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**Saving us from ourselves?
A fundamental rights approach on
standardised packaging in the EU**

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Summary

The Court of Justice of the European Union delivered three decisions on the 4th of May on the validity of the new Tobacco Products Directive; one on the standardisation of packaging that is obligatory for member states to adopt. The present thesis examines the measure to be adopted only by four member states as part of the implementation of the Directive. The United Kingdom, Ireland, France and Hungary are adopting a stricter “standardised packaging” measure as well (also known as plain packaging), banning all branding from the packages and in effect hindering tobacco companies to use their registered trade marks. As the Court has only answered whether the Directive is valid, the present thesis seeks to answer the question whether this “standardised packaging” for tobacco products is in conformity with the fundamental rights laid down in the Charter of Fundamental Rights of the European Union.

After identifying the two relevant fundamental rights, namely the right to property and the freedom of expression and information; with a strong focus on the content and the function of the trade mark right, this thesis follows the Court’s case law in assessing fundamental rights related cases and concludes, that even though in its recent decision the Court is leaning towards a paternalistic approach to tobacco addiction, standardised packaging should amount to a violation of those two identified fundamental rights.

Preface

I would like to thank to my supervisor, Aurelija Lukoseviciene for her advices and guidance throughout the project and to my former professor Gábor Faludi for his insights on trade mark law.

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Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
CFR	Charter of Fundamental Rights of the EU
CoE	Council of Europe
DG SANCO	Directorate-General for Health and Consumers
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
EUIPO	European Union Intellectual Property Office
EUTMR	European Union Trademark Regulation (Council Regulation (EC) No 207/2009)
FCTC	WHO Framework Convention on Tobacco Control
IP	intellectual property
OHIM	Office for Harmonization in the Internal Market
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TMD	EU Trademark Directive (Directive 2015/2436/EU)
TPD	former Tobacco Products Directive (Directive 2001/37/EC)
TPD2	new Tobacco Products Directive (Directive 2014/40/EU)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
VCLT	Vienna Treaty on the Law of the Treaties
WHO	World Health Organization
WIPO	World Intellectual Property Office
WTO	World Trade Organisation

1. Introduction

The consumption of drugs¹ is presumably as old as humanity. The corresponding state control is a newer phenomenon that may focus on reducing their supply and/or their demand. The choice how to regulate depends on many factors; health impacts and related social costs being perhaps the most evident. Tobacco, along with other substances such as alcohol, caffeine, cannabinoids or opioids, is consumed for its psychoactive effect². Accordingly, tobacco control regulations often target both supply and demand. The policy tool discussed by this thesis, namely *standardised* or *plain packaging*, seeks to reduce the demand for tobacco products. From a human rights law perspective, this can be contextualised as an attempt on the state's side to fulfil its obligation in relation to a social right, the right to health. At the same time, it imposes limitations to certain civil rights. Balancing such rights, in a broader context, fits into the line of discussions on the role of the state and leads to questions as, how much interference with civil freedoms can be justified on social grounds; and whether the state can or should prevent the individual from self-imposed harm.

This thesis does not seek to fully answer these broad questions, but wishes to join the debate with an analysis on standardised packaging in the European Union (EU). As the Court of Justice of the European Union (CJEU) delivered three decisions on the 4th of May on the validity of the new Tobacco Products Directive³, one on the standardisation of packaging⁴; this issue is a topical addition to the debate.

¹ „Any chemical substance that can affect the structure or function of a living body, often used as a medicine, or in making a medicine, or taken for its pleasurable or satisfying effects” in: M. COLEMAN, ANDREW (ed): Dictionary of Psychology, 3rd edition, OUP, 2008.

² GARTNER, CORAL E.; PARTRIDGE, BRAD. *Addiction Neuroscience and Tobacco Control* in: CARTER, ET AL. (Ed). *Addiction neuroethics: The ethics of addiction neuroscience research and treatment*. Elsevier Academic Press; 2012, pp. 75-93.

³ Directive 2014/40/EU, [TPD2].

⁴ Case C-547/14, *Philip Morris Brands SARL, Philip Morris Ltd, British American Tobacco UK Ltd v The Secretary of State for Health*, [Tobacco packaging case]. The other two cases are: Case C-358/14, *Republic of Poland v European Parliament and the Council of the European Union*, and Case C-477/14, *Pillbox 38 (UK) Ltd c Secretary of State for Health*, Judgments of the Court (Second Chamber) of 4 May 2016.

1.1. Background of the problem

Standardised packaging for tobacco is a policy tool combating the so-called tobacco epidemic. In this segment, firstly this public health problem is presented, then the core content of the measure is added, to provide an approximate definition for the purposes of the Introduction. The content of standardised packaging is more extensively elaborated on in the Legal framework chapter.

1.1.1. On the tobacco epidemic

Tobacco, according to the WHO Lexicon of alcohol and drug terms, is “any preparation of the leaves of *Nicotiana tabacum*, an American plant of the nightshade family. The main psychoactive ingredient is nicotine”⁵. Tobacco kills worldwide up to half of its users, 6 million people each year⁶. In the European Union, as of 2015, tobacco consumption remains the largest avoidable health risk, and it is responsible for 700,000 deaths each year. Approximately 50% of smokers die prematurely, resulting in the loss of an average of 14 years of life. Moreover, smokers are also more likely to suffer plenty of adverse health effects, including cardiovascular and respiratory diseases.⁷ Tobacco is also known as being highly addictive, especially because of nicotine, its predominant addicting component. Addiction is perhaps one of the most important aspects that, as it influences the attitudes of tobacco product consumers, is crucial for the purposes of this thesis. Since there is a wide range of theories on addiction⁸ it is necessary to state, that this thesis accepts tobacco addicts as persons who are effected by their addiction but who are able to make decisions concerning their health and life-style choices; and whose inherent dignity cannot be impaired with reference to their addiction.

⁵ p. 62. See at: http://apps.who.int/iris/bitstream/10665/39461/1/9241544686_eng.pdf.

⁶ WHO Fact Sheet N°339, last updated in July 2015. See at: <http://www.who.int/mediacentre/factsheets/fs339/en/>.

⁷ Special Eurobarometer 429, *Attitudes of Europeans Towards Tobacco and Electronic Cigarettes*, Report published in May 2015, p. 4.

⁸ See e.g.: [GARTNER, PARTRIDGE]; JOHNSON, BANKOLE A. *Addiction Medicine. Science and Practice*. n.p.: New York, NY: Springer New York, 2011; HARI, JOHANN. *Chasing the Scream*. London: Bloomsbury Circus, 2015.

1.1.2. *Sine qua non* of standardized packaging

After describing the problem standardised packaging targets, the measure itself is described. As it is presented later, EU directives harmonise certain aspects of tobacco control. The Tobacco Products Directive [TPD2] e.g. requires tobacco companies to display rotating written health warnings and pictures, and prohibits them to display certain elements and features on the packages⁹. These requirements result in a particular level of standardisation of tobacco packages, but the present thesis employs the term *standardized packaging* for further, optional¹⁰ standardisation. Taking the first legislation of this kind from Australia¹¹ as an example, what one can see is that the essential condition of standardized packaging is the removal of almost all branding. Accordingly, manufacturers are permitted to print the brand name only in a mandated size, font and place on the pack; the colours, logos and the imagery is removed. The difference between the mandatory packaging for EU Member States not enacting the standardized packaging (*right*) and an example for standardized packaging based on proposed UK law (*left*) is shown on these pictures¹² below.



The subject to this present thesis is this difference, in other words, *the prohibition for manufacturers to use their registered trademarks on the packages*, except for simple word marks, in which case the use is only restricted in terms of size and position.

⁹ Article 8-14. Hereinafter: obligatory packaging requirements.

¹⁰ Optional in the sense that the TPD2 does not oblige member states to adopt it, when implementing the TPD2 they may opt for such a stricter regulation.

¹¹ Tobacco Plain Packaging Act 2011, No. 148, 2011. Available at: <https://www.legislation.gov.au/Details/C2011A00148>.

¹² Source of the pictures: http://europa.eu/rapid/press-release_MEMO-14-134_en.htm and [https://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1/consult view](https://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1/consult_view).

1.2. Purpose and question formulation

As it was introduced, standardised packaging is a policy tool that in effect disables the use of trademarks on the packages. A survey, conducted in 2014 in England prior to the adoption of standardised packaging by the UK Parliament has revealed, that 64 percent of all English adults strongly supported or tended to support standardised packaging for tobacco products.¹³ Acknowledging the dangers of smoking and that public health is indeed a cornerstone of a functioning society, but also recognising that prohibiting the right holders to use their trademarks is affecting the intellectual property asset of manufacturers quite severely; a thorough analysis is required whether this measure is adequate. Enabling namely such interference without properly weighing the social needs or social rights against the civil rights that are to be interfered with, even if it seems just, leads to a slippery slope. It might lead to the assumption that if the given products are posing significant threat to health, their packages should not have trademarks on them, as trademarks are nothing but tools for shiny branding to make harmful products more appealing for the consumers. This assumption is however deficient in two ways. *Firstly*, it advocates a possible trademark ban for several other “unhealthy” products without establishing clear limits to its application. Alcohol, or even drinks with high caffeine content, sugary drinks and high-fat food could be targeted with similar legislations. At this point it is not our task to decide whether such legislations would be good for the general public or not, although one can assume the above mentioned survey would have had a different supporter rate if they asked people’s thoughts on packages of wine, coffee or cheese. It has to be kept in mind how dangerous such a practise can be without clear justification and without balancing fundamental rights of the stakeholders. And *secondly*, branding and advertising in general are not identical to trademark usage. As it is presented later in this thesis, the function of the trademark is more complex than that. These two things are intertwined: degrading trademark rights hinders the execution of a proper balancing, the

¹³ YouGov / ASH Survey Results, p. 4. available at: https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/rog5du1uxb/YG-Archive-140314-Ash-Tackling-Tobacco.pdf.

lack of balancing leads to downgrading trademark rights. Thus, the *purpose* of the thesis is to provide a human rights approach to standardized packaging, with an emphasis on the trademark right protection.

The inquiry is conducted from the perspective of the EU and the Charter of Fundamental Rights (CFR)¹⁴ that forms an overarching human rights regime, interpreted and effectively enforced by the CJEU. Even though the Court decided in the *Tobacco packaging case*¹⁵ on the validity of the TPD2 in relation to standardisation of packaging, it left aside the trademark related the fundamental rights concerns. Hence, there is a problematic issue at hand, with clear links to EU law and with a possible future demand for a court decision on the measure's conformity with fundamental rights. Consequently, the research question is the following:

Is "standardised packaging" for tobacco products in conformity with the fundamental rights laid down in the Charter of Fundamental Rights of the European Union?

Nevertheless, prior to assessing whether the public interest is adequately balanced against the rights of the tobacco companies, the latter rights have to be identified. For this - as trademarks are distinct from all other forms of intellectual property and they are often simplified as tools of branding - the function of, and the rights encompassed by the trademark have to be analysed. These assist to identify the relevant fundamental rights, then each of the rights can be examined in light of the standardized packaging. In context, answering the research question will also provide a better understanding on trademarks and their function in our societies.

¹⁴ It is worth mentioning; that the UK and Poland, during the negotiations of the Lisbon Treaty, signed an opt-out protocol and as a consequence, the extent of applicability of the CFR to these two countries is still debated.

¹⁵ Case C-547/14, *Philip Morris Brands SARL, Philip Morris Ltd, British American Tobacco UK Ltd v The Secretary of State for Health*.

1.3. Delimitation

Standardised packaging today is particularly relevant in the EU context, although it has been challenged both at Australian and international levels; some of those cases are still ongoing. These proceedings and decisions however do not form a part of the investigation for the reason that they do not affect in any way how the CJEU interprets the fundamental rights standards enshrined by the CFR. Therefore, the decision of the Australian Constitutional Court¹⁶ remains outside of the scope of this thesis, just as the litigations *vis á vis* the World Trade Organization (WTO) Dispute Settlement¹⁷. This is in spite the fact that the EU and its member states are both WTO members. Moreover, in relation to the content of trademark rights, international treaties such as the Paris Convention, the TRIPS Agreement or the Madrid Agreement, that similarly, both EU member states and the EU itself are parties to, are not investigated in depth for the main reason that the relevant content and the function of the trademark right under EU law can be established without looking into the international obligations of the member states or of the Union.

As to the European Union law, the validity of the TPD2 is outside of the scope of this thesis, following the decision of the CJEU in the *Tobacco packaging case*, the obligatory packaging measures are accepted as valid and as in conformity with the fundamental rights standards of the CFR. Furthermore, contrary to the analysis of the Court on the obligatory packaging measures in that case, in this thesis the questions of competence and the principle of subsidiarity are not addressed in detail. That is not to say, that the jurisdiction of the CJEU is not considered under the given circumstances. Quite contrary, it does form a part of the inquiry. Without establishing whether the CJEU has jurisdiction over the matter and is able to invoke the CFR, the analysis of this paper would remain only a meaningless thought experiment.

¹⁶ Case S389/2011 *British American Tobacco Australasia Limited and Others v. The Commonwealth of Australia*.

¹⁷ DS434; DS 435; DS441; DS458 and DS467.

The issue of standardised packaging, as it has been pointed out in the Introduction, is essentially the question of finding the right balance between social needs in a society such as public health, and certain civil rights. This interpretation invokes two different approaches. One is to analyse the civil rights in question and to bring forth public health under the legitimate aim test when analysing the proportionality of the measure. The second is to analyse the human right to health in depth and balance that right against the civil rights in question. This thesis solely adopts the first approach for taking up both approaches and conducting an in depth analysis of the right to health would exceed the limits of this thesis without providing sufficient additional value to its answer for the research question.

1.4. Method and material

This study is conducted mainly with a traditional legal method and the internationally accepted rules of interpretation. The method was chosen to provide a practical set of legal arguments that might bear relevance in a future case in front of the CJEU. When assessing which fundamental rights can be invoked in relation to the problem of this present thesis, certain entitlements in private law – set out on European or domestic level – has to be “translated” into fundamental rights. In order to do this, the underlying form intellectual property protection of this inquiry, trademark, is discussed in a disunited fashion. The thesis is not following the traditional structure of private law text books and commentaries on trademark, nor does it enclose one chapter or section that would only address the rights and obligations the trademark encompasses, but these are introduced separately with reference to the fundamental rights they are relevant to. This method is applied to provide a better understanding on which aspects of the trademark protection are particularly important from a human rights perspective, in relation to our problem.

The application of traditional legal method naturally has an impact on the material used. These materials form three distinct sets of sources. Firstly, as to the content of standardized packaging, domestic legislations of EU member states are used along with their notifications directed to the European Commission. These documents are valuable as they provide additional arguments from the member states. Secondly, to assess the measure’s impact on intellectual property, the European and domestic trademark laws are taken into account, supplemented by academic literature and theories on property in relation to the content of the right and its function. Thirdly, the conformity issue is investigated through the CFR and the related case law of the CJEU. Following Article 52 (3) of the CFR however, the case law of the European Court of Human Rights (ECtHR) will be used too, as long as the practice of the CJEU is not contrary. In any case, when assessing the content of EU law, the opinions issued by the Advocate General comprise essential sources on both EU trademark law and on fundamental rights.

1.5. Disposition

At the onset, in Chapter 2, the legal framework is presented: firstly, the available policy tools to address the problem of tobacco epidemic, secondly the EU's tobacco-related laws are shortly introduced, to explain that standardized packaging has not emerged to fill a total regulatory vacuum; thirdly the standardised packaging in detail followed by their effect on trademark rights. Subsequently the procedural background is described in Chapter 3; namely how the underlying problem of the thesis could form a basis for litigation, what the jurisdiction of the relevant court and the scope of the relevant instrument is.

In Chapter 4 the relation between trademarks and fundamental rights is mapped to the extent necessary, that is the institution of trademark is “translated” into fundamental rights: the right to property and the freedom of expression. This is conducted with respect to the function and the content of the trademark right, with respect to its origins, and the problematics whether trademark as a special type of intellectual property provides its right holder a right to use. After identifying the relevant civil rights standardised packaging might interfere with, Chapter 5 investigates whether standardised packaging indeed limits the two fundamental rights. Firstly the right to property is investigated, than the freedom of expression and information.

In Chapter 6 the proportionality principle is outlined based on the case law of the CJEU and the academic literature on the case law. Since some of the steps – such as legitimate aim, suitability and necessity - are equally applicable to both fundamental rights, this Chapter does not only discuss but also applies the stated, and thereby contributes to the analysis on whether the measure is justifiable. Chapter 7 assesses whether the limitations imposed are justifiable in light of the last step, the narrow sense proportionality: firstly with respect to the right to property, then to the freedom of expression. Finally, Chapter 8 concludes on the fundamental rights conformity of standardised packaging.

2. Legal framework

This chapter describes the object of the analysis more in detail along with its broader context. As to the context, namely the alternatively available policy tools to address the problem of tobacco epidemic and the other tobacco-related EU laws, it has to be said that it is particularly relevant when applying the proportionality principle according to the case law of the CJEU. If the results aimed at can be achieved or closely approached with policy tools less severely or not at all infringing on fundamental rights of the stakeholders, the measure under scrutiny is deemed as disproportionate.

As to the narrow sense object of the analysis, in order to assess the infringement, standardised packaging's effects on trademark rights also have to be explained. Therefore when introducing the detailed rules of the measure, elementary trademark law rules are also elaborated on.

2.1. International outlook on alternative policy tools

The most relevant source of international law for our purposes is the WHO Framework Convention on Tobacco Control (FCTC)¹⁸, ratified by 180 states, including all Member States of the EU and the EU itself¹⁹. The FCTC seeks to reduce both the demand and the supply of tobacco. As to the reduction of demand, it utilises price and tax measures²⁰, along with non-price measures²¹ such as protection from exposure to tobacco smoke, regulation of the contents of tobacco products, regulation of tobacco product disclosures, packaging and labelling of tobacco products, education, communication,

¹⁸ Adopted by the World Health Assembly on 21 May 2003, entered into force on 27 February 2005; currently counting 180 state parties. See at: <http://www.who.int/fctc/en/>. For how it has accelerated the adoption of new tobacco policies around the world, see UANG, RANDY; HEIKKI HIILAMO; AND STANTON A. GLANTZ. "Accelerated Adoption of Smoke-Free Laws After Ratification of the World Health Organization Framework Convention on Tobacco Control." *American Journal Of Public Health* 106, no. 1 (January 2016): 166-171.

¹⁹ For the negotiation history and implementation see e.g.: WU, CHIEN-HUEI. "EU's Participation in the Who and FCTC: A Good Case for EU as a Global Actor [article]." *Asian Journal Of WTO & International Health Law And Policy* no. 2 (2010): 467.

²⁰ Article 6.

²¹ Article 7-14.

training and public awareness, tobacco advertising, promotion and sponsorship, and demand reduction measures concerning tobacco dependence and cessation.

As to the reduction of supply, the FCTC contains provisions on illicit trade in tobacco products, on sales to and by minors, and of support for economically viable alternative activities²². The FCTC in most cases only requires the states to move towards the objective of the treaty²³; price and tax measures are a good example. It is required of states to adopt or maintain such measures in light of the objective of the treaty, but the actual content of those measures is not defined. Other provisions place more concrete obligations on the member states; the ones concerning labelling and packaging are among them²⁴. Importantly, the FCTC does not mention standardized packaging, although the WHO does promote its enactment at other fora²⁵. In addition, Article 2 (1) of the treaty states that “*Parties are encouraged to implement measures beyond those required by this Convention and its protocols.*” By all accounts, the FCTC gives a broad set of areas where tobacco regulation is advised and provides several tools to fight the tobacco epidemic, which could be seen as alternative to standardized packaging.

²² Article 15-17.

²³ The *Guidelines for implementation of the WHO FCTC* (see at: http://apps.who.int/iris/bitstream/10665/80510/1/9789241505185_eng.pdf?ua=1) provide further information and additional recommendation for each article, these are however not binding upon the member states.

²⁴ See especially Article 11 (1) (b) on the packaging.

²⁵ See e.g. WHO Press Statement on the Australian tobacco legislation: http://www.who.int/mediacentre/news/statements/2012/tobacco_packaging_update/en/.

2.2. Tobacco control in the EU

The origins of tobacco regulation at union level date back to 1985, when the European Council in Milan adopted the *European action programme against cancer*, ultimately giving rise to the first directive as a whole addressing tobacco products²⁶. The scope of this directive covered only *labelling*: health warnings on the packages along with indication of the tar and nicotine yield. Similarly to the first directive focusing wholly on tobacco products, the second had also a very limited scope regulating only the maximum limits for tar yields²⁷. Notably, these directives stood on a dual basis. *Firstly*, on the notion that the differences between domestic laws of member states are likely to constitute barriers to trade and to impede the establishment and operation of the internal market²⁸. *Secondly*, on the European action programme against cancer and thus public health considerations. This duality is rooted in the division of competences between the EU and the member states²⁹, and the principle of subsidiarity³⁰. These render the EU unable to regulate on public health basis only³¹.

Advertising and sponsorship related to tobacco products are regulated on a sectorial basis. Accordingly, the first relevant provisions ban tobacco advertising via television broadcasting activities³². The attempt to impose a general ban on advertising and sponsorship of tobacco products³³ has failed

²⁶ Council Directive 89/622/EEC.

²⁷ Council Directive 90/239/EEC.

²⁸ The internal market has been one of the core objectives or central policies of the European integration since the establishment of the European Economic Community, see: KACZOROWSKA, ALINA. *European Union law*. n.p.: Abingdon: Routledge, 2013, p. 9; importantly, Article 114 of the TFEU provides a legal basis for legislation to achieve this objective thus the reference to the internal market is common in secondary legislation of EU organs, see e.g.: CHALMERS, DAMIAN, G. T. DAVIES, AND GIORGIO MONTI. *European Union law: text and materials*. n.p.: Cambridge : Cambridge University Press, 2014, pp. 677-687. [CHALMERS].

²⁹ See e.g.: CRAIG, PAUL, AND GRÁINNE DE BÚRCA. *EU law : text, cases, and materials*. n.p.: Oxford : Oxford Univ. Press, 2011, p. 307-318, [CRAIG, DE BÚRCA].

³⁰ The principle of proportionality is enshrined in Article 5(3) of the TEU. For a detailed explanation on the principle see e.g.: CHALMERS, pp. 394-399.

³¹ For more on EU competences in relation to health regulations see: NEERGAARD, ULLA. "EU Health Care Law in a Constitutional Light: Distribution of Competences, Notions of 'Solidarity', and 'Social Europe'." In *Health Care and EU Law*, 19-58. n.p.: Legal Issues of Services of General Interest. The Hague: T.M.C. Asser Press; distributed by Springer, New York, 2011.

³² Council Directive 89/552/EEC.

³³ Directive 98/43/EC, see especially Article 3 (1).

as the directive has been annulled³⁴ by the Court of First Instance³⁵, mostly for the reason of lack of competence³⁶. The directive to replace it³⁷ was likewise challenged but the Court has uphold its validity³⁸. It bans tobacco advertising in several branches of the media as press, printed publication, radio broadcasting, and information society services. Lastly, the *Audiovisual Media Directive*³⁹ prohibits advertisement and sponsorship in some additional cases. The first comprehensive document on tobacco control was the *previous Tobacco Products Directive (TPD)*⁴⁰ that sought

“the approximation of laws on the maximum tar, nicotine and carbon monoxide yields of cigarettes, the warnings regarding health and other information to appear on unit packets of tobacco products, together with certain measures concerning the ingredients and the descriptions of tobacco products”⁴¹.

The *Tobacco Products Directive* currently in effect (TPD2)⁴² repealed the previous and is aiming to comply with the FCTC, as far as EU competences allow it⁴³. For instance, parties to the FCTC has to enact certain tax measures, but since the power to levy taxes is central to the sovereignty of EU Member States, there are only limited competences to the EU in this area⁴⁴. Consequently, taxing is outside of the scope of the TPD2. At the same time, it regulates certain new areas, such as electronic cigarettes and refill containers, and herbal products for smoking. It also obliges states to prohibit the placing on the market of tobacco products with a characterising flavour.

³⁴ Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, Judgment of the Court of 5 October 2000.

³⁵ Predecessor of the General Court, established by 88/591/ECSC, ECC.

³⁶ For an in depth analysis of the case see: TRIDIMAS, GEORGE, AND TAKIS TRIDIMAS. "The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?." *European Journal Of Law & Economics* 14, no. 2 (September 2002): 171.

³⁷ Directive 2003/33/EC.

³⁸ Case C-380/03, *Federal Republic of Germany v European Parliament and Council of the European Union*, Judgment of the Court (Grand Chamber) of 12 December 2006.

³⁹ Directive 2010/13/EU.

⁴⁰ Directive 2001/37/EC.

⁴¹ Article 1.

⁴² Directive 2014/40/EU.

⁴³ On to what extent the EU itself governs areas in the convention, see the *FCTC Implementation Factsheet of the EU* at:

<http://apps.who.int/fctc/implementation/database/parties/European%20Union/factsheet>.

⁴⁴ See the tax provisions chapter of TFEU (Articles 110-113) and the chapter on the approximation of laws (Articles 114-118).

Nevertheless, it reiterates previously existing rules: it prohibits the placing on the market of tobacco for oral use⁴⁵, prescribes the maximum emission levels for tar, nicotine and carbon monoxide⁴⁶. Analogously, health warnings are to appear on the packages. Novelty is however, that packages shall carry “*combined health warnings*”⁴⁷ that is

“a health warning consisting of a combination of a text warning and a corresponding photograph or illustration”⁴⁸.

The TPD2 does not oblige states to enact standardized packaging, but it authorizes states to

“introduce provisions providing for further standardisation of the packaging of tobacco products, provided that those provisions are compatible with the TFEU, with WTO obligations and do not affect the full application of this Directive”⁴⁹

In order to discover what the “*further standardisation*” in TPD2 means. The *Consultation Document* issued by the Commission explains that

“manufacturers would only be allowed to print brand and product names, the quantity of the product, health warnings and other mandatory information such as security markings. The package itself would be plain coloured (...)”⁵⁰.

This section enables member states to adopt standardised packaging in their domestic laws.

⁴⁵ Article 17.

⁴⁶ Article 3.

⁴⁷ Article 10.

⁴⁸ Section (33) of Recitals.

⁴⁹ Section (53) of Recitals.

⁵⁰ Possible Revision of the Tobacco Products Directive 2001/37/EC, Public Consultation Document, DG SANCO 2010, p.7.

2.3. Standardised packaging and its effects on trademark rights

2.3.1. Domestic legislations

Two of three EU member states which have already enacted the measure. Ireland has chosen to legislate by an act of parliament⁵¹ and France whose parliament adopted a new health related act⁵², authorizing the government to create a decree on standardisation of tobacco packages⁵³. The act has been challenged at the *Conseil Constitutionnel* that has approved the French legislation in its decision⁵⁴. In the United Kingdom (UK), the Secretary of State has passed regulations, approved by resolutions of each House of Parliament⁵⁵. The two other member states considering the measure as of 2015 were Sweden and Hungary⁵⁶.

In Sweden, the inquiry report *A Review of the Tobacco Act*⁵⁷ found that – even though it should be regarded as compatible with the CFR, trademark rights, design rights, WTO law, EU law and the *Instrument of Government* –

⁵¹ Public Health (Standardised Packaging of Tobacco) Act 2015. Available at: <http://www.tobaccocontrolaws.org/files/live/Ireland/Ireland%20-%20Stand.%20Packaging%20Act%202015%20-%20national.pdf>. See also: HEFLER, MARITA. 2014. "Ireland: Leading the EU on Plain Packaging." *Tobacco Control* 23, no. 5: 372-372.

⁵² LOI n° 2016-41 du 26 janvier 2016 de modernisation de notre système de santé. Available at: <https://www.legifrance.gouv.fr/eli/loi/2016/1/26/AFSX1418355L/jo/texte>.

⁵³ JORF n°0069 du 22 mars 2016, texte n° 5, Décret n° 2016-334 du 21 mars 2016 relatif au paquet neutre des cigarettes et de certains produits du tabac, available at: <https://www.legifrance.gouv.fr/eli/decret/2016/3/21/AFSP1603141D/jo/texte>. See also the WHO FCTC report on the French legislation at: http://apps.who.int/fctc/implementation/database/groups/france-transposition-law-european-directive-tobacco-and-advent-plain-packaging?utm_content=buffer2ea62&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

⁵⁴ Décision n° 2015-727 DC du 21 janvier 2016, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2015-727-dc/decision-n-2015-727-dc-du-21-janvier-2016.146887.html>.

⁵⁵ The Standardised Packaging of Tobacco Products Regulation 2015, 2015 No. 829. Available at: <http://www.legislation.gov.uk/uksi/2015/829/contents/made>. See also: WISE, JACQUI. "UK moves to legislate on standardised cigarette packaging before election." *BMJ (Clinical Research Ed.)* 350, (January 23, 2015): h416.

⁵⁶ See: *Plain packaging of tobacco products worldwide movement to address a global challenge*, Press Kit from the first ministerial meeting on plain tobacco packaging. Paris, July 20th, 2015. Available at: http://social-sante.gouv.fr/IMG/pdf/150720_-_PK_-_Plain_Packaging_Meeting.pdf.

⁵⁷ *En översyn av tobakslagen - Nya steg mot ett minskat tobaksbruk*, available at: <http://www.regeringen.se/rattsdokument/statens-offentliga-utredningar/2016/03/sou-201614/>. Summary in English at: http://tobaksfakta.se/tema/aktuellt_i_svensk_tobakspolitik/.

standardised packaging would not be compatible with the current provisions of the *Freedom of the Press Act*. Consequently, the report advises against introducing this requirement for tobacco packaging, at least without an exception introduced to the Constitution⁵⁸. This possibly withholds Sweden from enacting the measure.

The Hungarian Government has proposed a package of two amendments, one to the *Tobacco Regulation Act*⁵⁹ to be approved by the Parliament, and one to the *Implementation Decree*⁶⁰. *Ergo*, these are the four legislations that will have an impact on national trademarks registered in the UK, Ireland, France and Hungary, as well as on Community trademarks.

2.3.2. Fundamentals of EU trademark law

Before delving into further details on how standardised packaging affects trademark rights, it is worth mentioning some of the basics of the European trademark system. It rests upon two pillars. One is the harmonization of the national trademark laws of the member states by the implementation of the *Trademark Directive* (TMD)⁶¹. The registration and administration of national trademarks continue to be the competence of national intellectual property offices; the TMD only seeks for approximation limited to those national provisions of law which most directly affect the functioning of the internal market⁶². The other pillar consists of three

⁵⁸ Summary of *A Review of the Tobacco Act*, p. 7.

⁵⁹ Amendment to Act XLII of 1999 on the protection of non-smokers and certain regulations on the consumption and distribution of tobacco products, available at: <http://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/%3Ftrisation%3Dsearch.detail%26year%3D2015%26num%3D529%26dLang%3DEN+%&cd=1&hl=sv&ct=clnk&gl=se?trisation=search.detail&year=2015&num=656>.

⁶⁰ Amendment to Government Decree 39/2013 of 14 February 2013 on the manufacture, placement on the market and control of tobacco products, combined warnings and the detailed rules for the application of the health-protection fine. Available at: <http://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/%3Ftrisation%3Dsearch.detail%26year%3D2015%26num%3D529%26dLang%3DEN+%&cd=1&hl=sv&ct=clnk&gl=se?trisation=search.detail&year=2015&num=723>; with Annex 1 to proposal 28425-11/2015/JOGIEÜ, available at: <http://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/%3Ftrisation%3Dsearch.detail%26year%3D2015%26num%3D529%26dLang%3DEN+%&cd=1&hl=sv&ct=clnk&gl=se?trisation=search.detail&year=2015&num=529>

⁶¹ Directive 2015/2436 of the European Parliament and the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks.

⁶² TMD, para. (4) of the Recitals.

regulations, with the *European Union Trademark Regulation (EUTMR)*⁶³ being the most relevant, establishing the Community trademark and the European Union Intellectual Property Office (EUIPO)⁶⁴. The substantive provisions of the TMD and the EUTMR are virtually identical⁶⁵. Accordingly, trademark may consist of:

“any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

- (a) distinguishing the goods or services of one undertaking from those of other undertakings; and
- (b) being represented on the register (...).”⁶⁶

2.3.3. The impact on trademark rights

As standardised packaging hinders the use of trademarks, the relevance of use has to be assessed. Both in the EUTMR and in the TMD “*genuine use*” has a particular relevance⁶⁷. Firstly, following the “*requirement of use*”⁶⁸, the proprietor has to put the trademark to genuine use in connection with the goods and services within a period of five years following the registration. Article 15 of the EUTMR and Article 16 of the TMD both renders that the lack of use entails sanctions, unless there are “*proper reasons*” for non-use. These sanctions are the followings: non-use can be invoked by the opposing party as defence in infringement proceedings⁶⁹, in opposition proceedings⁷⁰, and in proceedings seeking a declaration of invalidity⁷¹; the lack of genuine

⁶³ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trademark.

⁶⁴ Formerly known as Office for Harmonization in the Internal Market (OHIM).

⁶⁵ NORMAN, HELEN E. *Intellectual property law: directions*. n.p.: Oxford: Oxford University Press, 2011, p. 318. [NORMAN].

⁶⁶ Article 3 of the TMD, similar to Article 4 of the EUTMR.

⁶⁷ MACQUEEN, HECTOR L. *Contemporary intellectual property: law and policy*. n.p.: Oxford: Oxford University Press, 2011, p. 571, [MACQUEEN]; BENTLY, LIONEL; SHERMAN, BRAD. 2014. *Intellectual property law*. n.p.: Oxford: Oxford University Press, 2014, p. 899. [BENTLY, SHERMAN].

⁶⁸ Article 16 of the TMD, and Article 15 of the EUTMR.

⁶⁹ Article 17 of the TMD, Article 14 of the EUTMR regulates the complementary application of national law relating to infringement, therefore the rules of the TMD apply here too.

⁷⁰ Article 44 of the TMD, and Article 42 (2) of the EUMTR.

⁷¹ Article 46(3) and (4) of the TMD, and Article 52 (2) of the EUTMR.

use constitutes a ground for revocation⁷². These sanctions do not apply if the proprietor is able to prove that there were proper reasons for their non-use⁷³.

The CJEU has dealt with the proper reasons *inter alia* in the *Lidl case*⁷⁴, where the Austrian *Oberster Patent- und Markensamt* has referred to the Court essentially asking how these reasons should be outside of the control of the proprietor. Advocate General (AG) RUIZ-JARABO COLOMER – for a lack of self-evident wording in the TMD – analysed Article 19 of the TRIPS Agreement⁷⁵ in his Opinion, and emphasised that such valid reasons can especially arise as import restrictions imposed by governments⁷⁶. The Court in its judgement concurred with the AG Opinion and went on to state, that a broad interpretation would jeopardise the objective set out in the 8th Recital, that “*the trademarks must actually be used*”. Thus, the obstacles beyond the control of the proprietor should also have a direct relationship with the trademark in order to qualify as proper⁷⁷. Following this decision, it is highly unlikely, that standardised packaging would threaten the existence of the trademark rights of tobacco companies. However, since the Court has stressed, that the proper reason has to be investigated on a case by case basis⁷⁸, and since it is mostly domestic intellectual property offices and courts that would apply these laws⁷⁹, there is still a chance that standardised packaging, as hindering the use of trademarks, results in revocation or declaration of invalidity.

⁷² Article 19 of the TMD, and Article 51 of the EUTMR.

⁷³ MACQUEEN, p. 644, para. 14.104; BENTLY, SHERMAN, p. 903.

⁷⁴ Case C-246/05, *Armin Häupl v Lidl Stiftung & Co. KG*, Judgment of the Court (Third Chamber) of 14 June 2007; also referred to in BENTLY, SHERMAN, p. 903.

⁷⁵ Article 19 (1) states:

“If use is required to maintain a registration, the registration may be cancelled (...), unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark (...) such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.”

⁷⁶ Opinion of A.G. RUIZ-JARABO COLOMER to Case C-246/05, point 78.

⁷⁷ *Lidl case*, para. 52-55.

⁷⁸ *ibid*, para. 54.

⁷⁹ Opinion of AG RUIZ-JARABO COLOMER stresses this in para. 66.

Some legislation addressed the problem of lack of use directly, enacting provisions that standardised packaging by no means forms an obstacle to the registration of a trademark; neither does it form a ground for revocation or for declaration of invalidity⁸⁰. The outcome in this case is an existing trademark right protection without the actual possibility to use that mark. The consequences are still not mitigated, only formally; but as it was previously presented, a successful procedure against the trademarks in question based on non-use is not a particularly plausible scenario.

⁸⁰ Article 13 (1) of the Standardised Packaging of Tobacco Products Regulation 2015 [UK]; Article 5 (1) Public Health Act 2015 [Ireland].

3.Procedural background

After introducing standardised packaging as a policy tool combating tobacco epidemic and elaborating on the legal context thereof, this chapter moves on to the procedural aspects of the inquiry. *Firstly*, it explains why the CJEU is the most adequate forum to discuss the human rights conformity of standardised packaging in the EU. *Secondly*, the jurisdiction of the Court is established, that is its competences are investigated in light of the present case. The aim is to demonstrate that answering the research question means providing a solution that is indeed applicable to solve the problem at hand: in case the CJEU were not able to hear the case, an analysis from our angle, namely from the angle of the CFR, would be futile.

3.1. Why opt for the Court of Justice of the European Union?

It has been already revealed why the analysis is conducted from an EU-perspective. This however does not imply an evident choice of forum, or of a human rights regime. The member states of the EU are namely also state parties to the European Convention on Human Rights (ECHR)⁸¹, a human rights regime of the Council of Europe (CoE) establishing the European Court of Human Rights (ECtHR)⁸² as its permanent enforcement body based in Strasbourg. It is a remarkable regional human rights system with more than sixty years of jurisprudence. Still, the focus of this thesis is the CFR and the jurisprudence of the CJEU, with the exceptions deriving from Article 52 (3) of the CFR, when the CJEU, establishing the meaning and scope of fundamental rights, may refer to their content as it was expressed by the ECtHR.

The reasons for opting for the CJEU are twofold; some of these reasons enroot in the competences of the Court and the enforcement mechanisms,

⁸¹ Also known as the Convention for the Protection of Human Rights and Fundamental Freedoms, it opened for signature in Rome on 4 November 1950 and entered into force on 3 September 1953.

⁸² Established by Article 19 of the ECHR.

while others enroot in the fact that opting for the CJEU naturally means opting for the CFR as the catalogue of rights, instead of the ECHR.

As to the reasons in favour of one court to the other, the scope of the cases the CJEU adjudicate is broader, that implies different expertise of the judges and other personal. The ECtHR, as it is shown in following chapters, has also dealt with human rights issues linked to intellectual property, however the CJEU has the competence to overrule decisions of the EUIPO⁸³, consequently, there is a well-funded presumption that the CJEU can take into account details of the trademark law, which matter so much in the present case. Apart from this, to some extent sociological reason, there is another, rather legal reason as well. It is considered to be one the most effective international court, “*its judgments are complied with*”, it has “*a high approval rating*”, and it

“has been able through a variety of formal and informal powers and strategies to develop legal doctrines, political alliances, and legitimacy capital than enabled it to significantly influence government conduct and support and legitimize the EC/EU Project.”⁸⁴

As to the reasons to opt for the CFR (and consequently for the CJEU), there are again, Article 52 (3) of the CFR provides that “*this provision shall not prevent Union law providing more extensive protection.*” Thus, there is a possibility for stronger human rights protection under the CFR and under the EU law in general. For our purposes this difference is crucial, as it is demonstrated for instance in the chapter on the proportionality principle.

Importantly, a comparison between the two regimes could have been also conducted, doubling the actual analysis however would have exceeded the limits of this thesis; therefore, the more appealing regime had to be selected.

⁸³ Article 53 of TFEU and Title 4 of the Rules of procedure of the General Court.

⁸⁴ SHANY, YUVAL. "Conclusions." In *Assessing the Effectiveness of International Courts*. Oxford: Oxford University Press, 2014. Oxford Scholarship Online, 2014. p. 311.

3.2. Jurisdiction of the Court of Justice

The CJEU consists of three courts, the Court of Justice (ECJ)⁸⁵, the General Court⁸⁶ and the Civil Service Tribunal⁸⁷. In our context, the ECJ is the only relevant body, as the competences of the two other courts do not include any proceedings under which the standardised packaging could be weight against the standards of fundamental rights⁸⁸.

3.2.1. Proceedings of the Court of Justice

The Court of Justice has three types of proceedings⁸⁹. *Firstly*, direct proceedings against Member States or an institution, body, office or agency of the European Union. This group includes several different proceedings, either against a Member State for failure to fulfil an obligation, i.e. infringement actions⁹⁰ – actions can be brought by the Commission or by another Member State – or against the EU institutions for annulment, i.e. annulment actions⁹¹, or for failure to act.⁹² In these two types of proceedings, the action can be brought by the Member States, the institutions themselves or any natural or legal person if the actions relate to a measure.

Secondly, indirect proceedings: question of validity raised before a national court or tribunal, i.e. preliminary rulings.⁹³ And *thirdly*, proceedings where the ECJ acts as second instance court to review the decisions of the General Court and Civil Service Tribunal. These ones are irrelevant in this context, given that the first instance decisions themselves are already outside of our interest.

⁸⁵ Also known as the European Court of Justice.

⁸⁶ See: Article 256 of the TFEU.

⁸⁷ See: Article 257 and 270 of the TFEU, and Council Decision 2004/752/EC.

⁸⁸ For proceedings of the General Court see Articles 256-257 of the TFEU; for proceedings of the Civil Service Tribunal see ANNEX on the Civil Service Tribunal to TFEU.

⁸⁹ Source of typology is the *Fact Sheet of the European Union*, available at: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.3.10.html.

⁹⁰ Article 258 and 259 TFEU.

⁹¹ Article 263 the TFEU.

⁹² Article 265 of the TFEU.

⁹³ Article 267 of the TFEU.

3.2.2. Finding the link to EU law

The ECJ has a mandate to interpret and apply the CFR as part of the EU law but it is only applicable to member states when they are implementing Union law⁹⁴. Therefore, to establish the jurisdiction of the Court in the present case – and then subsequently assess which action could be brought to the Court in relation to standardised packaging – we have to take into account how the enactment of standardised packaging is linked to EU law. The TPD2 authorizes states to “*introduce provisions providing for further standardisation of the packaging of tobacco product*”⁹⁵ and it is the member states, who, when implementing the Directive opt in or opt out for the standardised packaging. This “authorisation” does however not appear in the main text of the TPD2 but among the Recitals. In the main text, Article 13 (3) on product presentation gives a hint what this might mean:

“the *elements and features that are prohibited* pursuant to paragraphs 1 and 2 *may include* but are not limited to texts, symbols, names, *trademarks*, figurative or other signs” (emphasis added).

Still, the fact that “*further standardisation*” refers to standardised packaging as defined in this thesis, comes to light only after reading the *travaux préparatoires* of the Directive. It is namely the *Public Consultation Document issued by the Directorate-General for Health and Consumers* (DG SANCO) that is explaining that there are three options to legislate in terms of tobacco packaging: either not changing anything (1); or improving the consumer information by making picture warnings compulsory, along with new rules on information on the packages on the levels of tar, nicotine and carbon monoxide, and on harmful substances in tobacco products (2); or introducing generic or plain packaging (3). The third one would entail that

“[m]anufacturers would only be allowed to print brand and product names, the quantity of the product, health warnings and other mandatory information such as security markings. The package itself would be plain coloured (such as white, grey or

⁹⁴ Article 51 (1) of the CFR.

⁹⁵ 53rd Recital.

plain cardboard). The size and shape of the package could also be regulated”⁹⁶.

In terms of binding obligations, the TPD2 chooses the second version. Therefore, it is apparent, that “*further standardisation*” means plain packaging corresponding standardised packaging as used in this thesis.

As result, two questions emerge. Are the *travaux préparatoires* accepted as supplementary means of interpretation under European law, as it is in international law stemming from Article 32 of the Vienna Convention⁹⁷? What is the legal status of the Recitals? As to the first question, the preparatory works can be used as tool of the teleological interpretation⁹⁸, according to which it was the intent of the drafters that further standardisation means adopting standardised packaging, especially reading that together with the referenced Article 13 (3) of the TPD2. As to the second question, the common understanding is that Recitals are not binding⁹⁹. The main question here is essentially, how we see standardised packaging: as a policy tool already present in the TPD2 or as a separate, further restriction imposed by member states when implementing the TPD2 and therefore it is only the implementing member states that can be held accountable for infringement. In case the *first* view were accepted, the Court would proceed with the fundamental rights review concerning the legality of the action on behalf of the Union institutions¹⁰⁰. Hence, an action against the European Parliament

⁹⁶ Possible Revision of the Tobacco Products Directive 2001/37/EC, Public Consultation Document, DG SANCO 2010, p.7.

⁹⁷ Vienna Convention on the Law of Treaties (VCLT), signed in Vienna on the 23rd of May 1969, in force from 27th of January 1980, with 114 member states and with Article 32 accepted as customary international law.

⁹⁸ ARNULL, ANTHONY. *The European Union and its Court of Justice*. n.p.: Oxford : Oxford University Press, 1999, p.607, 608.

⁹⁹ See: *Joint Practical Guide - for persons involved in the drafting of the European union legislation*, pp. 20-21, available at: <http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf>.

¹⁰⁰ As in the following cases: Case 29-69, *Erich Stauder v City of Ulm*, Judgment of the Court of 12 November 1969; Case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of the Court of 17 December 1970; Case 4-73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*. Judgment of the Court of 14 May 1974; Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*. Judgment of the Court of 13 December 1979. [*Hauer case*]; see also CHALMERS, p. 425-428, and see especially the fundamental rights-based challenges in CRAIG, DE BÚRCA, pp. 372-381, referring among others to the Nold case, and the Joined cases C-20/00 and C-64/00, *Booker Aquaculture Ltd (C-20/00) and Hydro Seafood GSP Ltd (C-64/00) v The Scottish Ministers*, Judgment of the Court of 10 July 2003, [*Booker Aquaculture case*].

and the Council to annul the TPD2 could be brought on the ground that standardised packaging violates fundamental rights enshrined in the CFR. Following this line of argumentation, a preliminary action is also plausible, when a national court would refer a tobacco packaging related domestic case to the CJEU asking to determine the validity of the TPD2.

It is relevant however that in the *Tobacco Packaging case*, where the relevant articles of the TPD2 were challenged, the Court did not assess standardised packaging. Question 2 of the referring order was targeting Article 13 (1) and its conformity to Article 11 of the CFR, freedom of expression. Challenging the validity of the TPD2, the Court could only take into account the obligatory packaging provisions. Indeed, the Recitals are not binding and Article 13 (3) contains only an explicatory list for further (optional) standardisation, therefore not even the referring High Court of Justice could refer a question directly on the trade mark related issues of standardised packaging.

Consequently, the *second* view is the accurate, because as the TDP2 does not directly refer to standardised packaging, it is only the *way* of implementation, the measure enacted when implementing the directive that is violating fundamental rights, not the TDP2 in its entirety or certain Articles thereof. It is however not problematic for our purposes, as the CFR is binding upon even member states, when they are implementing Union law¹⁰¹, and the Court has in several occasions reviewed measures of member states implementing EU law even before the adoption of the CFR¹⁰². Hence, an infringement action could be brought against the member states in question for failure to fulfil their obligation to implement directives according to the fundamental rights of the CFR¹⁰³. In conclusion, it is procedurally possible for the CJEU to assess the fundamental rights conformity of standardised packaging in the EU.

¹⁰¹ Article 51 (1) of the CFR.

¹⁰² Case 5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Judgment of the Court (Third Chamber) of 13 July 1989, see especially para 19; Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, Judgment of the Court of 30 July 1996, [*Bosphorus case*].

¹⁰³ See: CRAIG, DE BÚRCA, pp. 382-384, referring *inter alia* to Case C-219/91, *Criminal Proceedings against Ter Voort*, Judgment of the Court (Fifth Chamber) of 28 October 1992. [*Ter Voort case*].

4. Trademarks and fundamental rights

This chapter opens the analytic part of the thesis as the possibility to proceed such a case *vis à vis* the CJEU has been established. The chapter's primary task is to "translate" the trademark right into fundamental rights by mustering its content and social function. That standardised packaging unfavourably affects trademark rights is now evident, but what this implies for fundamental rights, needs to be presented in detail to proceed further with the analysis. The two fundamental rights, the trademark right can be translated to, are discussed individually. *Firstly*, trademark as a form of intellectual property is introduced, establishing the basis to invoke right to property as it is laid down in Article 17 of the CFR. *Secondly*, trademark as speech providing information to consumers is added, as the basis to invoke freedom of expression and information as it is laid down in Article 11.

4.1. Trademarks as property

The present section investigates the content of trademark rights and claims that it is not sufficient to declare that trademarks are *property* for the reason that they are *intellectual property*; as this declaration does not add much to our inquiry for two reasons: property laws and IP laws developed separately for a long time, and they approach the content of right differently; not to mention that the various forms of intellectual property also differ substantially. These differences play a pivotal role in the case of standardised packaging.

The CFR itself does not provide guidance on how certain forms of intellectual property can be assessed. Article 17, on the right to property reads as follows:

“1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.”

This implies only that “*the guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property*”¹⁰⁴ but does not provide a further understanding on how the inherent differences between IP and other property rights or between each IP rights are dealt with. This article is based on Article 1 of the Protocol to the ECHR (Article P1-1) that is even more reticent regarding these questions:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”¹⁰⁵.

It is indisputable that an intellectual property can be a basis to invoke the fundamental right to property. The interplay however between these rights is not apparent. In order to illuminate it, *firstly*, intellectual property in general is elaborated on, more precisely, how intellectual property as such lacks a unified content and that there is a consequential need for specifying the content of the IP right which serves as the basis of the claim. *Secondly*, the

¹⁰⁴ Explanations relating to the Charter of Fundamental Rights of the European Union (Version 2007) p. 8. [Explanations]. Available at: http://www.cvce.eu/en/obj/explanations_relating_to_the_charter_of_fundamental_rights_of_the_european_union_version_2007-en-11b81cf7-22fc-4463-873f-1db65a733a8c.html.

¹⁰⁵ Explanations, p. 8.

importance of defining the content is highlighted in relation to the present case. *Thirdly*, the identified crucial aspect is analysed: whether the trademark protection encompasses the right to use. *Lastly*, an alternative claim is made on the application of Article 17.

4.1.1. Understanding intellectual property

It is certain, that trademarks belong to the greater category of *intellectual property* (IP). This term, as evident as it is today, is in fact a relatively new concept: it became internationally used after the adoption of the World Intellectual Property Organization (WIPO) Convention¹⁰⁶ that does not create a general definition, but explains that

“intellectual property shall include the rights relating to: literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor(sic!); scientific discoveries; industrial design; *trademarks*, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from the intellectual activity in the industrial, scientific, literary or artistic fields”¹⁰⁷ (emphasis added).

Similarly, the other internationally relevant IP instrument, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹⁰⁸ does not define intellectual property but states, that

“For the purposes of this Agreement, the term “intellectual property” refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.”¹⁰⁹

This list indicates that copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of

¹⁰⁶ The WIPO Convention, the constituent instrument of the WIPO, was signed at Stockholm on July 14, 1967, entered into force in 1970. On its impact on the wider use of “intellectual property” see: BENTLY, SHERMAN, p. 2, footnote 3.

¹⁰⁷ Convention establishing the World Intellectual Property Organization (signed at Stockholm on July 14 1967 and as amended on September 28 1979) Article 2. (viii).

¹⁰⁸ An international agreement administered by the World Trade Organization (WTO), in effect from 1 January 1995.

¹⁰⁹ Article 1 (2) of TRIPS.

integrated circuits and protection of undisclosed information are intellectual property.

On European level, the EU secondary legislation becomes more and more relevant in terms of intellectual property; the legislation is however fragmented¹¹⁰ and lacks overarching definition. In relation to Article 17 of the CFR, the Explanations provide an open list:

“Intellectual property covers not only literary and artistic property but also inter alia patent and *trademark* rights and associated rights. The guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property”¹¹¹ (emphasis added).

All these documents do not undertake to provide a general IP definition, some common qualifying criteria on intellectual property however can be determined from these lists.

First of all, these rights are related to intellectual creation; as it is shown in English, French (*propriété intellectuelle*) and German (*geistiges Eigentum*). Secondly, the objects of these rights are intangible, which is reflected in the German term (*immaterielle Güter*) and the Swedish term of intellectual property law (*immaterialrätt*). This aspect is crucial: the object of property rights in tangible goods is mostly easy to identify by reference to their physical boundaries, but not in intangible goods. The answer for this problematic is that the object of the protection must be identified and its limits must be defined by law. These legally established boundaries are dissimilar in case of copyrights, trademarks or patents; they also might differ from member state to member state. This the reason why the content of the particular intellectual property right has to be established prior the analysis on the fundamental right to property. Namely, without establishing these boundaries and limits of the right, the interference thereupon cannot be assessed either.

¹¹⁰ Only the copyright-related secondary legislation of the EU includes ten different directives, with the *InfoSoc Directive* 2001/29/EC, the *Rental and Lending Directive* 2006/115/EC and the *Satellite and Cable Directive* 93/83/EEC among them.

¹¹¹ p. 8.

4.1.2. Finding the trademark right

As we have seen, Article 17 is applicable to trademarks but their boundaries and limits have to be established. Although domestic legislations even within the EU differ in terms of the content of certain forms of intellectual property, this is not a problem in case of standardised packaging, since trademark law is harmonised to the point that the material rules on national trademarks and on Community trademarks are virtually identical. Even the European Court of Human Rights in the *Dima case*¹¹², in relation to the alleged copyright protection in Romanian, investigated several different European domestic legislations and established “*general principle, viewed in the abstracts*”¹¹³, although the decision of the ECtHR was still essentially based on the interpretation of law by the Romanian domestic courts.

The Court of Justice of the European Union on the other hand has the mandate to interpret European Union law; hence it could establish the content of trademark rights, without necessarily taking into account which member states have adopted standardised packaging, with reference to the secondary legislation on trademark law and to general principles of the EU law. It also may investigate domestic legislations of member states other than the four adopting standardised packaging in order to establish general principles of trademark law as tendencies apparent in all European member states.

¹¹² *Dima v. Romania*, no. 58472/00, (2005) (admissibility decision) (in French only). The case is described in English in: HELFER, LAURENCE R. "The new innovation frontier? Intellectual property and the European Court of Human Rights." *Harvard International Law Journal* 49, no. 1, p. 14-16. [HELFER].

¹¹³ HELFER, p. 16.

4.1.3. Content of the trademark

As it is established in Subsection 2.3.3, standardised packaging hinders the use of trademarks; and it might even result in the total loss of the trademark; although chances are that the proper reason for non-use as valid justification will prevent such event to happen. By any means, this second case, the loss of the property right is easier to assess when applying Article 17 of CFR¹¹⁴. It is the first case, where only the use is hindered but the property does not cease to exist, when the assessment is more complicated and a special attention has to be paid to the content of the trademark. The fundamental right to property namely covers only the entitlements the claimant enjoyed before the alleged intervention, the aim of the right to property is not to create new entitlements but to secure the existing ones from unjustified interferences. This difference has been established in German constitutional practise as well, as the distinction between protection of acquiring and acquired positions¹¹⁵. In this sense, right to property only provides protection for acquired positions¹¹⁶, while the charter right of freedom to conduct business might cover certain aspects of activities aiming at acquiring positions. An example to illustrate how the fundamental right to property applies is presented below.

In case of the most extensive property right, the ownership in tangible objects¹¹⁷, the proprietor enjoys for instance the right to possess (*jus possidendi*)¹¹⁸, the right to use (*jus utendi*), the right to derive profit from (*jus fruendi*), and the right to dispose (*jus disponendi*), which includes the right to

¹¹⁴ Elaborated on in detail in Chapter 6.

¹¹⁵ WOLLENSCHLÄGER, FERDINAND. “Article 17(1)” In *The EU Charter of Fundamental Rights: A Commentary*, edited by PEERS, STEVE; HERVEY, TAMARA; KENNER, JEFF AND WARD, ANGELA, 465–488. London: Hart Publishing, 2014, p. 468. See especially fn. 10. [Commentary to Article 17(1)].

¹¹⁶ *Marckx v Belgium* Series A no 31 (1979) 2 EHRR 330, para. 50.

¹¹⁷ This particular example is provided, as certain civil law regimes due to their Roman law heritage, when regulating property in their civil codes as *jus in rem*, the object of property (*res*) can be only tangible (certain domestic regimes include some exceptions). See for instance § 90 of the BGB (German civil code) that states that “*Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände.*” or Section 5:14 of the Hungarian Civil Code stating that “(1) *There may be ownership of all things of a tangible nature which are capable of appropriation. / (2) The provisions pertaining to things shall also apply to money and securities, including natural resources that can be utilized as capital goods.*”

¹¹⁸ The meaning of “*possession*” or “*to possess*” is in English very multifaceted; this instance it corresponds to the German term “*Besitz*” or “*besitzen*”.

alienate (*jus aliendi*), the right to annihilate (*jus disponendi de substantia*), and the right to abandon (*jus alienandi*)¹¹⁹. Subsequently, the fundamental right to property comprises all these rights, when the underlying entitlement for the claim is ownership. The right to property in Article 17 – following the practise of the ECtHR on the application of Article P1-1 – also covers rights of usufruct without ownership¹²⁰. Naturally, in case where the basis to invoke the right to property is a right to usufruct¹²¹, the fundamental right protection does not extend to cover more than the underlying private law entitlement. The interference can be established based on the claimant’s right to use or their right to derive profit, but for instance a restraint on alienation issued by the state – as it does not interfere with the rights deriving from the usufruct – will not result in an interference with the fundamental right to property, or at least not in relation to the beneficiary of the usufruct.

Following the argument that the content of the right in question has to be established in order to define the scope of the protection the right to property provides; and bearing in mind, that standardised packaging hinders the use of trademark, the question arises whether the trademark right encompasses a right to use. Equivalently to the example provided above, the fundamental right to property covers trademark rights only to the extent of their content; if that lacks a right to use, there is no interference that could be established based on standardised packaging. Importantly, this is not the only possible interpretation of Article 17; the alternative is elaborated on under Subsection 4.1.4.

¹¹⁹ The list is essentially endless, but these are the most commonly identified rights deriving from ownership in a rather continental perception of property. See e.g. MENYHÁRD, ATTILA. *Dologi jog*. Budapest: ELTE Eötvös Kiadó, 2014, section II. 4. on the content of the property right. (in Hungarian only).

¹²⁰ *Wittek v. Germany* App no 37290/97 (ECHR, 12 December 2002) para. 43.

¹²¹ A *jus in rem* in civil law regimes, corresponds to the German term “*Nießbrauch*” in § 1030 and § 1089 BGB and to the French term “*usufruit*” in Articles 578-581 of the Code civil. Also corresponds to Section 5:146 of the Hungarian Civil Code, translated into English as “Beneficial ownership”.

4.1.4. Arguments against the right to use

Intellectual property rights are absolute¹²² and exclusive rights, out of which the most important aspect is the *jus excludendi* they encompass¹²³. Traditionally, all intellectual property rights are perceived as *only* negative rights¹²⁴, without the positive entitlement to use the object of the protection, as opposed to other absolute property rights, for instance ownership in tangible objects, where the proprietor has the right to exclude everyone else (negative right) but as it was introduced above, it includes a right to use as well (positive right). As this issue lacked practical relevance up until the issue of standardised packaging arose¹²⁵, it has not been so often discussed in the general IP or trademark literature. Authors mostly asseverate the principle without further explanation¹²⁶.

From the literature in fact arguing against the existence of a positive right to use a trade mark there is one argument prevailing¹²⁷. As it explains, the trademark right the proprietor enjoys by the virtue of registration is negative because the positive right to use a sign already exists independently, without registration¹²⁸; it is only the right to exclude others from the use of

¹²² The right of one person creates an obligation (here: obligation to refrain) for every other person.

¹²³ COLSTON, CATHERINE, AND MIDDLETON, KIRSTY. *Modern intellectual property law*. n.p.: London : Cavendish Publishing, 2005, p. 1, 3, [COLSTON, MIDDLETON]; MACQUEEN, p.908.

¹²⁴ CORNISH, WILLIAM RODOLPH, AND DAVID LLEWELYN. *Intellectual property: patents, copyright, trade marks and allied rights*. n.p.: London: Sweet & Maxwell, 2003, p. 6. [CORNISH, LLEWELYN]; NORMAN, p. 14.

¹²⁵ KUR, ANNETTE. "The right to use one's own trade mark: a self-evident issue or a new concept in German, European and international trade mark law?" *European Intellectual Property Review*, 1996, 18(4), p. 198. [KUR].

¹²⁶ None of the above cited authors (in fn. 124) explain in detail why exactly there is no positive right to use one's intellectual property. Authors referring to an exclusive trade mark right without in detail analysis include: BENTLY, SHERMAN, p.781; MACQUEEN p. 570; NORMANN, p. 309; COLSTON, MIDDLETON, p. 504.

¹²⁷ Another, in the literature less prevalent argument is based on the possibility for parallel protection in trade mark law (other than parallel imports, and of the parallel existing national trademarks and Community trademarks). The source of such a situation would be acquiescence (see Article 9 (1) of the TMD). The argument is that the trademark right can only be a negative right, since two separate positive rights – not a joint ownership – identical in content on the same object cannot exist. Given that the object of the property in this case is a sign, that is it is intangible, this argument would need further research to fully comprehend.

¹²⁸ LEHMANN, SCHÖNFELD. "Die neue europäische und deutsche Marke: Positive Handlungsrechte im Dienste der Informationsökonomie" *Gewerblicher Rechtsschutz und Urheberrecht*, 1994, p. 468.

that sign, that requires registration and state supported enforcement system¹²⁹. According to this understanding, such a right to use is not an entitlement from property law but rather derives from commercial practices¹³⁰. If this position would be the current understanding on trademark law, standardised packaging would not interfere with the right to property, but the freedom of expression could be certainly invoked. The historical origins of trademark rights explain this view. Undertakings started to use signs assisting their customers to identify their products and later these became protected by the tort of passing-off in common law countries¹³¹ and by prohibition of unfair commercial practices in continental legal systems¹³². And even though registrations of these signs became the law and general practise already in the nineteenth century¹³³, that is trademark law as such had emerged, the legal understanding on these marks was still different than today. In the UK, the conceptualisation of trademarks as property started already in that period¹³⁴, while in Europe the notion of trademark as property was unequivocally rejected, partly due to the civil law definition of *res* as a tangible object. Due to Europeanisation of intellectual property perhaps, this has been changing, and trademarks are now more evidently excepted as enjoying the status of property just as tangible objects even in continental legal systems¹³⁵. Thus the first argument seems to be outdated, as it is further explained in the next section.

¹²⁹ See e.g. BECK, SALAMON. *Magyar védjegyjog*, Budapest, 1934, p. 159-160, [only in Hungarian].

¹³⁰ See KUR, footnote 13, elaborating on the German legal debate on this issue.

¹³¹ CORNISH, WILLIAM RODOLPH. *Intellectual property: patents, copyright, trademarks and allied rights*. n.p.: London : Sweet & Maxwell, 1989, p. 392-3945. [CORNISH].

¹³² Explanations to the Hungarian Act XI of 1997 on the protection of trade marks and geographical indications: *Indokolás a védjegyek és a földrajzi árujelzők oltalmáról szóló törvényjavaslatához*, para. 3. [only in Hungarian].

¹³³ BENTLY, LIONEL. "The making of modern trademark law: the construction of the legal concept of trademark (1860–1880)." In: BENTLY, LIONEL. *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge intellectual property and information law) [Elektronisk resurs]. n.p.: Cambridge University Press 2008, p. 3. See also the historic legislations of Germany (Gesetz über Markenschutz, Deutsches Reichsgesetzblatt Band 1874, Nr. 28, Seite 143 – 146).

¹³⁴ BENTLY, LIONEL. "From Communication to Thing: Historical Aspects of the Conceptualisation of Trademarks as Property" in DINWOODIE, G. AND. JANIS, M (eds.), *Trademark Law and Theory: A Handbook of Contemporary Research*, Cheltenham: Edward Elgar, 2008.

¹³⁵ For the understanding in German law see: KUR, p. 200, fn. 24., for the summary of the debate in the Hungarian literature on the terminology *intellectual creation* versus *intellectual property*, see e.g.: GRAD-GYENGE, ANIKÓ. "Búcsú a szellemi alkotások jogától? – A szerzői jog és az iparjogvédelmi oltalmi formák polgári jogi védelme a magyar magánjogban." Hvgorac online publication, section II.2. Available at: <http://ptk2013.hu/szakcikkek/grad->

4.1.5. Arguments in favour of right to use

This thesis brings forth three arguments supporting a right to use based interpretation of the fundamental right to property, all of which prove how outdated the previously presented strict interpretation on trademark rights is. All of them derives from the understanding that trademarks are a form of intellectual property, thus property. The first argument is philosophical, stemming from the general property theory, the second is the systemic argument, how trademark rights fit into the contemporary legal systems and the third one points towards the trademark experts and practitioners, who have already argued for a right to use.

As to the first argument, in his work John Locke also touched upon private property, and identified the use as the most important aspect, not just a right, but even an obligation:

“But if they perished in his possession without having been properly used—if the fruits rotted or the venison putrified before he could use it—he offended against the common law of nature, and was liable to be punished.”¹³⁶

The notion that the proprietor should use its property is reflected by the rules of trademark legislations on the sanctions of non-use. Indeed, how can one have a property without being able to use it? The moral purpose of property is use, and this is not different in case of intellectual property. It is enough to consider the conduct of the so-called “patent trolls”¹³⁷ to see, that clearly, only excluding others from the use does not make sense without the use itself.

As to the second, and more legal argument, the legal context of trademark rights should be briefly analysed. Contrary to the early stand of the law, when only the function of indicating the origin of the goods was in the

[gyenge-aniko-bucusu-a-szellemi-alkotasok-jogatol-a-szerzoi-jog-es-az-iparjogvedelmi-oltalmi-formak-polgari-jogi-vedelme-a-magyar-maganjogban/1776.](#)

¹³⁶ LOCKE, JOHN. “Second Treatise” in: *Two Treatises of Government: In the Former, The False Principles, and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown. The Latter Is an Essay Concerning The True Original, Extent, and End of Civil Government*, London, 1689, Chapter 5, Sec. 38.

¹³⁷ On the problem of patent trolls see: HU, CHRISTOPHER. "Some Observations on the Patent Troll Litigation Problem." *Intellectual Property & Technology Law Journal* 26, no. 8 (August 2014): 10-19.

center, today it is possible to licence¹³⁸, to assign¹³⁹ or to put a pledge on¹⁴⁰ a trademark or in some states even to establish a usufruct¹⁴¹ on a trademark. In relation to licences, it is arguable that the subject of these contracts are not to transfer the right to use but the right to exclude, but in fact, in some cases the proprietor of the trademark does not authorise the licensee to exclude third parties from the use by initiating adequate procedures¹⁴². Even if license contracts do not necessarily indicate the existence of a right to use, they show how trademarks more and more become an asset, instead of a sign attached to only one entity. As respect to pledge or mortgage, the same can be established. In the case of usufruct however, the right to use seems to be a prerequisite. The institution of usufruct provides for the right to use and gain profit from a property¹⁴³. If there is no right to use a trademark, how can someone transfer that right? The principle of *nemo plus iuris* prohibits such a transfer¹⁴⁴. From the contextual analysis a certain answer cannot be given, but it shows why any argument built upon the notion that trademarks are inherently different from property¹⁴⁵ is outdated.

And lastly, without ignoring opinions on the contrary, such as AG GEELHOED held¹⁴⁶, there are arguments in favour of a right to use, even on

¹³⁸ See e.g. Article 25 and 28-31 of the the UK Trade Mark Act of 1994, Chapter IV. of the the Hungarian Act XI of 1997 on the protection of trade marks and geographical indications.

¹³⁹ TRITTON, GUY. *Intellectual property in Europe*. n.p.: London : Sweet & Maxwell, 2008, p. 462. [TRINTTON], see also Article 24 of the UK Trade Mark Act of 1994.

¹⁴⁰ COHEN JEHORAM, TOBIAS ET AL. *European trademark law: community trademark law and harmonized national trademark law*. N.p.: Alphen aan den Rijn: Wolters Kluwer, 2010, p. 539. [COHEN JEHORAM], See also Article 20 of the Hungarian trade marks act.

¹⁴¹ COHEN JEHORAM, p. 539, and WANGER, MARKUS. *Liechtenstein trademark law: commentary with an introduction into the EU-Community Trademark: first English-language edition*. Berlin: Pro Business, 2011, p. 66.

¹⁴² See e.g. BENTLY, SHERMAN, 963-964, on the different licenses existing in UK law, also COLSTON, MIDDLETON, p. 606, on how some licensees “*may call on the proprietor to take proceedings*”.

¹⁴³ COHEN JEHORAM, p. 539.

¹⁴⁴ “*nemo plus iuris (ad alienum) transferre potest quam ipse habet*” is a maxim of Roman law origin meaning “No one can transfer more rights (to another) than he himself has.” See in: FELLMETH, AARON X., AND MAURICE HORWITZ. *Guide to Latin in International Law, 1 ed.* n.p.: Oxford University Press, 2011.

¹⁴⁵ See e.g.

¹⁴⁶ When assessing the validity of the former Tobacco Directive, AG GEELHOED also stated, that “the essential substance of a trademark right does not consist in an entitlement as against the authorities to use a trademark unimpeded by provisions of public law. On the contrary, a trademark right is essentially a right enforceable against other individuals if they infringe the use made by the holder” (emphasis added). Opinion of Advocate General GEELHOED in Case C-491/01, para 266.; He did not further elaborate on the causes or reasons of his opinion.

European level. During the years of practise, the *essential function* and the *specific object* principles have become pre-eminent in the jurisprudence of the ECJ¹⁴⁷, especially in cases concerning parallel imports. Accordingly, as it was defined:

“The specific object of the trademark right consists particularly in granting the owner the exclusive right to use the trademark when first putting a product into circulation, and in thereby protecting him against competitors seeking to abuse the position and reputation of the trademark.”¹⁴⁸

AG Sharpston in his opinion¹⁴⁹ to a more recent case¹⁵⁰ has explicated that

“The specific subject-matter of a trademark thus has two components. First, there is the right to use the mark for the purpose of putting products protected by it into circulation for the first time in the EC, after which that right is exhausted. Second, there is the right to oppose any use of the trademark which is liable to impair the guarantee of origin, which comprises both a guarantee of identity of origin and a guarantee of integrity of the trade-marked product.”¹⁵¹

All considered; it seems well funded to conclude in favour of a right to use.

¹⁴⁷ TRITTON, p. 260-261.

¹⁴⁸ Case 16-74, *Centrafarm BV and Adriaan de Peijper v Winthrop BV*. Judgment of the Court of 31 October 1974, para 480; referenced in: TRINTTON, p. 260.

¹⁴⁹ Opinion of Advocate General SHARPSTON delivered to Case C-348/04.

¹⁵⁰ Case C-348/04, *Boehringer Ingelheim KG and Others v Swingward Ltd and Dowelhurst Ltd*, Judgment of the Court (Second Chamber) of 26 April 2007.

¹⁵¹ Para. 9.

4.1.6. An alternative application of Article 17

It was established, in principle the fundamental right to property covers only the entitlements the claimant enjoyed before the alleged intervention. It was argued before, that because of this principle, the right to property covers trademark rights only to the extent of their content defined in trademark law; if that lacks a right to use, there is no interference that could be established based on standardised packaging, since the measure – as it can be foreseen at this point – only interferes with the use. There is however a compelling alternative argument on how to “translate” trademark rights into the fundamental right of property that can be invoked even if the Court were to find that the existence of a positive right to use is dubious, or it considered that right rather a principle deriving from competition law but not being part of the trademark right as property.

The content of the trademark right as a form of intellectual property is set out in private law. It is greatly important however, that the term “property” within the meaning of Article 17 has to be defined autonomously¹⁵², so that even immaterial positions that are not property according to civil law (intellectual property or *jura in rem*) are encompassed by the fundamental right to property. This is evident from the case law of the Court of Justice even preceding the codification of the Charter. Claims of an economic value were acknowledged as covered by the “*fundamental right to peaceful enjoyment of property*” in the *Bosphorus case*¹⁵³ and the more recent *Sky Österreich case*¹⁵⁴, where the Court gave a definition on property rights as

“rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit.”¹⁵⁵

¹⁵² Commentary to Article 17(1), p. 472. Similarly to autonomous meaning of the term “possession” in Article 1 of Protocol I to the European Convention on Human Rights (Article P1-1), see: GRGIÆ, AIDA; MATAGA, ZVONIMIR; LONGAR, MATIJA AND VILFAN, ANA: *The right to property under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights and its protocols*. European Council, 2007, Human rights handbooks, No. 10, p. 7. [Handbook].

¹⁵³ *Bosphorus case*.

¹⁵⁴ Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, Judgment of the Court (Grand Chamber) 22 January [*Sky Österreich case*].

¹⁵⁵ para. 34-35.

Accordingly, the principle set out regarding the division of the *acquired position* and the *conduct to acquire* is still upheld¹⁵⁶, but the acquired position is interpreted broader than the entitlements established by trademark law in a way that they cover the overall legal position including legitimate expectations¹⁵⁷. This interpretation of Article 17 provides for a less formalistic view that corresponds to the purpose of the right in general. The case law of the ECtHR provides even more examples. The most important to mention is the *Anheuser-Busch case*¹⁵⁸ where the Strasbourg-based court decided upon a trademark related claim, and held that not only a trademark but even

“the applicant company’s legal position as an applicant for the registration of a trademark came within Article 1 of Protocol No. 1.”¹⁵⁹

This finding was criticized by Judge STEINER and Judge HAJIYEV in their concurring opinion, as they deemed acceptable the application of Article P1-1 to a duly registered trademark.¹⁶⁰ Nonetheless, the reasoning of the ECtHR seems to fit into the general definition of property rights given by the ECJ in the *Sky Österreich case*. The ECtHR investigated the position of the claimant as an applicant for the registration of a trademark. It first stated, that

“in certain circumstances, a “legitimate expectation” of obtaining an “asset” may also enjoy the protection of Article 1 of Protocol No. 1.”¹⁶¹

Then expressed its view that it is

“appropriate to examine whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1. (...) the question whether the applicant company became the owner of

¹⁵⁶ Elaborated on in Subsection 4.1.3.

¹⁵⁷ See e.g. *Pine Valley Developments Ltd. And others v. Ireland*, Series A. 222 (1991) ECtHR, *Pressos Compania Naviera S.A. and Others v. Belgium*, Series A. 332 (1995).

¹⁵⁸ *Case of Anheuser-Busch Inc. v. Portugal* (Application No. 73049/01) Judgment, Strasbourg, 11 January 2007.

¹⁵⁹ para. 78.

¹⁶⁰ Joint Concurring Opinion of Judge Steiner and Hajiyevev (*Anheuser-Busch case*), para. 2.

¹⁶¹ para. 65.

the “Budweiser” mark (...) is ultimately of secondary importance
(...)/

the Court takes due note of the bundle of financial rights and interests that arise upon an application for the registration of a trademark. (...) such applications may give rise to a variety of legal transactions, such as a sale or licence agreement for consideration, and possess – or are capable of possessing – a substantial financial value.”¹⁶²

As we could see, the ECtHR based its decision on the legal position granted by the Portuguese law for a trademark applicant, as they were able to show the value of that position. Even if the right to use as such is not a positive entitlement of the property, it is surely the aim of the trademark laws that proprietors are going to use the trademarks; this is why the non-use is sanctioned. As it is the aim of the legislation, it is well assumable that the proprietors have at least the legitimate expectation that they will be able to use the trademarks. Furthermore, the *position* of the proprietor entails not only the possibility to use the trademark but to sell it, to license it, and so forth. Thus, following the arguments of the two courts, the position including all these possibilities is covered by the fundamental right to property. Naturally, in case of such an interpretation, Article 17 applies somewhat differently to its application on a position that is perceived by private law as property.

¹⁶² para. 75-76.

4.2. Trademarks as expression

After converting the trademark right to *right to property*, the second fundamental right relevant to our purpose can be discussed. In comparison to right to property however, the *freedom of expression and information* as enshrined in Article 11 of the CFR appears to be less complicated, in terms of translating trademark rights. It is important to note however that in the trademark related freedom of expression cases, both the CJEU and the ECtHR dealt with the conflict of trademarks and freedom of expression¹⁶³, not the regulation of trademark usage.

Article 11 reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.”

This Article of the CFR, according to the Explanations corresponds to Article 10 of the ECHR and their meaning and scope are the same. This could be established based on the case law of the CJEU preceding the adoption of the Charter, where the Court recognised this fundamental right as a general principle of EU law as understood by Article 10 of the ECHR¹⁶⁴. As in case of “property”, the CFR does not define “expression” but the extensive case law of both European courts could provide an explanation to set against the trademark rights. Although the importance of freedom of expression lays in enabling “*expression to be given to opinions which differ from those held at an official level*”¹⁶⁵, thus promoting democracy¹⁶⁶; that could be understood

¹⁶³ See e.g. SAKULIN, WOLFGANG. *Trademark protection and freedom of expression: an inquiry into the conflict between trademark rights and freedom of expression under European law*. n.p.: Alphen aan den Rijn: Kluwer Law International, 2011. [SAKULIN].

¹⁶⁴ *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Case C-260/89, Judgment of the Court of 18 June 1991. para. 41; *Ter Voort case*, para. 35.

¹⁶⁵ Case C-340/00 P, *Commission of the European Communities v Michael Cwik*, Judgment of the Court of 13 December 2001, para. 22.

¹⁶⁶ CASTBERG, FREDE. *Freedom of speech in the West : a comparative study of public law in France, the United States and Germany*. n.p.: Oslo; London: University P.: Allen & Unwin, 1960, p. 422.

as political speech; the fundamental right of freedom of expression however covers not only political, but cultural and artistic, as well as commercial speech¹⁶⁷. Nevertheless, commentators draw the attention on how this trichotomy is not a clear cut¹⁶⁸.

Advertising¹⁶⁹ and even use of symbols¹⁷⁰ are covered by freedom of expression. Trademarks as signs conveying information for the customers fit in the category of commercial speech. Notably, freedom of expression also covers “*the form in which they [ideas and information expressed] are conveyed*”¹⁷¹. This means that every aspect of a figurative mark or a colour mark is covered; that is hindering the colours and shapes of figurative marks to appear on tobacco packages, on its own constitutes an interference with the right to freedom of expression. Additionally, since trademarks qualify as expression, the question whether trademark rights entail a right to use a trademark is inconsequential, as the right to “use” the expression – the trademark – derives from the core content of the fundamental right:

“Article 10 applies not only to the content of the information but also to the means of transmission or reception”¹⁷².

In this sense, indicating the trademark on the packages is the transmission that is hindered by standardised packaging. All this is also supported by the *Tobacco packaging case*, where the Court reiterated a previous case: “*the freedom covers the use by a business, on the packaging and labelling of tobacco products (...) (judgement in Neptune Distribution, C-157/14)*”¹⁷³.

¹⁶⁷ Opinion of AG ALBER in Case C-71/02 *Karner* (n 4) [AG75]; Case C-376/98; Case C-421/07, *Criminal proceedings against Frede Damgaard*, Judgment of the Court (Second Chamber) of 2 April 2009. and from the ECtHR: *Markt Intern Verlag GmbH and Klaus Beermann v Germany* (20 November 1989) Series A, No 165, para. 25-26, and *Casado Coca v Spain* (24 February 1994) Series A, No 285-A, para. 35-36.

¹⁶⁸ ALEXANDER, LARRY. “Legal Theory: Low Value Speech” In: ALEXANDER, LARRY. *Freedom of speech*. n.p.: Aldershot: Ashgate, 2000, pp. 451-458.; WOODS, LORNA. “Freedom of Expression and Information.” In *The EU Charter of Fundamental Rights: A Commentary*, edited by PEERS, STEVE; HERVEY, TAMARA; KENNER, JEFF AND WARD, ANGELA, 311-340. London: Hart Publishing, 2014, p. 321. [Commentary to Article 11].

¹⁶⁹ Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, Judgment of the Court of 26 June 1997. para. 25-27.

¹⁷⁰ *Vajnai v Hungary* (Application no. 33629/06) Judgment, Strasbourg, 8 July 2008.

¹⁷¹ *De Haes and Gijssels v Belgium* App no 7/1996/626/809/1996/626 (Judgment 24 February 1997) para 48. *Casado Coca v Spain*, para. 35.

¹⁷² *Pirate Bay: Neij and Sunde Kolisoppi v Sweden* App no 40397/12 (decision 13 March 2013) decision of the ECtHR, under THE LAW, Section A:

¹⁷³ para. 147.

4.2.1. Trademarks as commercial speech

It was asserted that trademarks, or better said displaying trademarks on the packages is covered by Article 11, and most likely it falls under the category of commercial speech, albeit the inconsistency of the jurisprudence regarding the trichotomy of political - artistic - commercial expressions. The traditional aim of freedom of expression is closely linked to the concept of democracy; therefore the question arises, what is the exact aim of the protection of commercial speech? The reason to protect even commercial speech is that

“for the public, advertising is a means of discovering the characteristics of services and goods offered to them”¹⁷⁴.

The Court went on to state:

“Nevertheless, it may sometimes be restricted, especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, even the publication of objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions. Any such restrictions must, however, be closely scrutinised by the Court, which must weigh the requirements of those particular features against the advertising in question”¹⁷⁵.

It shines through the case law of both courts that commercial speech is the “*least valuable*”¹⁷⁶; on the other hand from this statement it is evident, that any interference with it still requires close scrutiny. What is also striking that the content of the commercial speech affects the justification of the restriction. This suggests that the purpose of the expression plays a role further than establishing whether it is political, artistic or commercial speech. For this reason, the purpose of displaying trademarks that is the social function of trademarks is considered.

¹⁷⁴ Case of Krone Verlag GmbH & Co. KG v. Austria (no. 3) (Application no. 39069/97). Judgement, Strasbourg, 11 December 2003, para. 31.

¹⁷⁵ Ibid.

¹⁷⁶ Commentary to Article 11, p. 322, 337; SAKULIN, p. 2, fn. 3.

4.2.2. The social functions of the trademark

Advertising might or might not carry useful information; it is “*a communication that is paid for by an identified sponsor with the object of promoting ideas, goods, or services. It is intended to persuade and sometimes to inform*”¹⁷⁷. It is a relatively free area, beyond untruthful and misleading advertising¹⁷⁸ everything is permitted, with the exception of certain branches of industry, such as tobacco for instance¹⁷⁹. Trademarks play a crucial role in advertising¹⁸⁰, especially in linking the message transmitted by the advertisement to the goods and services. It is however more than a tool of advertising; it is rather the advertising that can be perceived as one element in fulfilling the social functions of trademarks.

In their comprehensive work, LIONEL BENTLY and BRED SHERMAN identified three different groups of justifications for the legal protection of trademarks¹⁸¹, corresponding to the social functions thereof. These are: *creativity, information and search cost*, and *ethical justifications*. The first two of these can be recognised in the practise of the CJEU as well, although in its practise these justifications are often inseparable. As the third group contains less practical and not-referenced ideas, it can be left aside for the purposes of this thesis. Creativity means that trademarks are the guarantee for undertakings keeping their goods and services at high quality. As the Court expressed it:

“Trademark rights constitute an essential element in the system of undistorted competition which the Treaty is intended to establish and maintain. In such a system, undertakings must be able to attract and retain customers by the quality of their goods or services, which is made possible only by distinctive signs allowing them to be identified”¹⁸².

¹⁷⁷ LAW, JONATHAN. *A dictionary of business and management. [Elektronisk resurs]*. n.p.: Oxford ; New York : Oxford University Press, 2009, at “advertising”.

¹⁷⁸ See e.g. Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

¹⁷⁹ Directives governing tobacco advertising, see Section 2.2. of this thesis.

¹⁸⁰ COLSTON, MIDDLETON, p. 506-508.

¹⁸¹ BENTLY, SHERMAN, pp. 814-819.

¹⁸² Case C-206/01, *Arsenal Football Club plc v Matthew Reed*, Judgment of the Court of 12 November 2002, para 47.

Additionally, the European Commission during the drafting of the current TMD, called the institution of trademark “*an engine of innovation*”¹⁸³.

The arguments within the group called “information and search cost” are similar to the argument in favour of advertisement and the protection of commercial speech in general, that is trademarks provide information (on the origin) to the consumers. According to the CJEU:

“*the essential function* of the trademark, which is to guarantee the identity of the origin of the marked product to the consumer or ultimate user by enabling him without any possibility of confusion to distinguish that product from products which have another origin”¹⁸⁴ (emphasis added).

Trademarks however still provide more than just advertising in this concept, as the signs are “*shorthand way of communicating information that purchasers need in order to make informed purchasing choices*”¹⁸⁵ i.e. they are reducing costs by making the search for the desired product quicker and easier.

This characteristic of trademarks is important in relation to the first line of argument as well: all the information is easier to recall based on a symbol or a colour than on a lengthy advert; but also bad experiences and lack of quality can be easier attached to the trademark, encouraging the undertakings to provide consistently high quality. This joint view seems to be reflected by the Commission. Just before adopting the first EU legislation on Community trademarks, the reason for trademark protection was found:

“[t]o make the right choice, the consumer needs to be able to identify and distinguish these goods according to their origin and to recognize a connection between a particular product, its quality and its reputation”¹⁸⁶.

¹⁸³ Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trademarks (Recast), COM/2013/0162 final - 2013/0089 (COD) Explanatory memorandum, para 1.

¹⁸⁴ Case C-10/89, *SA CNL-SUCAL NV v HAG GF AG*. Judgment of the Court of 17 October 1990, para. 14.

¹⁸⁵ BENTLY, SHERMAN, pp. 816.

¹⁸⁶ Memorandum on the creation of an EEC trademark adopted by the Commission on 6 July 1976 SEC(76) 2462 July 1976, p. 7 para. 11. available at: <http://aei.pitt.edu/5363/>.

4.2.3. Trademarks and corporate social responsibility

An additional reason why knowing the origin of the product is important for the consumer besides the quality of the goods or services is gaining information on the impact of the undertaking to the environment and to human rights while producing the goods and providing the services. Companies operating across borders are more and more under scrutiny not only based on the effect of their products but on the impact of their conducts¹⁸⁷. Non-governmental organisations seek to “name and shame” those responsible for devastating consequences for the environment, life and safety of workers. Tobacco industry is one of the most criticised branches, especially due to their contribution to child labour¹⁸⁸. As the WHO has put it, tobacco industry and corporate responsibility is an inherent contradiction¹⁸⁹ that is hard to disagree with. Nonetheless, it is one tool to compel companies at least to eradicate child labour, as the harmfulness of their products will not change. And trademarks play an important part in this. Naming and shaming the ones that procure from farm affected by child labour is only effective if the consumer is able to make the link between child labour and the particular package of tobacco. For that, trademarks are just suitable: they are able to transfer the positive image of the company that eradicated child labour thorough its supply chain. It is true that the main goal is to minimise tobacco consumption, but shifting the already existing consumption towards a more responsible direction is a worthy goal. Even more importantly, trademarks are also useful in the process of naming and shaming, so that consumers can identify the products they would like to boycott¹⁹⁰.

¹⁸⁷ See e.g. United Nations Guiding Principles on Business and Human Rights (UNGPs), unanimously endorsed by Human Rights Council.

¹⁸⁸ See e.g. the website of the NGO Eliminating Child Labour in Tobacco growing: <http://www.eclt.org/about-child-labour/about-child-labour-in-tobacco-growing/>, the article of Human Rights Watch on the stem child labour in the US: <https://www.hrw.org/news/2014/12/17/dispatches-tobacco-industry-moves-stem-child-labor>, the description of the problem by the International Labor Rights Forum: <http://www.laborrights.org/industries/tobacco>, or the WHO Report on Tobacco and the rights of the child: http://www.who.int/tobacco/resources/publications/rights_child/en/, *Tobacco Industry and Corporate Responsibility... An Inherent Contradiction*, WHO publication (not official), http://www.who.int/tobacco/communications/CSR_report.pdf.

¹⁹⁰ See e.g. the campaigns against Nike sweatshops and the use of trademarks to identify the company whose products were made with child labour.

5. Imposed limitations

When assessing conformity of a given measure to the fundamental rights standards, the Court first takes a look at the scope of the fundamental right in question and investigates whether there is an *interference* with (or, according to the wording of the CFR, a *limitation* on) the right. This assessment is conducted separately in relation to right to property and the freedom of expression.

5.1. Right to property

As it was elaborated on above, standardised packaging and its effect on the trademark use falls within the material scope Article 17 of the CFR¹⁹¹. Here the categories of limitations are discussed; which one reflects the limitation adopting standardised packaging entails and what are the consequences thereof.

The wording of Article 17 (1) contains two separate cases of limitation; the *deprivation of possessions* and the *regulation of the use of property*. The Article 1 of Protocol I to the ECHR, as the bases of Article 17 (1) is relevant too. The ECtHR, interpreting the wording of the Article, identified three forms of limitations: deprivation of possession, identical to the one under Article 17 (1); control of use of property which is very similar but not identical to the regulation of use; and thirdly, from the general right “*Every natural person is entitled to the peaceful enjoyment of his possessions*”, the Strasbourg based court has also acknowledged an “*interference with the peaceful enjoyment of property*”. As WOLLENSCHLÄGER suggests it in the Commentary on Article 17 (1), this residual category might play a role in the practise of the CJEU as well, however since the scope of *regulation of use* is wider than of the equivalent *control of use*, he foresees minor relevancy¹⁹².

¹⁹¹ See Section 4.1.

¹⁹² p. 486.

Deprivation of possessions means expropriation in both systems. The CJEU already in its first right to property related decision on the *Hauer case*¹⁹³ elaborated on the two different ways of limitation:

“two ways in which the rights of a property owner may be impaired, according as the impairment is intended to deprive the owner of his right or to restrict the exercise thereof. In this case it is incontestable that the prohibition on new planting *cannot be considered to be an act depriving the owner of his property, since he remains free to dispose of it or to put it to other uses which are not prohibited*”¹⁹⁴ (emphasis added).

Additionally, as also WOLLENSCHLÄGER draws attention to it¹⁹⁵, the Court requires the deprived property to be transferred to another person than the former owner; otherwise severe interferences would not qualify as (*de facto*) expropriation¹⁹⁶. Consequently, standardised packaging, even if it amounts to the complete loss of trademark rights – that is unlikely¹⁹⁷ – does not amount to a deprivation of property according to the practice of the Court.

In case we accept the existence of a right to use, standardised packaging evidently amounts to a *regulation of the use of property*. In case the alternative arguments on the material scope of Article 17¹⁹⁸ were to be accepted by the Court, standardised packaging constitutes an *interference with the peaceful enjoyment* of property other than deprivation. The standards of justification in both cases are the same¹⁹⁹.

¹⁹³ *Hauer case*.

¹⁹⁴ para. 19.

¹⁹⁵ Commentary on Article 17 (1), p. 478-479.

¹⁹⁶ *Booker Aquaculture case*, para. 58.; and Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 3 September 2008, para. 358. [*Kadi case*].

¹⁹⁷ See in Subsection 4.1.3, due to the proper reason clause, exculpating the otherwise sanctioned non-use of a trademark.

¹⁹⁸ See Subsection 4.1.6.

¹⁹⁹ Commentary on Article 17 (1), p. 486.

5.2. Freedom of expression and information

It has been previously stated, that trademarks fit into the category of commercial speech, with the information they transfer possibly being of more value than just advertisement, a message with a sole aim to encourage consumption.

Standardised packaging is an interference with the freedom of expression of tobacco companies, as it prohibits the right holders to use their trademarks on the packages of their products. The CJEU held in the *Tobacco packaging directive case*, in relation to the obligatory packaging standards of the TPD2 that

“the prohibition on including on the labelling of unit packets and on outside packaging, as well as on the tobacco product itself, the elements and features referred to in Article 13(1) of Directive 2014/40 constitutes, it is true, *an interference with a business’s freedom of expression and information*”²⁰⁰ (emphasis added).

The measure could be on the other hand also perceived as limiting the right to receive of information of consumers, as they cannot access the information the trademark transfers. These are the two sides of the same coin; and given the importance of trademarks for the consumers in terms of commercial communication, both sides must be taken into account.

The emphasis is naturally on the rights of the businesses, as the Court applies the right to receive information mostly in different areas, such as broadcasting and cable networks²⁰¹. But in terms of balancing, the consumer interest lies not only with the ban but with the information trademarks confer as well.

²⁰⁰ para. 148.

²⁰¹ An example is the Case C-336/07, *Kabel Deutschland Vertrieb und Service GmbH & Co. KG v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, Judgement of the Court of 22 December 2008, paras 32-33. [*Kabel Deutschland case*].

6. The proportionality principle

As the relevant fundamental rights have been identified, along with how and to what degree they are limited by adopting standardised packaging, the present Chapter can proceed to discuss the justification of such limitations, since neither the right to property nor the right to freedom of expression and information are absolute rights²⁰², and therefore interference, in case it is *justified*, does not amount to a violation of the fundamental right in question. Although both the establishment of the interference and the justification thereof must be conducted with regards to each right individually, following Article 52 (1) of the CFR, the method of justification has the same base:

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. *Subject to the principle of proportionality*, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others” (emphasis added).

The principle of proportionality has been originally developed by the Court as a general principle of EU law²⁰³. Following Article 5 (1) and (4) of the TEU²⁰⁴ (formerly in Article 5 of TEC), it is not only applicable in a fundamental right context, but generally in EU administrative law.

In case of fundamental rights, the principle applies to measures taken at Union level as well as Member State level. These differentiations outline three cases, where the Court applies the principle differently²⁰⁵. The

²⁰² See the wording of Article 11 and 17.

²⁰³ Applied already in: Case 8-55, *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, Judgment of the Court of 16 July 1956; *para.* 299.

²⁰⁴ “1. *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (...) / 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. / The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.*”

²⁰⁵ SAUTER, WOLF. “Proportionality in EU Law: A Balancing Act [article].” *Cambridge Yearbook of European Legal Studies* (2012): 439, PETURSSON, GUNNAR THOR. *The*

underlying difference between the two, fundamental rights related applications (when the limitations are provided in the EU law as mandatory requirement, or when the member state has a choice between various measures to attain the objective of the law it implements) is the following. In the first case, the Court is

“in essence balancing a private interest vis-à-vis a public interest, and therefore the review of the policy measure is based on the so-called ‘manifestly inappropriate test’”²⁰⁶;

while in the second,

“the balance is between the EU interest vis-à-vis a national interest, with a strong intensity of the review”²⁰⁷.

The present Chapter only introduces the principle as it is applied by the CJEU in the *second* case, to assess whether the measure limiting fundamental rights, enacted by Member States as implementation of EU law can be justified, with respect to the observations made in the Chapter on the procedural background. Hence the EU interest and the national interest are addressed when executing the balancing act in the next Chapter. According to the understanding of this thesis, in the case of plain packaging, although the national interest seems to concur with the EU interest that is expressed in the TPD2 – see below under legitimate aim – in this context the “EU interest” means the interest behind each fundamental right that is limited; and the interest in limiting those rights, the interest of adopting the national measure is the “national interest”. This approach provides for a more holistic view by exceeding the rigid dichotomy of public-private interest and thus acknowledging that there might be public interest arguments not solely *in favour*, but also *against* the limiting measure; and that fundamental rights, even when sought as subjective rights, intrinsically bear public interest.

The proportionality principle holds in fact three tests; the suitability test (or appropriateness of the measure), the necessity test, and the *stricto sensu*

proportionality principle as a tool for disintegration in EU law: of balancing and coherence in the light of the fundamental freedoms. n.p.: Lund: Lund University, Faculty of Law 2014, p.91, 140. [PETURSSON].

²⁰⁶ TRIDIMAS, TAKIS. *General Principles of EC Law (Oxford EC law library)*. n.p.: Oxford University Press, pp. 137-138. interpreted by PETURSSON, p. 141. (quote from the latter).

²⁰⁷ Ibid.

proportionality (or the test of balancing)²⁰⁸. In addition, the legitimate end (or legitimate aim) test, without forming a part of the principle, as a previous step, it is connected to it²⁰⁹. Therefore, in the followings these four tests are introduced. As the legitimate aim and the suitability tests are the same in relation to both two discussed fundamental rights, they are not only presented in abstract, but applied to the measure at hand as well. In terms of the necessity test, there are certain similarities that are similarly to the other two tests, addressed in this Chapter. The last test is the actual balancing, that is conducted in the next Chapter with respect to the two fundamental rights separately; here it is only introduced in a rather general manner.

6.1. Legitimate aim

In the fundamental rights context, legitimate aim test can be applied in order to “*identify the rank of the respective aim (and its admissibility), otherwise weighing up fundamental rights against these objectives would be impossible*”²¹⁰. This suggests that in order to compare the national interest with the EU interest, the previous has to be established. If it is not legitimate, the measure imposing limitation to fundamental rights amounts to a violation thereof; if there is such an aim identified, it constitutes the base of the balancing exercise.

The Court itself however rarely elaborates on these steps as clearly²¹¹ and there is no unified rule how to establish what the legitimate aim is. In our case, from both the TPD²¹² and from the national legislation the legitimate aim can be identified with ease as *public health*. In order to assess the suitability of the measure, it seems however more reasonable to narrow down the legitimate aim and identify it from the text and the preparatory works of

²⁰⁸ PETURSSON, p. 148; ŠUŠNJAR, DAVOR. *Proportionality, fundamental rights, and balance of powers*. n.p.: Leiden; Boston : Martinus Nijhoff Publishers, 2010, p. 163. [ŠUŠNJAR].

²⁰⁹ ŠUŠNJAR, p. 163.

²¹⁰ STORR, STEFAN. “Zur Bonität des Grundrechtsschutzes in der Europäischen Union”. *Der Staat*, 36, 1997, pp. 547-73, interpreted by ŠUŠNJAR, p. 166. (quote from the latter).

²¹¹ PETURSSON, p. 149; also see for instance Case C-470/93, paras. 22-25, the Court does not reflect on it *expressis verbis* but in effect it assesses whether the aim of the measure in question is legitimate.

²¹² See: the Recitals, particularly the 8th, the 13th, and 59th.

the domestic legislations. As a result, the aim of standardised packaging is to *reduce the demand* for tobacco products, especially *within children and young people*. An adequate example is provided by the preparatory works of the UK legislation, namely the *Impact Assessment*²¹³ that states:

“The objectives of standardised tobacco packaging would be to improve public health by *discouraging young people* from taking up smoking, *supporting quitting* among smokers who want to quit and *helping people who have quit to avoid relapse* back to smoking. Achieving these aims will improve the health of those who never start to smoke and those who succeed in quitting smoking. There may also be wider benefits such as narrowing of health inequalities and a reduction in the levels of exposure to secondhand(sic!) smoke which is particularly harmful to the health of children.” (Emphasis added).

As we can see, there are several aims but the ones the measure targets directly are the ones underlined. These three aims can be accepted as legitimate – since they fit into the state duty to fulfil the right to health - and thus can be tested under the proportionality principle.

6.2. Suitability

As it was stated above, suitability is the first step within the proportionality principle. The measure in question should not be arbitrary but appropriate to achieve the legitimate aims²¹⁴. The question is whether standardised packaging is suitable to achieve the legitimate aims listed above; to discourage young people from taking up smoking, to support quitting efforts and to help to avoid relapse of general smokers. In order to answer this question, one has to take into account the evidence available supporting or opposing the measure. Some of the evidence required in our case can be to a certain extent deducted from previous studies.

²¹³ Document dated 17/06/2014, available among the preparatory works of the UK legislation at: <https://consultations.dh.gov.uk/tobacco/standardised-packaging-of-tobacco-products-1/consult-view>. For the Irish legislation, the preparatory works are available at: <http://health.gov.ie/healthy-ireland/tobacco/>.

²¹⁴ PETURSSON, p. 148.

The most influential and recent report published is perhaps the *Standardised packaging of tobacco – Report of the independent review undertaken by Sir Cyril Chantler*²¹⁵. It identifies the aim of the measure in reducing “the tobacco package’s visual identity and appeal as an advertisement for the product”²¹⁶. This is not to be understood as the legitimate aim but rather *how* standardised packaging is a *suitable* measure to reduce smoking.

It is important to see; that the “appeal” credited to branding was based on the packages previous to the TPD2 regime; that is the effect of introducing standardised packaging was not compared to the effect of TPD2 compatible packages but with allowing the trademarks to appear on the bottom side thereof²¹⁷. This seems to be a minor difference but it might play an important role in assessing necessity. Importantly, there are other studies available suggesting that standardised packaging allows for paying more attention to the textual and pictorial warnings²¹⁸, although not in case of daily smokers²¹⁹. Several studies focused on the perception of packages by younger generations and concluded that branding influences young people more intensely and hence standardised packaging might be an effective tool to lower the appeal of tobacco products for this group²²⁰. The wording of such studies is however

²¹⁵ Available at: <http://www.kcl.ac.uk/health/10035-tso-2901853-chantler-review-accessible.pdf>. [CHANTLER Report].

²¹⁶ p. 4.

²¹⁷ See the difference in Subsection 1.1.2 of this thesis.

²¹⁸ THRASHER, JAMES F., ET AL. "Estimating the impact of pictorial health warnings and “plain” cigarette packaging: Evidence from experimental auctions among adult smokers in the United States." *Health Policy* 102, (January 1, 2011): 41-48 [THRASHER, JAMES F., ET AL]; GERMAIN, D., M.A. WAKEFIELD, AND S.J. DURKIN. "Adolescents' Perceptions of Cigarette Brand Image: Does Plain Packaging Make a Difference?." *Journal Of Adolescent Health* 46, no. 4 (April 1, 2010): 385-392.

²¹⁹ MUNAFÒ M, ROBERTS N, BAULD L, UTE L. "Plain packaging increases visual attention to health warnings on cigarette packs in non-smokers and weekly smokers but not daily smokers." *Addiction*. 2011;106(8): 1505-1510.

²²⁰ BEEDE, P, AND R LAWSON. "The effect of plain packages on the perception of cigarette health warnings." *Public Health (Nature)* 106, no. 4 (July 1992): 315-322; HAMMOND, DAVID, SAMANTHA DANIEL, AND CHRISTINE M. WHITE. "Original article: The Effect of Cigarette Branding and Plain Packaging on Female Youth in the United Kingdom." *Journal Of Adolescent Health* 52, (February 1, 2013): 151-157; HAMMOND, D, ET AL. "The perceptions of UK youth of branded and standardized, 'plain' cigarette packaging." *European Journal Of Public Health* 24, no. 4 (n.d.): 537-543; SCHEFFELS, J, AND G SÆBØ. "Perceptions of plain and branded cigarette packaging among Norwegian youth and adults: a focus group study." *Nicotine & Tobacco Research* 15, no. 2 (February 2013): 450-456; HOEK, JANET; ET. AL. "Tobacco Branding, Plain Packaging, Pictorial Warnings, and Symbolic Consumption." *Qualitative Health Research* 22, no. 5 (May 2012) 630-639.

often vague and assesses rather plausible effects than evidence, as it has been pointed out by other authors²²¹. SIR CYRIL CHANTLER in his Report, also noting the problem, elaborates on the ethical reasons behind why randomised controlled trials producing hard evidence can be hard to carry out²²². In conclusion the Report states that

“Having reviewed the evidence it is [...] highly likely that standardised packaging would *serve to reduce the rate of children taking up smoking* and implausible that it would increase the consumption of tobacco.”²²³ (Emphasis added).

The effect of standardised packaging on adult smokers and non-smokers – other than increasing the attention paid to other warnings is less evident²²⁴. Some suggested it would reduce demand for tobacco among adult smokers as well²²⁵, other studies suggest only a possibility for a demand reduction as much as 1%, and in any case of significantly less volume than in case of youth²²⁶. This is reflecting the fact that reducing the appeal does not equal to enabling tobacco addicts to quit.

In conclusion, standardised packaging can be assessed as suitable to the legitimate aims; however, there is place for doubt. Nevertheless, looking back at the three aims identified, the measure seems to be more suitable for discouraging young people from taking up smoking, than for supporting quitting efforts and helping to avoid relapse of general smokers. As the future of public health relies on the smoking habits of younger generation, if that aim only can be achieved by standardised packaging, it has to be deemed suitable.

²²¹ MCKEGANEY, NEIL, AND CHRISTOPHER RUSSELL. "Policy analysis: Tobacco plain packaging: Evidence based policy or public health advocacy?." *International Journal Of Drug Policy* (March 19, 2015).

²²² CHANTLER Report, p. 4, para. 10.

²²³ *ibid*, p. 6.

²²⁴ *ibid* Report, p. 4. para 8.

²²⁵ THRASHER, JAMES F., ET AL.

²²⁶ PECHEY, R., SPIEGELHALTER, D. AND MARTEAU, T.M. "Impact of plain packaging of tobacco products on smoking in adults and children: An elicitation of international experts' estimates." *BMC Public Health* 13, no. 1 (January 1, 2013).

6.3. Necessity

The second step, the first *expressis verbis* mentioned in Article 52 (1) of the CFR is necessity that has been explained by AG VAN GERVEN as the test

“ascertaining whether there is a relationship of necessity between the measure adopted and the attainment of the objective pursued”²²⁷.

According to his opinion, it includes two requirements:

“the existence of a causal connection between the measure adopted and the aim pursued, that is to say the measure is relevant or pertinent, and secondly there is no alternative to it which is less restrictive of the free movement of goods. The second requirement is concerned with the existence of a relationship of proportionality between the obstacle introduced, on the one hand, and, on the other, the objective pursued thereby and its actual attainment.”²²⁸

The first requirement seems to equal to the one addressed in this thesis as suitability, the second is the necessity test discussed in this Section, where the Court practically considers whether there are alternative measures suitable for the aims pursued *and* less restrictive. This means that these alternative measures must be equally efficient but impose less limitation on fundamental rights at the same time²²⁹.

As it was stated above, standardised packaging would be most probably deemed suitable to discourage young people from taking up smoking by reducing the appeal of tobacco – even if this reduction is presumably mild, – and through shifting the focus from the colours and shapes of the trademarks to the warnings, it could potentially support quitting efforts as well. Most of the other alternative tobacco control policy tools mentioned in the Legal framework chapter aim at the same. The problem arises however whether they

²²⁷ See e.g. the Opinion of AG VAN GERVEN delivered on 20 March 1990 to Case C-169/89, para. 8.

²²⁸ Ibid.

²²⁹ ŠUŠNJAR, p. 170.

can be considered as alternative measures in terms of the necessity test. All those measures namely only reduce but do not eliminate the demand for tobacco products; therefore, in combination they are more effective. A true alternative implies a decision “either - or”; as long as all of the measures applied combined are the most effective achieving the aims, we cannot talk about real alternatives. This is even so following the allegations, that standardised packaging boosts the effects of other packaging policies, especially warnings²³⁰.

There is another policy tool besides the ones aiming at demand reduction that is important to consider in relation to the aim of reducing taking up smoking at an early age: that in accordance with Article 16 of the FCTC, it is prohibited in all EU member states to sale to and by minors. It seems that the main issue standardised packaging seeks to address is in fact an enforcement issue, how states are not able to enforce the already existing ban on selling tobacco to persons under 18²³¹. Is it necessary to limit fundamental rights to approximate to the legitimate aim, when that that could be achieved by better enforcing already existing laws?

In Hungary for instance, following the adoption of the *Act CXXXIV of 2012 on reducing smoking prevalence among young people and retail of tobacco products*²³², only supervised tobacco shops with concession may sell tobacco products. There had been more than 40,000 retail outlets²³³ selling tobacco products just before the act came into effect in 2013. As of now, there are approximately 3000 national tobacco shops operating²³⁴; a number that is supervised and controlled easier. Sales of tobacco products are only allowed to people above 18 years of age; in relation to this, the legislation also imposes various obligations to the retailer²³⁵. Although this measure imposes limitations to another fundamental right, namely to the freedom to conduct business, enshrined in Article 16 of the CFR, its effect and the severity of the

²³⁰ WAKEFIELD, MELANIE, ET AL. "Do larger pictorial health warnings diminish the need for plain packaging of cigarettes?." *Addiction* 107, no. 6 (June 2012): 1159-1167 9p.

²³¹ In case of Austria, Belgium and Luxemburg under 16.

²³² adopted by the Hungarian Parliament on 11 September 2012.

²³³ Data of the WHO, available at:

http://www.who.int/fctc/implementation/news/news_hung/en/.

²³⁴ <http://trafikuzlet.hu/trafikkereso>.

²³⁵ Section 16 of the Act.

limitation might be worth to weigh against the ones of standardized packaging as the aim of reducing tobacco consumption of minors is shared.

It is not of secondary importance, that in the case of *Vékony v. Hungary*²³⁶ the ECtHR held that Hungary has violated Article 1 of Protocol I of the ECHR, the right to property – that also covers interferences that in the EU regime would amount to a violation of Article 16, the freedom to conduct business rather than to a violation of Article 17, the right to property²³⁷; as the previous one is not an established right within the CoE regime²³⁸. The reasons why violation has been found however were mostly procedural in the sense that the licenses for tobacco shops granted in concession system on its own could have been justified. The Court however found that “*the applicant’s licence was extinguished without compensation*” and without “*the possibility of judicial redress*”; and there was “*very short period provided to licence holders to make adequate arrangements to respond to the impending change*” and that “*was not alleviated by any positive measures on behalf of the State, for example, the adoption of a scheme of reasonable compensation*”.

Furthermore,

“the measure was introduced by way of constant changes of the law and with remarkable hastiness, the loss of the old licence was automatic, and the non-acquisition of a new one was not subject to any public scrutiny or legal remedy.”

The ECtHR also emphasised that

“the measure did not offer a realistic prospect to continue the possession because the process of granting of new concessions was verging on arbitrariness” among other for reasons of “lack of transparent rules in the awarding of the concessions, which took place without giving any privilege to a previous licence-holder”²³⁹.

These severe flaws however do not directly stem from the policy measure itself but the way of adoption, therefore it could be assessed as a relevant

²³⁶ (Application no. 65681/13), Judgment, Strasbourg, 13 January 2015, Final, 01/06/2015.

²³⁷ See e.g. the *Sky Österreich case*, para. 34. and the Commentary to Article 17(1), pp. 474-475.

²³⁸ *Vékony v. Hungary*, paras. 29-30.

²³⁹ *Vékony v. Hungary*, paras. 35-36.

alternative. All in all, as long as tobacco consumption is deemed a mythical sea serpent and every policy tool aiming to reduce the demand for tobacco is one harpoon wounding but not destroying it, all the harpoons available are needed on the sea; and there is no real *alternative* to standardised packaging.

6.4. *Stricto sensu* proportionality

The third step is the narrow sense proportionality test. As this test especially must be conducted with respect to each fundamental right separately, here it is addressed only in a general fashion.

The CJEU at this point balances between the limitation put on the fundamental right by adopting the measure and the aims pursued; “*it is principally a value judgement about the legal acceptability of burdens*”²⁴⁰.

The effect of the measure is relevant here too: the *extent* the measure is able to achieve the aims is taken into consideration on the one hand. How heavy the burdens are²⁴¹ and what probable adverse effects the measure can entail are weighed against the effect on the other hand²⁴².

As ŠUŠNJAR points it out, the difference between necessity and the narrow sense proportionality is palpable when considering that under this step “*legislators may be forced to have recourse to less burdensome and less effective measures*”²⁴³, (emphasis in the original text). In other words, even if the measure does not have an equally effective alternative to achieve the legitimate aim(s), that is, it is necessary; it fails the proportionality test if it imposes severe limitation to the fundamental rights and its effectiveness compared to other less effective measures does not justify that.

Disproportionality can be established by the CJEU also on the grounds of “*specific errors*”²⁴⁴ in the adoption of the measure, just as the ECtHR found violation in the case of *Vékony v. Hungary*²⁴⁵.

²⁴⁰ ŠUŠNJAR, p. 190. See also PETURSSON, p. 149.

²⁴¹ Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA Ltd and Others v Secretary of State for Health and Others*, para. 3 of the Summary. [ABNA case].

²⁴² See: Joined opinion of AG CAPOTORTI delivered on 7 June 1977 to the Case 114/76, *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO. KG*; and ŠUŠNJAR, p. 190.

²⁴³ p. 170.

²⁴⁴ ŠUŠNJAR, p. 191.

²⁴⁵ See in Section 6.2. of this thesis.

The CJEU in its case law has reiterated several times that the *stricto sensu* proportionality test also includes assessing the measure with respect to the minimum standard of the fundamental right in question; the measure is violating fundamental rights if it

“constitutes in relation to the aim pursued a disproportionate and intolerable interference, impairing the *very substance of the rights guaranteed*”²⁴⁶ (emphasis added).

This level of protection must be respected even if there are no alternative measures of any kind of effectiveness available.

Lastly, it has to be kept in mind, that this test is not applied the same way in relation to all measures member states adopt. The Court held, that

“the Community legislature must be allowed a broad discretion in an area [...] which involves political, economic and *social choices* on its part, and in which it is called on to undertake *complex assessments*”²⁴⁷ (emphasis added).

Standardised packaging is most probably falls into this category, which means that member states enjoy a broader discretion than in other cases. Still, this is not to say that the measure does not have to suffice for the narrow sense proportionality test as it was described above. Also, as it was stated above, since the Court evaluates domestic measures and weighs national interest against EU-interest in this case, the review is of strong intensity²⁴⁸.

²⁴⁶ ABNA case, para. 87; see also: Case 44/79, *Hauer case*, para 23; and the more recent Joined Cases C-154/04 *Alliance for Natural Health and Others* and C-155/04 *The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales*, Judgement of the Court, 12 July 2005, para. 126.

²⁴⁷ ABNA case, para. 69.

²⁴⁸ See the introductory part for this Chapter.

7. Proportionate limitations?

It has been stated that standardised packaging most probably would qualify as a suitable and necessary measure. The question is whether it is proportionate in the narrow sense, that is the limitation it puts on the right to property or on the freedom of expression and information is proportionate with respect to the degree of influence standardised packaging has in achieving the legitimate aim.

7.1. Right to property

It is the standpoint of this thesis that, for the reasons described in Chapter 4 and Chapter 5 respectively, standardised packaging leads to a severe interference with the right to property. The asset value of trademark registered for tobacco products sinks close to zero, as the right holders are banned from using the mark. It can be well presumed that besides the ban on the use, proprietors will not be able to license or sell their marks either. Additionally, such interference endangers the stability of the trademark (and geographical indication) sensitive industries just as of alcoholic beverages. On the other pair of the scale is the effect of removing trademarks from the packages. As it has been evaluated in Chapter 6, it is only one policy tool supporting the other, less restrictive measures; its only purpose that can be supported by evidence is to boost somewhat the effect of the other packaging related rules, for an age group that is otherwise prohibited to access the products in question. It is true that the aim of the measure is as important for the society as it can be; however the degree this severe restriction contributes to the achievement of that aim is rather inappropriate.

Moreover, even when the restriction amounts to a regulation of property, the essence of the fundamental rights in question must be

respected²⁴⁹. As WOLLENSCHLÄGER explains based on the jurisprudence of the Court:

“The essence of the right to property is disrespected when the guarantee of property is deprived of its substance, but not when affected only marginally or when only modalities of its existence are regulated.”²⁵⁰

Consequently, what could be more the essence of property than the ability to use it? Do not we have property in the society for using it, trading, investing, lending, licensing? Are not the obligatory restrictions in the TPD2 sufficient enough to serve the good cause of public health without impairing trademarks right in this severe way?

Taking into account, that the Court has “*often awarded a broad margin of discretion (...) to Member States when implementing Union law*”²⁵¹ and that it often held only measures “*apparently inappropriate*”²⁵² disproportionate, lastly the weight of the legitimate aim; one can conclude that based on the directions of the case law, the Court might decide in favour of standardised packaging. Focusing however on the Charter and the aim of fundamental rights together with the purpose of the narrow sense proportionality test in the jurisprudence of the Court, standardised packaging is to be seen as disproportionate and therefore it amounts to a violation of Article 17 of the CFR.

²⁴⁹ Article 52 (1) of the CFR.

²⁵⁰ Commentary on Article 17 (1), p.485, with reference to the Case 59/83, *SA Biovilac NV v European Economic Community*, Judgment of the Court of 6 December 1984, para. 22; Case C-177/90, *Ralf-Herbert Kühn v Landwirtschaftskammer Weser-Ems*, Judgment of the Court (Third Chamber) of 10 January 1992, para. 17.

²⁵¹ *Ibid*, p. 483, see e.g. Case C-44/94, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations and others and Federation of Highlands and Islands Fishermen and others*, Judgment of the Court of 17 October 1995, para. 56.

²⁵² *Ibid*, 484. See referenced cases: Case C-306/93, *SMW Winzersekt GmbH v Land Rheinland-Pfalz*, Judgment of the Court of 13 December 1994, para. 27; Case C-504/04, *Agrarproduktion Staebelow GmbH v Landrat des Landkreises Bad Doberan*, Judgment of the Court (Third Chamber) of 12 January 2006, para. 36.

7.2. Freedom of expression and information

As it was introduced in Chapter 6, ultimately the interest behind each fundamental right has to be weighed against the interest in limiting those rights. The latter is the legitimate aim, public health or put it differently, the protection of consumers of tobacco products. At this point a reference has to be made to the greater debate mentioned in the Introduction, namely how far may a state go to prevent the individual from self-imposed harm.

The idea behind the TPD2 (and standardised packaging as well) is that consumers of tobacco products are particularly vulnerable class because of the addictive effects of nicotine²⁵³ and so they require a high level of protection. It is understandable why the TPD2 in its Article 13 (1) (a) bans element or features of the packaging that

“promotes a tobacco product or encourages its consumption by creating an erroneous impression about its characteristics, health effects, risks or emissions”.²⁵⁴

Standardised packaging on the other hand bans trademarks based on the underlying idea that as a tool of branding it triggers tobacco consumption. As it has been explained in Section 4.2, trademarks have a range of other social functions, among them the function of informing consumers of the origin of the product, and thus even of the social conduct of the producer. Standardised packaging, as it also has been explained in Section 5.2, limits the information consumers need to access. Again, comparing this interference and that the consumer interest does not only lie with the prohibition but in the freedom of information as well with the fact that standardised packaging is only supplementary to the other packaging measures, adopting a complete trademark ban seems to take more than it gives in return; in terms of fundamental rights and in terms of consumer protection simultaneously. Relying on these arguments, one could conclude that standardised packaging imposes a disproportionate limitation on the freedom of expression and information.

²⁵³ Tobacco packaging case, para. 144.

²⁵⁴ TPD2, Article 13 (1) (a)

The argumentation of the CJEU in the *Tobacco packaging case* is however worrying. The referring Court asked among others whether the prohibition laid down in Article 13 (1) must be interpreted as prohibiting certain information to be displayed *even if that information is factually accurate*, and, if that is the case, whether it is in conformity with Article 11 of CFR²⁵⁵.

The CJEU extensively elaborated on the Article and held, that

“the provision (...) clearly attributes no importance to the question of whether or not this type of information is factually accurate (...) due to the fact (...) that indications of this type may be misleading in that they lead consumers to believe that certain cigarettes are less harmful than others”²⁵⁶.

Hence, following Article 13 (1) (e), the TPD2 also prohibits elements or features “*suggesting that a certain tobacco product has improved biodegradability or other environmental advantages, (...) irrespective of whether the claims in question are factually accurate*”²⁵⁷. It is the understanding of this thesis, that a difference can be and should be made on whether the element or feature that is factually true refers to the health effects of the tobacco – in which case it can be prohibited – or it refers to another quality of the product that makes it socially less harmful, for instance its paper is recycled or it was produced child labour free. The standpoint the Court has taken is dangerous in two ways. *Firstly*, it treats tobacco consumers and non-smokers as unable to make that difference presented above. *Secondly*, it makes social problems linked to tobacco production extremely hard to handle. Demand reduction is the goal all legislations should be aiming at, but as long as there is a foreseeable possibility for tobacco consumption and thus for production, the adverse effects linked to the production should be mitigated as well. The Court also added:

²⁵⁵ The CJEU reformulated the question this way, see para. 137 of the Decision.

²⁵⁶ para. 140.

²⁵⁷ para. 141.

“It cannot be accepted that those elements and features may be included for the purpose of giving consumers clear and precise information, inasmuch as they are intended more to exploit the vulnerability of consumers of tobacco products who, because of their nicotine dependence, are particularly receptive *to any element suggesting there may be some kind of benefit linked to tobacco consumption*, in order to vindicate or reduce the risks associated with their habits”²⁵⁸ (emphasis added).

The Court evidently does not make a difference between suggested positive health effects and suggested mitigation of social cost of tobacco production. This argument, in case it would be employed against standardised packaging as well, could render the measure conform to Article 11.

On the other hand, when assessing the conformity of the above presented interpretation with Article 11 of the CFR, the Court also stated:

“(…) the essence of a business’s freedom of expression and information is not affected by Article 13 (1) of Directive 2014/40 inasmuch as that provision, *far from prohibiting the communication of all information about the product*, merely controls, in a very clearly defined area, the labelling of those products by prohibiting only the inclusion of certain elements and features”²⁵⁹ (emphasis added).

Trade marks carry concentrated information on the products. All the information that a consumer ever receives on a particular product can be linked to the actual piece of package they intend to buy *via* the trade mark. It is thus arguable, that abolishing trade marks on the packages does not lay far from “*prohibiting the communication of all information about the product*”.

²⁵⁸ para 160.

²⁵⁹ para 151.

It is acceptable that the obligatory packaging standards in the TPD2 are in conformity with freedom of expression and it is in line with the proportionality principle as it was described in this thesis. The ban on trademark use however, for the reasons explained above in Section 7.1. on the right to property, that standardised packaging is an additional policy tool to this fundamental rights conform set of rules, in its positive effect limited, in its restricting effect severe. Taken all these arguments together, although there is uncertainty on what the Court might decide if it were to adjudicate the case of standardised packaging, it is the view of the present thesis, that the measure is disproportionate. As the limitation imposed to Article 11 cannot be justified, adopting standardised packaging violates the freedom of expression and information.

8. Conclusion

The purpose of this thesis was to join the greater debate on state regulation and protection of vulnerable citizens with respect to their interest and the interests of other stakeholders, by providing *a fundamental rights focused analysis on standardized packaging*. The core problematics of the measure has been identified as limiting trademark right protection, and thus the right to property and the freedom of expression and information as laid down in the Charter Fundamental Rights of the European Union. Assessing the social function of trademarks and the severity of the limitations on both fundamental rights along with the actual impact of standardised packaging, the measure was deemed disproportionate. Taking into account the jurisprudence of the Court of Justice of the European Union in such delicate issues, with distinguished focus on the recent *Tobacco packaging case*, the answer to the research question became less evident. With reference to the differences between the obligatory tobacco packaging measures and standardised packaging, the thesis concludes that the latter, as a disproportionate measure, amount to a violation of Article 17 and Article 11 of the Charter respectively. It must not be forgotten that every balancing exercise is drawing the fine line between defending vulnerable citizens with proportionate measures and a paternalistic state that treats consumers, and citizens in general as children. This attitude namely does not serve human dignity; quite contrary it goes against it.

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4. Other documents

4.1. Travaux préparatoires and explanations

- DG SANCO, Possible Revision of the Tobacco Products Directive 2001/37/EC, Public Consultation Document, 2010.
- Explanations relating to the Charter of Fundamental Rights of the European Union (Version 2007)
- Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trademarks (Recast), COM/2013/0162 final - 2013/0089 (COD) Explanatory memorandum.
- Explanations to the Hungarian Act XI of 1997 on the protection of trade marks and geographical indications: *Indokolás a védjegyek és a földrajzi árujelzők oltalmáról szóló törvényjavaslathoz.*

4.2. Other legal documents

- United Nations Guiding Principles on Business and Human Rights (UNGPs)
- Guidelines for implementation of the WHO FCTC, published in 2013.
- Joint Practical Guide - for persons involved in the drafting of the European union legislation.

4.3. Other sources

- *Fact Sheet of the European Union*
- Special Eurobarometer 429, *Attitudes of Europeans Towards Tobacco and Electronic Cigarettes*, Report published in May 2015
- WHO Press Statement on the Australian tobacco legislation
- WHO Fact Sheet N°339,
- YouGov / ASH Survey Results
- *Plain packaging of tobacco products worldwide movement to address a global challenge*, Press Kit from the first ministerial meeting on plain tobacco packaging. Paris, July 20th, 2015.
- *En översyn av tobakslagen - Nya steg mot ett minskat tobaksbruk, (A Review of the Tobacco Act)*
- Website of the NGO Eliminating Child Labour in Tobacco growing.
- Article of Human Rights Watch on the stem child labour in the US.
- Document by the International Labor Rights Forum.
- WHO Report on Tobacco and the rights of the child: *Tobacco Industry and Corporate Responsibility... An Inherent Contradiction*, WHO publication (not official)
- FCTC Implementation Factsheet of the EU.
- WHO FCTC report on the French legislation.