

FACTSHEET 4: DON'T JUDGE A BOOK BY ITS COVER

Plain packaging helps criminals, not legal manufacturers or consumers

It is important to approach the consideration of plain packaging with extreme caution. Plain packaging will further erode the competitiveness of the legal industry against illicit trade, potentially leading to increased consumption of unregulated products and undermining both public health objectives and tax revenues.

There are substantial grounds for scepticism regarding the efficacy of plain packaging in reducing smoking rates, particularly in a country like South Africa with high levels of illicit trade.

Evidence from countries that have introduced plain packaging, including Australia, the UK and France, shows mixed results at best -- with some studies indicating no significant reduction in smoking prevalence and others suggesting potential increases in consumption. These outcomes raise serious questions about the policy's effectiveness, particularly when applied to South Africa's complex tobacco landscape.

The high prevalence of illicit trade in our market introduces additional complications. Operating outside the law, illicit traders would likely continue to produce branded packs, giving them a significant competitive advantage. Meanwhile, the legal industry would be constrained by plain packaging regulations, unable to compete on brand differentiation in addition to already being at a price disadvantage due to the taxes being evaded by the illicit operators. This dynamic could further skew the market in favour of illicit products.

Furthermore, counterfeit products would be easier to produce and harder to distinguish from legal ones. This could potentially drive more consumers towards cheaper, un-regulated products, undermining both public health objectives and tax revenues.

Given these factors, it is imperative that we approach the consideration of plain packaging with extreme caution. The policy risks further eroding the competitiveness of the legal industry against illicit trade, potentially leading to increased consumption of unregulated products and undermining both public health objectives and tax revenues. Any potential benefits must be weighed carefully against these significant risks in our unique market environment.

Constitutional considerations

The implementation of plain packaging raises significant constitutional concerns, particularly regarding property rights and potential expropriation of intellectual property:

- Section 25 of the Constitution protects property rights, which includes intellectual property such as trademarks and brand elements.
- If plain packaging is deemed to constitute expropriation of intellectual property, the Government may be required to pay just and equitable compensation to affected parties.
- This could result in substantial financial liabilities for the state, potentially diverting resources from other critical areas of public spending.
- There's also a risk of protracted legal battles, which could delay implementation and incur additional costs.

Any limitation of these rights must be justified under Section 36 of the Constitution, which allows for the limitation of rights only if it is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." An analysis under Section 36 raises serious doubts about the justifiability of plain packaging:

- While the purpose (improving public health) is important, the effectiveness of plain packaging in achieving this goal in South Africa's context is questionable.
- The limitation on property rights and freedom of expression is severe.
- Less restrictive means to achieve public health goals are likely available.
- The high levels of illicit trade in South Africa weaken the connection between the limitation and its purpose.

Given these factors, plain packaging would face significant challenges in meeting the criteria set out in Section 36, particularly considering South Africa's unique market conditions and the availability of potentially more effective, less restrictive alternatives.

This constitutional dimension adds substantial complexity to the policy decision, underscoring the need for careful consideration of legal implications, potential for litigation, and the balance between public health objectives and constitutional rights.

What should we expect in South Africa if plain packaging is introduced?

The forced removal of branding and trademarks from tobacco packaging will have serious, adverse consequences for consumers, business, government and the wider South African economy. These consequences may include:

- **Reduced tax revenues:** Tobacco products, including cigarettes, become commoditised when distinctive packaging is removed because packaging is a key tool used by consumers to differentiate product and verify quality. This results in competition between brands becoming focused on price, leading to down-trading and ultimately reduced government tax revenues.
- **Increased illicit trade:** Already an estimated 70% of all cigarettes sold in South Africa are illicit. This equates to an estimated annual loss of government tax revenue of R24 billion. Counterfeiting will become easier and many consumers will seek cheaper, branded products from illicit sources. This will exacerbate the illegal tobacco trade in South Africa, which is already known to have exploded in size post the unlawful Covid-19 tobacco ban.
- **Enforcement challenges:** A booming illicit trade hampers enforcement efforts and undermines investments made by legitimate businesses.
- **Legal and Constitutional implications:** Banning the use of registered trademarks may infringe on constitutional protections, and lead to protracted litigation and potential compensation claims worth billions of rands.
- **Public health considerations:** Given the high levels of illicit trade, plain packaging may not achieve its intended public health objectives. It could potentially increase consumption of unregulated, illicit products, which may pose additional health risks.

In conclusion, while plain packaging aims to reduce tobacco consumption, its implementation in South Africa's unique market context could lead to a range of unintended negative consequences. These potential outcomes underscore the need for a comprehensive impact assessment and consideration of alternative measures that might more effectively address both public health concerns and the challenges posed by the illicit market.

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