Law Society of Ireland

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Joint Oireachtas Committee on Health & Children

Pre legislative Consultation on the
Public Health (Standardised Packaging of Tobacco) Bill 2013.

Opening remarks of the President of the Law Society Of Ireland,
Mr. John P. Shaw.

Thursday. 13th February 2014

Introduction

The Law Society of Ireland is the representative, educational and statutory regulatory body for solicitors in Ireland. I have the honour this year to be the President of the Society, representing some 10,000 members the length and breadth of the country. Practising in some 2,200 legal firms, they also act for the public service bodies, industry and other sectors. Indeed 16% of our members now work in house.

I am here today with the Director General of the Law Society, Mr. Ken Murphy.

The Law Society welcomes the opportunity to come before this Oireachtas Committee to elaborate on its intellectual property law concerns regarding the proposed Bill.

Let me begin by making it perfectly clear: The Society does not represent anybody other then its members. The Society is not here to represent either directly or indirectly the view of the tobacco industry. We have accepted the invitation to attend today to consider exclusively the intellectual property law aspects of the proposed Bill. We do not claim to have any expertise in health policy.

The witnesses before the Committee over the past three sessions, have, as Deputy O'Caolain said in one such session, come at it *'from a variety of experiences and responsibilities in life".* And so too do the Law Society.

It should come as no surprise that many of the Society's members represent plaintiffs who are in legal action against both tobacco companies and the State in respect of smoking related injury. In addition, many members are working for, and alongside key state agencies that play a central role in the fight against illicit trade including Revenue, Customs and Excise and the Gardai Siochana. Of course some of our members represent those who have been accused of illicit trade. Naturally also some solicitors act as legal advisors to tobacco companies.

Some members of the Society work on a daily basis in Intellectual Property law as it applies to the entire gambit of industry sectors; in particular the food and drinks sector, engineering, information technology and pharmaceutical companies to name but a few.

For the avoidance of doubt, we are not here to defend the tobacco industry and are not, to use the expression "in the pocket" of anyone. We fully accept that tobacco has had a disastrous impact on health.

It is important to us then that the Law Society is not portrayed as representing anybody other than its members and the public interest which the profession serves.

On this point, it should be noted for the record that the Law Society constantly participates in public consultations on a wide range of issues that affect the public and the profession. Our contribution and participation has been extensive, on issues from human rights to conveyancing, probate to criminal justice, and all forms of litigation. In addition to constant interactions with Government departments and agencies, in the past two years alone, the Law Society made a total of 20 formal submissions on issues ranging from complex insolvency law reforms, various criminal justice bills and litigation reforms. Indeed the Director General and I were here in Leinster House yesterday for the conclusion of the Committee Stage of the Legal Services Regulation Bill

Submissions made by the Law Society, represent the commitment of its 10,000 members to contribute to public discourse, bringing with them the benefit of their legal understanding and professional experiences.

We are concerned with the legal implications of the concept of plain packaging as such, and how it might affect the standing of intellectual property rights here in Ireland and abroad. That is to say we have no issue with the policy objectives underpinning the Bill, but do have concerns regarding its impact on the Intellectual Property regime in this country.

Context

I would like to preface our substantive submission with the following brief comments.

- The Office for Harmonisation in the Internal Market in September 2013, stated that along with Germany and Hungary, "Ireland has the highest share – 40.8% - of trade mark-intensive value added in their GDP."[1].

- The above report also states that of all the European States, "the highest share of jobs in IPR-intensive industries generated by companies from outside the EU is to be found in Ireland, at almost 18%[2]

[1] OHIM (2013) 'Contribution of IP-intensive industries to the EU Economy', pp 74-75

- Eurostat – the statistical office of the European Union – confirms that there are currently 138,000 people working in knowledge intensive industries and high-end manufacturing in Ireland, such as pharmaceuticals and technology companies whose IP assets are their key asset. This is an increase of 5.3% since 2008.

- We note that no Regulatory Impact Assessment has yet been prepared on this proposed Bill. We look forward to it to the extent that it will consider what impact the proposals will have on rights under intellectual property law in Ireland.

- Clearly it is the proper and important task of the Committee and the Oireachtas to strike that careful balance between protecting and maintaining Intellectual Property law with public health and other relevant public policy considerations.

- Finally, our submissions aim to assist the Committee by outlining key legal concerns and potential ramifications of plain packaging proposals

Key Submissions

In the February 2013, the Society stated and here today wishes to restate:

"A fully functioning intellectual property system, which operates consistently and transparently across all sectors and provides certainty for intellectual property owners, investors, international partners and traders and members of the public, is vital to the future of both the EU and Irish economies. Reforms which have the effect of undermining that system should be considered very carefully"

1. Constitutional Issues

Our submission sets out a key consideration:

"The Irish Constitution requires the State to protect property rights and the Irish Supreme Court has previously struck down legislative provisions as unconstitutional where they involved restrictions on the exercise of property rights or a deprivation of rights all together without compensation for such interference"

In relation to restrictions on property rights, we do not underestimate the crucial role of the legislature in striking that balance; that 'principle of proportionality'. Our submission emphasises the challenge for the Oireachtas:

[The test of proportionality], as developed by the High Court and the Supreme Court, requires firstly that the restriction on use of the trademark must have an objective of sufficient importance to warrant interference with the property right in the mark, secondly that the impairment of this right should be minimal as possible and finally the effects on the Constitutionally protected right should be proportionate to the objectives sought to be attained.

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[2] Ibid. at p88

Were this matter to come to court, it is likely that the Court would be asked to consider evidence available regarding the effectiveness of plain packaging on smoking habits as against the range of other actions that can be considered to minimise or eradicate smoking. Some of these have been highlighted by other witnesses, such taxation, educational and cessation initiatives, sanctions and penalties etc.

2. World Trade Organisation / Paris Convention.

Ireland is a signatory to the WTO, and specifically the TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights Agreement). Under that Agreement, we have committed to respect a number of key provisions that impact on the nature trademark rights.

Article 7 provides that the nature of goods 'shall in no case form an obstacle to the registration of the mark'

Article 20 provides that "the use of a trade mark 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"

Members of the Committee will note from our submission reference to Section 8.1 of TRIPS, on the rights of member states to enact legislation in a way which is necessary to protect public health.

Article 17 provides that limitations to rights conferred – such as those on the grounds of public health - may be acceptable 'provided such exceptions take account of the legitimate interests of the owner of the trade mark"

Potential Exposure for the State

The Law Society is concerned that the extent of interference envisaged by the proposed Bill may give rise to potential actions against the State, and Europe under the provisions of the TRIPS agreement.

3. European Law Issues – ECHR

The Charter of Fundamental Rights of the European Union is binding on Member States under the Lisbon Treaty and Article 17 of the Charter guarantees rights to property, expressly including intellectual property rights. The European Court of Human Rights has held that property for this purpose includes intellectual property and has distinguished between a straightforward deprivation of property and restricting the use of the property in the general interest.

Consequently, the State runs a risk - and it is that, a risk – of going beyond regulation and restricting rights which affect the substance of a trademark, in contravention of our international obligations.

The Law Society submits that restrictions of property rights should be carefully considered, in addition to all other approaches which are less severe but might be likely to have similar consequences. The Court will ask the question, applying an objective test, whether the decision maker – ie the Oireachtas – could reasonably have concluded that the interference was necessary to achieve the legitimate aims recognised by the Convention.

The Society's intention today is to underline the need for careful and robust examination of the options available.

The Law Society submits a further concern in respect of our European obligations. The introduction of plain packaging may give rise to a challenge that it acts as a barrier to the Treaty based freedom of movement of goods. Put simply, products sold in another members state, would not have the same access to Irish markets as a result of the Bill's provisions. Ireland is entitled to rely on a derogation on the grounds of public health, but should anticipate a challenge.

4. Loss of Trademark Rights

The fundamental purpose of a registered trade mark is to distinguish goods or services of one undertaking from another. If a trademark ceases to be used it cannot continue to operate as a distinguisher of origin, quality etc.

Consequently and as currently framed, the "use it or lose it" rule could result in a reduction in intellectual property value for companies, which may give rise to compensation claims payable by the state.

The Law Society is concerned that 'unintended consequences' could result not only in claims against the state, but could also adversely impact on businesses and employment. The role of the IP in foreign direct investment should not be underestimated, and perhaps should be included in the regulatory impact assessment of the Bill.

Conclusion.

Tobacco smoking, with its destructive effects on young people – on all people – and the burden it presents for the health sector, is an emotive issue.

The basis of our appearance here today is to draw attention to the potential impact of the Bill to the regard in which Ireland is held internationally in respect of Intellectual Property and to set out generally, some key legal concerns for the Committee to consider. The General Scheme of the Bill gives rise to unavoidable legal concerns of both an Irish and EU character.

We respect the task that the Committee have before them. We are available to assist with any questions you may have.