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Alþingi
Erindi nr. Þ 140/792
komudagur 13.12.2011

December 5, 2011

Via Electronic Mail

Health Committee
Parliament of Iceland

Re: Comments of Business Civil Liberties in Response to a Resolution in the Icelandic Parliament Relating to Plain Packaging of Tobacco

Dear Members of the Health Committee:

Business Civil Liberties, Inc. (BCL), a United States-based public interest organization, very much appreciates the opportunity to comment on the Proposal for a Parliamentary Resolution (Parliamentary document 20 – item 20) introduced during Legislative session 140 (2011-2012), which sets a 10-year Action Plan for Tobacco Control to be delegated to the Ministry of Welfare. BCL shares the concerns of the sponsors of this resolution regarding the major health hazards posed by cigarette smoking. BCL supports efforts to reduce tobacco consumption, especially among minor children.

However, BCL has serious concerns with the plain packaging and 80% health warning proposal listed under Section 3 of the resolution, “Removing advertising and reducing the visibility of tobacco.” This proposal is quite frank in its intent: to make the packaging “unattractive” and “uniform,” such that consumers would be unable to distinguish between various brands. This proposal infringes on basic notions of free speech rights inherent in the Icelandic Constitution. Moreover, implementation of this proposal would violate numerous international legal commitments that Iceland has made to the rest of the world. Most importantly, there is no credible evidence that plain packaging and warnings of the type proposed would accomplish the goal of reducing smoking rates in adults or children.

I. Interests of BCL

Business Civil Liberties, Inc. (BCL) is a public-interest policy center located in Washington, D.C., USA. BCL is organized under § 501(c)(4) of the United States Internal Revenue Code, meaning that BCL devotes a substantial percentage of its resources to efforts to persuade American and worldwide policy-makers to adopt free-market economic policies. Together with the Washington Legal Foundation (BCL's litigation and education affiliate), BCL is devoted to the defense and promotion of free enterprise and individual rights. BCL has been a particularly strong advocate for private property rights and commercial speech rights. BCL believes that government regulators have an appropriate role to play in educating consumers regarding healthy lifestyle choices and in ensuring that commercial speakers do not disseminate false or misleading information. But BCL opposes government meddling in the private choices of consumers, or confiscation of private property from individuals and business that sell legal products to consumers.

While public health officials may not agree with the choices that consumers make based on truthful information, society as a whole benefits from the free choice of free individuals who are acting in what they believe to be their own best interest. Efforts to suppress speech and display of trademarks are justified by regulators as preventing consumers from hearing information that might induce them to make a decision that is not in their best interest. But it is the hallmark of a free society that individuals are permitted to listen to all truthful information and choose their own paths.

II. Plain Packaging Proposal Violates Constitutional Rights

BCL is not expert on Icelandic constitutional law, but there are basic legal protections in the Constitution that are accessible and transcend international boundaries. BCL will briefly summarize specific concerns under the Icelandic Constitution. Among these rights are the freedom of expression and the protection of property. The plain packaging proposal would unduly restrict these constitutional rights. For instance, trademarks enjoy the constitutional protection of property as stated in Article 71(1) of the Constitution. Moreover, truthful commercial communication is deemed to be protected by the freedom of expression found in Article 73(2). The plain packaging restrictions would likely infringe on Article 75(1), a protection of the right to engage in commercial activity. These rights are universal rights inherent in a free society, whether it is the United States or Iceland. If individuals are unable to promote their products in a truthful manner because of government restriction, then individuals are unable to engage in economic activity which is the underpinning of a free enterprise system. A democracy need not protect all speech, but it must protect truthful speech, both for the speaker and for the listener.

Article 71(1) of the Icelandic Constitution states that “[t]he right of private ownership shall be inviolate. No one may be obliged to surrender his property unless required by public interests. Such a measure shall be provided for by law, and full compensation shall be paid.” It is a well-established principle that trademarks constitute a form of property protected by this provision. Article 73(2) of the Constitution expands on right this by providing that “[e]veryone shall be free to express his thoughts... [t]he law may never provide for censorship or other similar

limitations to freedom of expression.” While BCL is not expert in Icelandic law, it is generally known that courts in Iceland have protected both social discourse and commercial discourse under these provisions of the Constitution.

Diminishing the display of trademarks on tobacco packages as the proposal suggests would interfere with tobacco companies’ property rights under the Constitution. The plain packaging proposal would effectively reduce the value of these trademarks to such an extent that it constitutes expropriation of property. Even if the property is not actually transferred to another person, the Supreme Court of Iceland decided in 1937 that preventing an owner from exploiting his or her own property for construction constituted a de facto expropriation of the property even though the city of Reykjavik had not taken the lot itself. This requires full compensation paid to the owner when a restriction, such as taking over 80% of the package, is a drastic prevention of using one’s own trademark.

In the United States, a federal court recently barred the Food and Drug Administration from implementing a similar plan. In *R.J. Reynolds Tobacco Co. v. Food and Drug Administration*, Civil Action No. 11-1482(RCL), the U.S. District Court for the District of Columbia granted an injunction against government implementation of a rule that would have required cigarette manufacturers to display warnings on their packaging and advertising that occupy the top 50% of the front and back panels of the package and the top 20% of all advertisements. The warnings contain text accompanied by highly controversial graphic images such as diseased body parts and a body on an autopsy table. In early November, the court agreed with the plaintiffs – five tobacco companies – that these restrictions are more likely than not to

be found to interfere with basic American constitutional protections of free speech. While the decisions of American courts are, of course, not binding on foreign governments in this manner, it is troublesome that the proposed action plan on plain packaging in Iceland constitutes an even more substantial infringement of free speech and private property rights than that attempted and struck down in the United States.

If the action plan is implemented and cigarette manufacturers are effectively unable to communicate their brand to consumers, it is difficult to discern how those speech restrictions can be meaningfully distinguished from a wide variety of other equally onerous restrictions. BCL is concerned that this precedent would, for example, justify broad restrictions on marketing and packaging for liquor, candy, soft drinks, butter, red meat, prescription drugs, and a broad array of products whose consumption, in the view of some activists, should be curtailed or prohibited for supposed public health reasons. The slippery slope may lead to even more government restrictions on free speech regarding legal products.

In sum, it is questionable whether the plain packaging proposal would survive challenge under Icelandic law. The sentiments expressed in the Constitution are universal values that BCL strongly believes must be protected in any free society: freedom of expression, freedom to engage in truthful commercial activity, and protection of private property rights. The proposal as it currently stands would infringe on all three of these rights.

III. Iceland's International Obligations are at Risk

Plain packaging in the manner proposed could violate several international agreements to which Iceland has committed itself. The first of these is the European Convention on Human Rights (ECHR). Article 1 of the First Protocol of the ECHR states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession exception in the public interests and subject to the conditions provided for by law and by the general principles of international law.”

Given that registered trademarks are recognized as forms of property under the ECHR and European case law from the Court of Human Rights, deprivation includes expropriation that interferes with the use or enjoyment of the property. Trademarks are a valuable property right because they assist consumers in identifying the origin of a product and thereby are a means by which the product manufacturer can assure repeat purchases from satisfied customers. By imposing severe restrictions at the point of sale and on advertising in addition to the plain packaging requirements, the proposed resolution would destroy the essential function of the trademark, depriving business of their inherent rights in the property.

Additionally, plain packaging would impair the free movement of goods as protected under Article 11 of the EEA Agreement (European Economic Area), which provides that quantitative restrictions on imports and similar measures are prohibited. Plain packaging would have the effect of requiring importers to alter the packaging of products when they come from other EEA member states. Rules that require such alterations hinder trade and are prohibited under EEA principles, to which Iceland is a signatory. In case No. 120/78 in the EFTA Court, also known as the “Cassis de Dijon formula,” the principle of mutual recognition is required

under Article 11: if a product is lawfully produced and marketed in one member state, then it should generally be able to be marketed in another state. Otherwise such restrictions hinder the free movement of goods.

Plain packaging rules also violate the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) and the Paris Convention on the Protection of Intellectual Property Rights. Iceland is a signatory member of both. These agreements set forth the basic requirements of recognizing and protecting registered trademarks. Article 15(4) of the TRIPS Agreement and Article 7 of the Paris Convention provide that “the nature of the goods... to which a trademark to be applied shall in no case form an obstacle to the registration of the mark.” The purpose of registering a trademark is to enable one to make exclusive use of that mark; if one can register a trademark but is severely restricted from using it, then registration has little legal effect and provides little protection.

Additionally, Article 20 of the TRIPS Agreement states that “the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as... use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.” Simply put, a member state such as Iceland may not impose special restrictions on a product that make it difficult for a consumer to distinguish that product from other products. Clearly, plain packaging encumbers trademarks in such a manner that consumers would have great difficulty choosing their preferred brand. Article 17, which permits some restrictions, is inapplicable here. Under Article 17, trademark owners can be prohibited from preventing others from using signs similar or identical to the

protected mark, if doing so would amount to “unfair competition.” *See, e.g.*, Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs* (The Hague: Kluwer, 2006), 294. Article 17 has no application to a regulation, as proposed in the resolution, which prevents *anyone* from using the protected mark in a meaningful way.

Finally, Iceland is a member of the agreement on Technical Barriers to Trade (TBT Agreement). Under Article 2.2 of the TBT, World Trade Organization members such as Iceland are prohibited from creating “unnecessary obstacles to trade.” Trade restrictions cannot be more restrictive than necessary. Technical regulation is defined by the TBT as a “document which lays down product characteristics... It may also include or deal exclusively with terminology, symbols, packaging, marking, or labeling requirements as they apply to a product, process or production method.” There is no question that 80% plain packaging falls within this category of technical regulation. Because there is no significant evidence that its adoption would lead to fulfillment of the Government’s “legitimate objective” (a decrease in overall tobacco sales), plain packaging as proposed here would conflict with Article 2.2 of the TBT.

IV. Ineffectiveness of Proposed Regulations

BCL requests that before Iceland adopts a plain packaging regime that destroys speech and trademark rights, it should have solid evidence that these measures would achieve the intended objective: reduction of smoking. BCL submits that no such evidence exists.

In the United States, a sizable market for the sale of “generic” cigarettes has arisen within the last 20 years. Experience that the United States has had with that market is telling. Some

“generics” are sold in relatively plain packaging; others are sold with some colorful labeling but under brand names unrecognizable to most consumers. Generic cigarettes generally sell at a considerable discount to more popular “brand” names. Evidence indicates that the price of the package is the only selling point for generic cigarettes. Consumers in the United States do not differentiate among generic brands based on how the label looks; the lowest-priced one wins.

This evidence runs counter to the goal of reducing cigarette consumption by eliminating use of trademarks. Price competition has led in some instances to *increased* overall sales. Consumers looking for reduced price will continue to buy the cheapest cigarette, regardless of how fancy the label is. Supporters of plain packaging may be correct in guessing that over time some consumers might begin to doubt the taste and freshness of products that are as unattractively packaged as the resolution proposes. BCL would not view this result as welcome: if adult consumers are seeking out cigarettes that are not stale or otherwise substandard, public officials should not deceive consumers into believing that such cigarettes are unavailable. As long as the product remains a legal product, even with the multitude of other restrictions the resolution would implement, consumers who choose to use the product should be able to receive truthful information allowing them to differentiate between the available products based on quality.

RAND Europe’s September 2010 Final Report on “Assessing the Impacts of Revising the Tobacco Products Directive” (the “RAND Report”) is perhaps the most comprehensive government study to date of the impact on tobacco consumption of adoption policy measures of the type contemplated by Iceland. Even though it was commissioned and funded by the

European Union, the RAND Report concluded that adoption of such policy measures would have virtually no impact on tobacco consumption. It concluded that the effect on tobacco consumption would be highly uncertain and would, at most, lead to a 0.5% reduction in smoking prevalence. Moreover, even those minimal impacts are subject to serious question. There has been extensive criticism directed at the report by experts in the field. For instance, the report included no quantitative econometric analysis, failed to consider whether the likely increases in counterfeiting and black market sales would eliminate any reductions in smoking prevalence, and failed to consider whether the increased price competition likely to be created by plain packaging would have similar effects.

Even more, graphic health warnings of the type implemented in some countries, such as the United Kingdom, have proven to have little impact on smoking behavior. Plain packaging of 80% with health warnings would have even less of an effect. With graphic images and warnings, emotional responses do not translate into behavioral change. A recent study of the effectiveness of these types of warnings in the United Kingdom concluded that, although the images “made smoking seem less attractive,” the warnings had no real impact on smoking behavior. *See* Heather Wardle, et al., “Final Report: Evaluating the Impact of Picture Warnings on Cigarette Packets,” Public Health Research Consortium (2010) (finding “no changes in the breadth or depth of people’s awareness of the health risks of smoking” after implementation in the UK of graphic health warnings).

Given that plain packaging and health warnings as proposed would be “introduced against a backdrop of other tobacco control measures,” there is little evidence to attribute

declines in smoking to health warnings. David Hammond, “Health Warning Messages On Tobacco Products: A Review,” *Tobacco Control*, 20:327-337, at 331 (August 17, 2011). *See also* Glenn Leshner, et al., “Motivated Processing of Fear Appeal and Disgust Images in Televised Anti-Tobacco Ads,” 23(2) *Journal of Media Psychology*, 77-89 (2011) (determining that ads accompanied by threatening messages produce a defensive reaction, rendering subjects unable to process the message, which reduces the likely effectiveness of the anti-smoking advocacy).

The truth is that people will continue to smoke despite unattractive packaging and health warnings. So long as the product is legal, people will buy it. Prohibiting tobacco manufacturers from using their trademarks through plain packaging may even increase sales of tobacco on the basis of price competition, a strong determining factor in the purchase of generic cigarettes. The proposed action plan in the resolution simply does not support, through empirical evidence, the positive benefits that plain packaging would allegedly have on smoking reduction. Iceland should have substantial evidence that such actions would not have an opposite and unwelcome result before implementing draconian measures such the plain packaging proposal.

V. Conclusion

Business Civil Liberties, Inc. respectfully requests that the government of Iceland reject proposals for “plain packaging” of tobacco products. BCL encourages adoption of alternatives that are consistent with Iceland’s trade obligations and that provide consumers with more information, rather than less. The current proposal in the resolution restricts and eliminates that

information, moving in the wrong direction. There is no evidence to suggest that the proposed regulation would do anything to improve public health. Finally, it is questionable whether the regulation would survive a challenge under the laws and Constitution of Iceland, which explicitly protect freedom of expression and the use and enjoyment of private property without uncompensated expropriation.

Sincerely yours,

/s/ Daniel J. Popeo
Daniel J. Popeo
Chairman

/s/ Constance Larcher
Constance Larcher
President

cc: Ingimar Ingason, Secretary General, Icelandic Bar Association
Einar Gunnarsson, Ministry of Foreign Affairs
Ragnhildur Hjaltadóttir, Ministry of the Interior
Hr. Hlynur Guðjónsson, Consul, IACC
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