Germany's black market in tobacco and is rapidly becoming one of the most seized in the EU.\textsuperscript{291} Numerous other manufacturers exist around the globe, and frequently target smokers in Europe.\textsuperscript{292}

\textsuperscript{282}Id.
\textsuperscript{283}See id. at 231.
\textsuperscript{284}Id.
\textsuperscript{285}Id.
\textsuperscript{286}See Joossens & Raw, supra note 280, at 231. To the extent that these firms replicate characteristics or designs of legitimate manufacturers, as some do, they similarly would expose these firms to trademark infringement litigation. See id.
\textsuperscript{287}Id.
\textsuperscript{288}Id.
\textsuperscript{289}Id.
\textsuperscript{290}Id.; see also Inga Springe, Europol: Climate is Right for Increased Tobacco Smuggling, THE CENTER FOR PUB. INTEGRITY (May 13, 2011, 2:00 AM), http://www.publicintegrity.org/2011/05/13/4576/europol-climate-right-increased-tobacco-smuggling.
\textsuperscript{291}Joossens & Raw, supra note 280, at 231; Springe, supra note 290.
\textsuperscript{292}Joossens & Raw, supra note 280, at 231-32 (“Libyan ‘illicit whites’ . . . are produced in Luxembourg and Bulgaria and imported through Dubai to Togo and Benin.”).
Illicit whites have the potential to dilute the primary goals of plain packaging.\textsuperscript{293} Illicit white manufacturers do not have to fear ready seizure by legitimate cigarette producers as they have developed a brand all of their own.\textsuperscript{294} Already avoiding taxes and duties in the target country through smuggling operations, Jin Ling manufacturers could easily ignore any plain packaging rules. The result would be that the significant advantages conveyed by colorful and attractive cigarette packs and brands would be concentrated in the hands of organized crime syndicates manufacturing smuggled cigarettes.\textsuperscript{295}

This would result in an unusual product environment for consumers: taxed legal cigarettes, both expensive and deliberately packaged in homely packaging with prominent labels encouraging discontinued use, would be competing against cheaper and untaxed illegal cigarettes emblazoned with attractive packaging, colorful labeling, and a recognized global brand. It is far from certain how consumers would react to such a market. An optimistic scenario holds that consumers will recognize that a colorful cigarette pack means an illegal cigarette pack and therefore avoid consumption. However, this would require consumers to look past the packaging and deliberately choose an expensive and ugly cigarette pack over an attractive and cheaper rival. Consumers would also be forced to ignore any of the numerous descriptors, such as "low-tar" or "menthol," which imply a healthier cigarette and are often banned on legal tobacco products.\textsuperscript{296} If the power of brand packaging expressed in

\textsuperscript{293} See Moodie et al., Young Adult Smokers, supra note 238, at 252 (“The tobacco industry argues . . . that [mandating plain packaging for tobacco products] could be counterproductive by making counterfeit cigarettes simpler to produce, thereby confusing consumers about genuine product and also reducing the price of illicit tobacco which would, in turn, inadvertently increase consumption.”).

\textsuperscript{294} Joossens & Raw, supra note 280, at 231 (noting, for instance, that Jin Ling has developed its own brand which is produced in Russia in accordance with domestic laws and is only seized when it enters into an illegal market such as the European Union).


\textsuperscript{296} BRUCE LEVINSON, AN INQUIRY INTO THE NATURE, CAUSES, AND IMPACTS OF CONTRABAND CIGARETTES 45 (2011).
marketing literature applies equally to legitimate and illegitimate pack packaging, then consumers will have to expend significant mental energy to overcome the very marketing that has been long been successful in the cigarette industry.

A pessimistic scenario would be consumer flight to illicit brands. Consumers accustomed to colorful branding might gravitate to those brands that invoke recollections of formerly established logos, colors, and designs. For example, Jin Ling invokes recollection of the Camel brand, which can attract consumers seeking that familiarity. Similarly, a red and white cigarette with a particular font and size might not use the Marlboro brand, but might invoke enough conscious or subconscious recall to nudge wavering consumers toward a comforting branded pack. Illicit whites would retain all the advantages of branded packaging with none of the disadvantages of warnings or discoloration.

However, cigarette taste might impede this flight to illicit brands. As noted earlier, illicit cigarettes lack the flavor of legitimate ones. A UK study found that seventy-eight percent of surveyed smokers reported that illicit cigarettes taste differently than their legitimate counterparts. "Smokers reported that 'they smell different, they taste different, they're too harsh, and they don't draw easily.'" If illegal cigarettes taste substantially worse than established rivals, all but the most determined consumers will be deterred from switching.

Taste differences, however, might not be enough to impede a flight to illegal brands. Illicit whites, as mentioned earlier, are manufactured with sophisticated methods and with little fear of prosecution. This may facilitate the ability to produce cigarettes that rival, or at least narrow the taste gap, between legitimate and smuggled products. Illicit manufacturers will also try to mask any taste gap by explicitly trying to match the taste of popular

297 Joossens & Raw, supra note 280, at 231.
298 See, e.g., supra note 260 and accompanying text.
299 JOOSENS, supra note 256, at 4.
300 Id.
301 See, e.g., Lee et al., supra note 240, at 26 ("[P]rice sensitive smokers with low levels of income and education are strongly inclined to smoke smuggled cigarettes as the price of legal cigarettes rises.").
302 See, e.g., supra note 285 and accompanying text.
Furthermore, plain packaging actually might make the same cigarettes taste differently to consumers because of the box they came in. In Australia, for example, where plain packaging is now mandatory, smokers groups have reported being “inundated with calls from angry smokers who say their cigarettes now taste ‘pathetic’ and ‘sickening’” even though the cigarettes remain unchanged. Such an effect might be welcome if plain packaging comprised the entire market, but the aggressive presence of smuggled cigarettes might make their branding even more attractive on the basis of perceived taste improvement.

Cigarette safety also might impede a flight to illicit brands. Tobacco grown with heavy use of fertilizers can absorb dangerous contaminants into the tobacco leaves. Illegal cigarettes can contain substantially more nicotine and carbon monoxide than their legitimate counterparts. “Chop-chop” tobacco, a homegrown and unregulated method of tobacco manufacture, can produce allergic reactions, chronic bronchitis, asthma, lung cancer, and Legionnaire’s disease. Illicit cigarettes can have levels of metals such as cadmium, thallium, and lead in far higher levels than the authentic brands. The sophistication of misleading

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303 JOOSSENS, supra note 256, at 3.
305 Id. This effect is reinforced by scholarly research. See Germain et al., supra note 228, at 390.
306 See W. Edryd Stephens et al., Source and Health Implications of High Toxic Metal Concentrations in Illicit Tobacco Products, 39 ENVTL. SCI. & TECH. 479 (2005).
307 See id. at 480 (finding increased levels of lead and cadmium); Chen, supra note 268 (reporting that Chinese counterfeits have 80% more nicotine and 130% more carbon monoxide than legitimate cigarettes).
308 RENÉE BITTOUN, THE MEDICAL CONSEQUENCES OF SMOKING “CHOP-CHOP” TOBACCO 9-13 (Australian Gov’t Dep’t of Health and Aging, 2004), available at http://www.health.gov.au/internet/main/publishing.nsf/Content/927F4224C3D9E1A6CA2570D0018284B/$File/chopchop.pdf. “Chop-chop” tobacco is so dangerous that it even has the potential to harm farmers of the product through exposure to grain and plant mold, which compromises their health. Id. at 9. This effect is known as “farmers’ lung” or “tobacco growers’ lung.” Id. at 13.
cigarette packaging makes it very difficult for ordinary consumers to tell the difference.  

Indeed, safety concerns with illicit cigarettes may significantly impede any flight to illegal products once plain packaging is introduced. The contaminants found in illicit cigarettes are more deadly than their legitimate counterparts and could be shocking to the public.  Yet an increased presence of some elements not immediately recognizable as harmful, such as cadmium and lead, may not provoke much of a reaction. There may even be a belief among some consumers that certain types of tobacco, such as “chop-chop” tobacco described earlier, are preferred because they are considered “natural and unadulterated.” However, ingredients found in illicit cigarettes, such as toxic fungus, dead flies, asbestos, and human excrement, might provoke even jaded consumers to think twice about buying illicit tobacco products. It would take little imagination to develop an attention-getting public awareness campaign warning against inhalation of products that may contain insect parts or human waste.

In spite of apparent awareness that smoking illicit cigarettes imposes additional health risks, the illicit market may continue to thrive even in the presence of an augmented cigarette safety campaign. Visceral images may deter prospective smokers, but

chemicals including lead and cadmium which can be at least five times higher than levels found in genuine products.”

310 Tim Phillips, Knockoff: The Deadly Trade in Counterfeit Goods 22 (2005) (explaining that most consumers don’t realize the cigarettes are fake until they purchase and smoke one and notice the unusual taste).

311 See Levinson, supra note 296, at 63 (“Illegally manufactured cigarettes are a greater health hazard than legal products. Thus, an increase in the size of the contraband market would harm public health.”).

312 See, e.g., id. at 12 (categorizing cadmium as a miscellaneous contaminant in counterfeit cigarettes).

313 Bittoun, supra note 308, at 6; see also Campbell Aitken et al., Health Perceptions of Home-Grown Tobacco (Chop-Chop) Smokers, 10 Nicotine & Tobacco Res. 413, 413 (2008) (internal quotation marks omitted).


315 See Moodie et al., Young Adult Smokers, supra note 238, at 253.

316 See Rich Thomaselli, Will Australia’s Cigarette Branding Ban Spread Beyond
might not be shocking enough to cause regular consumers to quit. The general message of harmful illicit products may get lost amongst numerous other public health campaigns against legitimate cigarettes. Smokers are already accepting a significant health risk through cigarette consumption and are subject to the addictive powers of nicotine; they may be unable or unconvinced to change their behavior. The lower price of illicit cigarettes may override health concerns, especially for low income smokers.

Overall, a health-effect campaign, powered by graphic imagery, has substantial potential to support plain packaging goals and stem the tide of illicit whites into the market. The challenge for such a campaign, however, will be to ensure effectiveness amongst consumers who are most deeply wedded to consumption. It is still possible that the consumption of illicit whites will grow under a plain packaging regime. However, strategic use of public communication resources should do much to mitigate any potential increase in illicit consumption.

IV. Conclusion

Plain packaging represents one of the most controversial approaches of prevailing tobacco regulatory initiatives. Plain packaging has the power to negate the powerful effects of package branding and deny tobacco manufacturers the ability to solicit customers based upon the pack itself. The package no longer

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317 See, e.g., LEVINSON, supra note 296, at 10 (“[I]t should be noted here that even though legitimate cigarettes contain lower levels of various substance than counterfeits, they cannot be characterized in any manner as being ‘safe.’ The profound health hazards associated with genuine-brand cigarettes is not in question.”).

318 See id.

319 E.g., Taylor et al., supra note 241, at 402 (“The link between price and consumption is clear and is consistent with the substantial body of research evidence on legitimate tobacco.”); see also Tsai et al., supra note 240, at 32; Lee et al., supra note 240, at 26.

320 See supra Part III.A.

321 See Petarganev, supra note 226.

322 See id.
becomes a promotional tool, but simply a boxed conveyor of the product, replete with clear and unambiguous warnings about the impact of smoking on human health.\textsuperscript{323} The EU has come close to imposing a plain packaging regime, and it seems likely that a plain packaging initiative will continue to be debated.\textsuperscript{324}

Like any significant regulatory initiative, plain packaging risks creating unintended consequences. Tobacco industry representatives have argued that plain packaging would reduce the price of tobacco, thus making it more attractive to purchase.\textsuperscript{325} Representatives have also argued that young smokers will find cigarettes a more cogent expression of rebellion because of plain packaging and that it will also contribute to the growth of the illicit tobacco market.\textsuperscript{326}

While these arguments against plain packaging come from a source financially incentivized against further tobacco regulation, the unintended consequences of plain packaging should not be entirely discounted without due consideration. Notwithstanding the aforementioned warnings, plain packaging appears to have an overall suppressive effect on tobacco consumption.\textsuperscript{327} Consumers will likely smoke less and perceive smoking as less glamorous than under the current brand-permissive regime.\textsuperscript{328} Plain packaging may drive prices down, but their illicit competitors may not necessarily be more attractive as a result.\textsuperscript{329} Furthermore, taxes and duties imposed by governments, if EU voters are willing, could increase the price of less expensive cigarette products to their pre-plain packaging levels if necessary.\textsuperscript{330}

Finally, the debranding that plain packaging imposes might

\begin{itemize}
\item \textsuperscript{323} See id.
\item \textsuperscript{324} Id.
\item \textsuperscript{325} Moodie et al., Young Adult Smokers, supra note 238, at 252.
\item \textsuperscript{326} See supra note 26 and accompanying text.
\item \textsuperscript{327} Freeman et al., supra note 12, at 587 ("While the research body on the effects of plain packaging is small and necessarily experimental, industry candor in internal documents and trade literature shows that tobacco product packaging is seen to be a persuasive form of advertising."). But see Petarganev, supra note 226 ("[A] critical review of such studies that had found a potentially effective impact of plain packaging on smoking . . . has exposed major flaws – their results are ambiguous at best.").
\item \textsuperscript{328} See supra note 23 and accompanying text.
\item \textsuperscript{329} See Petarganev, supra note 226.
\item \textsuperscript{330} See supra notes 269-270 and accompanying text.
\end{itemize}
make illicit whites the only packs with branding.331 These illicit whites are manufactured legally but are then transported and sold illegally in their target markets.332 This would leave the advantages of cigarette branding in the hands of illicit manufacturers, who are not subjected to minimal, if any, standards and risk exposing consumers to cigarettes even more dangerous than their legal counterparts. Mitigating measures are possible to deter or prevent consumers' flight to brands,333 but it remains insufficiently certain how consumers will react to a post-plain packaging marketing environment and whether their attitudes toward illicit whites will change. Australia's bold plain packaging regime may provide the conditions to explore these questions. For now, however, the impact of plain packaging on both the illicit and non-illicit market represents a significant, and perhaps insufficiently explored, consequence of tobacco regulation.

The topic of plain packaging, and the broader issue of tobacco control, leaves much to be explored. Further work could evaluate bills winding their way through national governments in the EU that would impose plain packaging rules and their compatibility with EU law. Further court challenges to Australia's plain packaging system and other pending systems offer a rich resource for exploring the legality of the initiative under TRIPS or other international investment laws. There are also vast questions related to the viability of these regimes under constitutional, national, and international trademark law that can be more fully explored. A longer-term view of such regulation may review the propriety of restrictive or plain packaging rules to less socially desirable products such as alcohol and certain junk foods.334 The desirability of such regulation, which represents a different set of

331 See supra Part III.C.
332 See supra Part III.C.
333 See supra Part III.C.
334 E.g., Peter Tynan, Executive Health: The Plain Truth about Packaging, NEW ZEALAND MGMT., Sept. 2012, at 54 ("Imagine a time in the not too distant future. Chocolate bars are sold in uniform plain packaging, stored behind a grey screen and available only upon request by those aged over 18."); Thomaselli, supra note 316 ("Australia's high court last week upheld the Plain Packaging Act, making it the first country to ban brand logos on all tobacco packages. That has led some to speculate whether the ruling could set a global marketing precedent for everything from cigarettes to sugary drinks to alcohol.").
challenges and public policy implications than cigarettes, is ripe for further discussion.

Tobacco consumption is a major health problem for most governmental entities, including the EU. With tobacco consumption shown to cause millions of deaths and billions of dollars in healthcare costs, regulatory bodies have sought to dramatically restrict the availability, promotions, and marketing of tobacco products. Plain packaging will likely both impede tobacco consumption and reduce desirability of smoking among potential consumers. The impact of plain packaging on illicit and non-illicit cigarette markets and consumer behavior, however, may be the ultimate test of whether plain packaging represents a substantial success or one that is impeded by unexpected consequences.

335 See supra notes 8-10 and accompanying text.
336 See supra notes 1-7 and accompanying text.
337 See supra notes 8-10 and accompanying text.
338 See supra note 327 and accompanying text.