"On the back of a cigarette packet" – standardised packaging legislation and the tobacco industry's fundamental right to (intellectual) property

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Introduction

In Europe, over the last few years, the consumption of tobacco products has declined.[1] Nevertheless, large numbers of young people continue to become smokers.[2] In the United Kingdom, it is estimated that over 200,000 children between 11 and 15 take up this addictive habit each year.[3] This is a very significant public health problem because fifty per cent of long-term smokers die from a smoking-related disease.[4] Such diseases are, by some distance, the primary cause of preventable morbidity and premature death in the United Kingdom.[5] Recently, standardised packaging (also known as plain packaging)[6] legislation has been adopted in some states as an additional tobacco control measure.[7] Under such laws, tobacco products must be sold in drab coloured

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[1] However, the incidence of smoking is increasing elsewhere in the world (particularly in developing countries). See P Cairney, ibid, 3-6.

[2] C.Chantler, *Standardised Packaging of Tobacco – Report of the Independent Review undertaken by Sir Cyril Chantler*, April 2014 ("*Chantler Report*"), [3].

[3] *Chantler Report*, 4.

[4] See Department of Health, Explanatory Memorandum to the Standardised Packaging of Tobacco Products Regulations 2015 ("*Explanatory Memorandum*"), [7.1]-[7.2.].

[5] HM Government, *Healthy Lives, Healthy People: a Tobacco Control Plan for England*, 9 March 2011 [5]; *Explanatory Memorandum,* ibid [7.1].

[6] The form of tobacco control measure discussed here has been described as "plain packaging" legislation in some contexts (see Australia's Tobacco Plain Packaging Act 2011 (Cth)). More recently, in the UK and the EU, the term "standardised packaging" has been adopted. The shift in terminology recognises that product packaging under the legislation is not really "plain" at all because it carries prominent mandatory textual and graphic health warnings.

[7] See section 1 below.. For discussion of tobacco control laws generally, see AD Mitchell & T Voon, *The Global Tobacco Epidemic & the Law* (Edward Elgar, 2014); P Cairney et al, *Global Tobacco Control* (Palgrave Macmillan, 2012); G Howells, *The Tobacco Challenge – Legal and Consumer Protection* (Ashgate, 2011).

packaging without branding other than a written indication of the name under which the product is sold.[8] Its aim is to reduce the attraction of tobacco products, particularly to young smokers, and to prevent advertising imagery from interfering with prominent mandatory textual and visual health warnings.

On 19th March 2015, the Standardised Packaging of Tobacco Products Regulations 2015 ("the Regulations")[9] received Parliamentary approval[10] in the United Kingdom.[11] The tobacco industry ("the Industry") vigorously opposed their introduction.[12] Amongst other objections, it has claimed that the restrictions on branding introduced under the Regulations violate its fundamental right of property under Art 1 of the First Protocol of the European Convention on Human Rights ("A1P1, ECHR") and Art 17 of the Charter of Fundamental Rights of the European Union ("Art 17, EU Charter") because the Regulations deprive it of its ability to use marks, designs and inventions protected by intellectual property law. In this article, I test this argument by reference to the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU). I demonstrate that the absolutist view of property rights promoted by the Industry is very different from that prevailing in European fundamental rights law and that, as a result, its suggestion that the Regulations violate A1P1 and Art 17 is seriously misleading. It is important for

[8] For further detail, see section 1 below.
[9] SI 2015/829 ("Regulations").
[10] The Regulations are scheduled to come into force on 20th May 2016. This date coincides with the transposition deadline for the revised Tobacco Products Directive (Directive 2014/40/EU of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC). Arts 4, 8, 10 and 19 of the Regulations implement Arts 13 and 14 and one element of Art 9(3) of the Directive. Those Articles provide certain restrictions on the presentation and appearance of tobacco products and packaging and minimum amounts of tobacco or cigarettes per individual packet. The Secretary of State intends to introduce a further statutory instrument implementing the remaining provisions of the Tobacco Products Directive. See *Explanatory Memorandum*, [4.3].
[11] Even though public health is a devolved matter, agreement has been reached on the application of the Regulations throughout the United Kingdom. The Children and Families Act 2014, which authorises the Secretary of State to introduce standardised packaging legislation provides that he or she obtains the consent of the governments of Scotland, Wales and Northern Ireland before making regulations which would normally fall within the competence of the devolved administrations (s 94(12)). The consent of the relevant Ministers has been obtained. See *Explanatory Memorandum*, supra, [5].
[12] Groups and individuals outside the Industry (including grocers, packaging companies and libertarians) have also opposed the introduction of the Regulations. However, the Industry has been the leading proponent of the claim that standardised packaging legislation violates the fundamental right of intellectual property and, for simplicity's sake, the argument is therefore treated here as though it were the Industry's alone.

the Industry's argument to be refuted in detail because it has been forcefully deployed in lobbying and has been widely recycled in the public sphere.[13] While the UK Government was not, ultimately, deterred from legislating, the legality of the Regulations has been challenged[14] and the same challenge will undoubtedly be raised when standardised packaging legislation is proposed elsewhere in Europe.[15]

1 The Standardised Packaging of Tobacco Products Regulations 2015

At the international level, the World Health Organisation's Tobacco Control Framework encourages, but does not require, contracting states to adopt standardised packaging laws.[16] Before 2015, Australia was the only country to have done so.[17] Following the enactment of the Tobacco Plain Packaging Act 2011 (Cth), the Australian state has faced a series of legal challenges from the Industry and countries with aligned financial interests. In proceedings in the Australian courts, Japan Tobacco International argued unsuccessfully that the legislation violates their right of property under the Australian constitution[18]

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[13] While counter-arguments have been advanced, the claim has not been dissected in detail. It has been doubted in PK Henning & L Shmatenko in "Tobacco Control in Europe: the Potential for Plain Packaging" in AD Mitchell & T Voon, *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 187; A Alemanno & E Bonadio, "Plain packaging of cigarettes under EU law" in T Voon et al (eds), *Public Health and Plain Packaging of Cigarettes – Legal Issues* (Edward Elgar, 2012) 214, 232-3; A Alemanno & A Garde, "Legal Opinion on the Compatibility of the UK proposals to Introduce Standardised Packaging on Tobacco Products with the EU Tobacco Products Directive", provided for Action on Smoking & Health (ASH), 2014, 41-2.

[14] *Inter alia*, as a violation of the right of property. See C Cooper, "Tobacco Companies File Lawsuits against UK Government over Plain Packaging Laws", *The Independent*, 22nd May 2015.

[15] The French government is currently attempting to introduce standardised packaging legislation (with effect from May 2016). See "French Tobacconists Dump Four Tonnes of Carrots on Street in Cigarette Protest", *The Guardian*, 22nd July 2015.

[16] See World Health Organisation, *Guidelines for implementation of Art 11 of the WHO Framework Convention on Tobacco Control*, Decision FCTC/COP3(10), [46] and *Guidelines for implementation of Art 11 of the WHO Framework Convention on Tobacco Control,* Decision FCTC/COP3(12), [16]. For discussion of the WHO Framework Convention, see P Cairney et al, *Global Tobacco Control: Power, Policy, Governance & Transfer* (Palgrave Macmillan, 2012), 189-211; chapters by K DeLand et al, C Lo & J Liberman in AD Mitchell & T Voon (eds), *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 11-31; 32-47; 48-63.

[17] Tobacco Plain Packaging Act 2011 (Cth).

[18] *JT International SA v Commonwealth* (2012) 291 ALR 669. For discussion, see M Davison, "Tobacco Control in Australia: the High Court challenge to plain packaging" in AD Mitchell & T Voon, *The Global Tobacco Epidemic and the Law* (Edward Elgar, 2014) 258; S Ricketson, "Plain Packaging Legislation for Tobacco

Internationally, a number of states have brought proceedings under the TRIPS Agreement[19] and Philip Morris Asia Ltd has brought a claim under an investment treaty between Australia and Hong Kong, alleging that Australia has expropriated Philip Morris's investments (represented by its intellectual property rights).[20] The TRIPS and investment treaty claims have not yet been resolved.

Products and Trade Marks in the High Court of Australia" (2013) *Queen Mary Journal of Intellectual Property* 224. Section 51(xxxi) of the Commonwealth constitution provides that there shall be no "acquisition" of property by the Commonwealth other than on "just terms". The majority of the High Court held that the Commonwealth had not "acquired" the trade mark owner's property. See S Evans & J Bosland, "Plain Packaging of Cigarettes and Constitutional Property Rights" in T Voon et al (eds), *Public Health and Plain Packaging of Cigarettes – Legal Issues* (Edward Elgar, 2012) (predicting that the legislation would be held to be constitutional).

[19] See *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (Honduras) WT/DS435; *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (Dominican Republic) WT/DS441, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (Cuba) WT/DS458; *Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging* (Indonesia) WT/DS467. Ukraine also filed an application against Australia for violation of the TRIPS Agreement on similar grounds, but has subsequently withdrawn the complaint (see "Ukraine's Decision to Withdraw its Complaint at WTO: an Evidence-Based Move", WHO Framework Convention on Tobacco Control, 9th June 2015, available at: http://www.who.int/fctc/mediacentre/news/2015/ukrainestmnt/en/. There is an extensive literature on these disputes. See, for example, S Frankel & D A Marsoof, "The TRIPS Compatibility of Australia's Tobacco Plain Packaging Legislation" (2013) 16 Journal of World Intellectual Property 197; "Plain Packaging and the Interpretation of the TRIPS Agreement" (2013) 46 Vanderbilt Journal of Transnational Law 1149; M Davison, "The Legitimacy of Plain Packaging under International Intellectual Property Law: Why there is no Right to Use a Trademark under either the Paris Convention or the TRIPS Agreement" in T Voon et al (eds), *Public Health and Plain Packaging of Cigarettes – Legal Issues* (Edward Elgar, 2012) 81-108; P Johnson, "Trade Marks without a Brand: the Proposals on 'Plain Packaging' of Tobacco Products" [2012] European Intellectual Property Review 46; M Davison, "Plain Packaging and the TRIPS Agreement: a Response to Professor Gervais" (2013) Australian Intellectual Property Journal 160.

[20] Agreement Between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, Austl.-H.K., Sept. 15, 1993, 1748 UNTS 385. For discussion of the claim, see T Voon & A Mitchell, "Implications of International Investment Law for Plain Tobacco Packaging:

Within the EU, the revised Tobacco Products Directive imposes stringent controls on the advertising and presentation of tobacco products. However, despite attempts to amend the Directive during the legislative process, it does not require the introduction of a, standardised packaging regime.[21] Nevertheless, this option is explicitly left open to member states, provided the existence of such a regime at national level would be "compatible with the TFEU, with WTO obligations and [would] not affect the full application of [the] Directive".[22] The Industry, and others, have challenged the revised Directive's legality, questioning its legal basis and compatibility with various fundamental principles of EU law.[23]

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lessons from the Hong Kong-Australia BIT", in T Voon et al (eds) *Public Health and Plain Packaging of Cigarettes – Legal Issues* (Edward Elgar, 2012) 137. Philip Morris has also brought proceedings against Uruguay over tobacco packaging requirements (falling short of standardised packaging) under a bilateral investment treaty between Switzerland and Uruguay. See B McGrady, "Implications of Ongoing Trade and Investment Disputes concerning Tobacco, *Philip Morris v Uruguay*" in T Voon et al (eds) *Public Health and Plain Packaging of Cigarettes – Legal Issues* (Edward Elgar, 2012) 173. For a discussion of these cases from a political scientist's perspective, see H Jarman, *The Politics of Trade & Tobacco Control* (Palgrave Macmillan) 2014. For discussion of a further dispute in which a state's intellectual property rules have been argued to contravene investment protection provisions, see R Okediji, "Is Intellectual Property 'Investment'? *Eli Lilly v Canada* and the International Intellectual Property System" (2014) 35 Univ of Pennsylvania J of Int Law 1121.

[21] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC. The Directive, which requires combined picture and text health warnings to cover 65% of the front and the back of the packaging of tobacco products for smoking, must be implemented by 20 May 2016. For discussion of the Commission's Proposal to revise the Directive, see A Alemanno, "Out of Sight, Out of Mind – Towards a New EU Tobacco Products Directive" (2012) Columbia Journal of European Law 197; MJ Elsmore & V Obolevich, "Thank You for Not Smoking: the Commission's Proposal for a New Tobacco Products Directive – Legally Sound but Does it Hit the Spot? (2013) European Law Review 552. An amendment requiring the inclusion of a full, standardised packaging regime within the Directive was proposed, and rejected, during the legislative process, see A Alemanno & A Garde, "Legal Opinion on the Compatibility of the UK Proposals to Introduce Standardised Packaging on Tobacco Products with the EU Tobacco Products Directive", provided for Action on Smoking & Health (ASH), 2014, 22-3.

[22] See Recital 53.

[23] See the references for preliminary ruling in (C-358/14) *Republic of Poland v European Parliament and Council of the European Union*; (C-477/14) *Pillbox 38 (UK) Ltd v Secretary of State for Health* (including a claimed violation of Art 17); (C-547/14) *Philip Morris Brands SARL v Secretary of State for Health.* For discussion of the legality of the directive, see A Alemanno, "Out of Sight, Out of Mind – Towards a New EU Tobacco Products Directive" (2012) Columbia Journal

The United Kingdom and Ireland [24] have nevertheless recently enacted standardised packaging regimes. Other European states plan to do so.[25]

In the United Kingdom, the legislative process leading to the adoption of the Regulations was protracted. Following an initial consultation process ("the 2012 consultation")[26] and an apparent faltering of legislative will, a provision was inserted in the Children and Families Act 2014 authorising the Secretary of State for Health to make regulations concerning the retail packaging of tobacco products if he or she considers they may contribute at any time to reducing the risk of harm to, or promoting, the health or welfare of people under the age of 18.[27] Following the introduction of this provision, the government sought an independent review of the scientific evidence on the effectiveness of standardized packaging legislation from the paediatrician, Sir Cyril Chantler. His report concluded that, in conjunction with the existing tobacco control regime, such legislation was "very likely to lead to a modest but important reduction over time on the uptake and prevalence of smoking and thus have a positive impact on public health". [28] Following further consultation ("the 2014 consultation"), [29] the Regulations were tabled and received Parliamentary approval. Their aims, which are set out in an accompanying explanatory memorandum, are; first, to discourage young people from starting to use tobacco products; secondly, to encourage people to give up using tobacco products; thirdly, to reduce the appeal or attractiveness of tobacco products; fourthly, to reduce the misleading elements of packaging and the potential for packaging to detract from the effectiveness of health warnings and, finally, to alter attitudes, beliefs, intentions and behaviour relating to the reduction in use of tobacco products.[30]

The Regulations pursue these goals through a series of stringent controls on the packaging of cigarettes and hand-rolling tobacco.[31] External packaging surfaces

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of European Law 197; A Alemanno & A Garde, "Legal Opinion on the Compatibility of the UK Proposals to Introduce Standardised Packaging on Tobacco Products with the EU Tobacco Products Directive", provided for Action on Smoking & Health (ASH), 2014

[24] See Public Health (Standardised Packaging of Tobacco) Act 2015. The Industry has sought judicial review of this legislation. See A O'Faolain, "State Wants Tobacco Packaging Challenge Referred to EU Court", *Irish Times*, 27th April 2015.

[25] In France, for example, see "Le paquet de cigarettes neutre sera obligatoire en mai 2016", *Le Figaro*, 3rd April 2015.

[26] Department of Health, *Consultation on Standardised Packaging of Tobacco Products*, 16th April 2012.

[27] Children and Families Act 2014, s 94.

[28] *Chantler Report*, supra, 6.

[29] Department of Health, Welsh Government, Scottish Government, Department of Health, Social Services & Public Safety (NI) *Consultation on the Introduction of Regulations for Standardised Packaging of Tobacco Products*, June 2014.

[30] *Explanatory Memorandum*, [7.3].

[31] The Regulations do not cover pipes or cigars, which are not generally used by young people (e.g. pipes and cigars). See *Explanatory Memorandum*, 7.11.

must be presented in a specific dull brown colour[32] and internal surfaces must either be white or the same dull brown.[33] With the exception of health warnings and other statutorily prescribed information, the only distinguishing text permitted on the packaging of products covered by the legislation is a brand[34] and variant name.[35] The font and maximum size of this text is specified.[36] Equally restrictive conditions are imposed on the presentation of cigarettes themselves.[37] Further constraints relating to the required materials, shape and type of packaging for tobacco products are designed to eradicate all other opportunities for product differentiation.[38] These packaging requirements apply only to packaging intended for consumers).[39] Breach of the Regulations is a criminal offence[40] and no compensation is payable to those whose interests are adversely affected. A short transitional period is provided, during which non-compliant products produced before the date on which the Regulations come into force can continue to be sold.[41]

The Regulations also include provisions designed to preserve the existence of intellectual property rights in the Industry's brand signs, despite the severe controls placed on their use. They include measures providing that trade marks and designs relating to tobacco products may still be registered even though they cannot be applied to tobacco products under the legislation.[42] They also ensure that a trade mark proprietor's failure to use a registered trade mark relating to tobacco products will not result in the revocation of the mark where non-use arises as a result of the Regulations.[43]

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[32] Pantone 448 C. See Regulations, Reg 3(2).
[33] Reg 3 (cigarettes); Reg 7 (hand rolling tobacco). See also Schedules 1-4 for further detail of the text and other markings permitted on the packaging of cigarettes and hand-rolling tobacco.
[34] "Brand name" is defined as "the primary name by which the product is known" (Reg 2(1)).
[35] "Variant name" is defined as "any name by which that product is distinguished from other tobacco products under the same brand name" (Reg 2(1)).
[36] Sch 1 (cigarettes); Sch 3 (hand rolling tobacco).
[37] Reg 5.
[38] Reg 4 (cigarettes); Reg 8 (hand-rolling tobacco); Regs 10-12; Sch 2.
[39] See Explanatory Memorandum, 7.10.
[40] Reg 15.
[41] Reg 20.
[42] Regs 13(1)-(3) (trade marks); 14 (designs).
[43] Reg 13(4)-(8).

2 The Tobacco Industry's challenge to the Regulations

The Industry has raised a number of objections to the Regulations. It has, for example, argued that branding encourages existing smokers to switch suppliers but does not cause young people to begin smoking.[44] It has also suggested that there is insufficient evidence that the Regulations will achieve their stated aim.[45] The Australian experience of standardised packaging has formed an important battleground in this respect.[46] The Industry has proposed that alternative policies (including education) would combat the incidence of smoking by young people more effectively[47] and that the introduction of standardised packaging legislation will have a number of negative consequences, including an increase in the counterfeit tobacco trade, with a resulting impact on the businesses of grocers, newsagents and packaging manufacturers and a reduction in tax revenue.[48] The Industry has further warned that the Regulations will harm the United Kingdom's reputation as a commercial environment.[49]

These arguments present standardised packaging legislation as a poor policy choice. However, it has also been claimed that the Regulations are *unlawful* for a variety of reasons. The Industry has suggested (i) that the United Kingdom will be vulnerable to TRIPS challenges similar to those brought against Australia;[50] (ii) that the introduction of standardised packaging legislation in an individual

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[44] See, for example, *JTI's Response to the UK Department of Health Consultation on the Introduction of Regulation on the Standardised Packaging of Tobacco Products*, 6 August 2014 [4.5]-[4.21]. This argument was considered by Sir Cyril Chantler in his review of the evidence on standardised packaging and considered to be "implausible". See *Chantler Report*, [8].

[45] See, for example, *JTI's Response to the UK Department of Health Consultation on the Introduction of Regulation on the Standardised Packaging of Tobacco Products*, Ibid 3-4.

[46] See, for example, British American Tobacco UK Ltd, *Response of British American Tobacco UK Ltd to the 2014 Consultation*, [2.1], [2.6].

[47] See *Explanatory* Memorandum [7.4]; Joint Committee on Health & Children, Houses of the Oireachtas (Ireland), Report on Hearings in Relation to the General Scheme of the Public health (Standardised Packaging of Tobacco) Bill, April 2014, Vol 1, 186-8 (Evidence of Andrew Meagher, John Player & Sons).

[48] For a list of a number of suggested adverse consequences, see British American Tobacco UK Ltd, *Response of British American Tobacco UK Ltd to the 2014 Consultation*, supra [2.4].

[49] See Imperial Tobacco, *Illegal, Unnecessary & Damaging for UK plc: Why Standardised Packaging is a Bad Policy Idea that would not Work*, 7 August 2014. For an extraordinary, institutionalised expression of this concern, see US Chamber of Commerce, *Global IPLC International Index*, 3rd ed, February 2015. For discussion of the US Chamber of Commerce's global lobbying in support of the Industry, see D Hakim, "US Chamber of Commerce Works Globally to Fight Antismoking Measures", *The New York Times,* 30 June 2015.

[50] See "British American Tobacco will Launch Legal Challenge over Plain Packaging in the UK", News Release, British American Tobacco, 11th March 2015.

member state (such as the United Kingdom or Ireland) breaches EU Treaty rules on competition[51] and/or free of movement of goods;[52] (iii) that the Regulations violate the Community Trade Mark Regulation[53] and (iv) that they contravene a number of fundamental principles and rights protected in the European legal order, including the right of commercial expression[54] and the right to conduct a business.[55] Amongst the challenges based on fundamental rights, the most forcefully advanced has been the claim that standardised packaging legislation violates the Industry's right to property (and, in particular, its right to intellectual property). This was repeatedly suggested in submissions to both the 2012 and 2014 consultations and was reiterated when the UK Government decided to proceed with the legislation. The argument focuses primarily on the impact on the Industry's registered trade marks, but also covers its unregistered marks, copyright, designs and patents in packaging technology.[56]

Sometimes, this claim has been made in general, rhetorical terms. Thus, for example, when the Regulations received final Parliamentary approval, BAT's "Corporate and Regulatory Affairs Director" stated that:

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[51] See, for example, Imperial Tobacco, *Illegal, Unnecessary & Damaging for UK plc: Why Standardised Packaging is a Bad Policy Idea that would not Work*, 7 August 2014, 51.

[52] See, for example, Philip Morris Ltd, *Response to the Consultation on "Standardised Packaging"*, 7 August 2014, 12-13.

[53] For discussion of the claim that the Regulations would violate European trade mark law, see A Alemanno & A Garde, "Legal Opinion on the Compatibility of the UK Proposals to Introduce Standardised Packaging on Tobacco Products with the EU Tobacco Products Directive", provided for Action on Smoking & Health (ASH), 2014, 37-40, available at http://www.ash.org.uk/files/documents/ASH_955.pdf

[54] See, for example, *JTI's Response to the UK Department of Health Consultation on the Introduction of Regulation on the Standardised Packaging of Tobacco Products*, 6 August 2014, 19. This challenge has been advanced previously in relation to tobacco advertising controls in Europe. See, for example (C-380/03) *Germany v Parliament & Council* [153]-[156]. In New Zealand, in the absence of a codified fundamental right of property, the Industry has also claimed that standardised packaging would violate its right to freedom of speech. See, for example, Imperial Tobacco New Zealand Ltd, Submission to the Health Committee on the Smokefree Environments (Tobacco Plain Packaging) Amendment Bill, 2014, 5.

[55] See, for example, Imperial Tobacco, *Illegal, Unnecessary & Damaging for UK plc: Why Standardised Packaging is a Bad Policy Idea that would not Work*, 7 August 2014, 50. The right to conduct a business is protected under Art 16, EU Charter.

[56] See, for example, W Pors & M Rieger-Jansen, Bird & Bird, *Paper regarding the Legality of Plain Packaging and other Pack Standardization Measures in the Netherlands*, Paper prepared for Philip Morris Benelux BVBA, 28 May 2013, 14-15; Philip Morris Ltd, *Standardised Tobacco Packaging will Harm Public Health and Cost UK Taxpayers Billions: a Response to the Department of Health Consultation on Standardised Packaging of Tobacco Products*, 9 August 2012, 24-25.

> "This legislation is a case of the UK Government taking property from a UK business without paying for it."[57]

However, the Industry has also argued more specifically that the introduction of standardised packaging legislation would contravene the binding guarantees for property (and particularly intellectual property) provided under A1P1 and Art 17. [58] Thus, for example, in its response to the 2014 Consultation, British American Tobacco UK Ltd wrote that:

> "Plain Packaging is per se unlawful, since it amounts to a complete deprivation of property without compensation contrary to Article 1 of Protocol 1 to the ECHR."[59]

In these specific claims, the Industry suggests that standardised packaging legislation prevents the application of its brand marks and signs (protected by intellectual property rights) to such a significant extent that it is effectively "deprived" of those rights and, as the Regulations make no provision for compensation, such deprivation of property rights violates A1P1 and Art 17.[60] These arguments have been echoed in the media and in legal commentary, with greater or lesser degrees of conviction and co-ordination.[61]

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[57] "British American Tobacco will Launch Legal Challenge over Plain Packaging in the UK", News Release, British American Tobacco, 11th March 2015. Sometimes, the Industry has presented this alleged expropriation as a threat to the nation's reputation for economic stability and the rule of law. See, for example, US Chamber of Commerce, *Global IPLC International Index*, 3rd ed, February 2015; Law Society of Ireland, Opening Remarks of the President of the Law Society of Ireland, Mr John P Shaw, to the Joint Oireachtas Committee on Health & Children, 13th February 2014. For criticism of the application of rule of law arguments in relation to property regulation, see J Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012).

[58] See, for example, Imperial Tobacco, *Illegal, Unnecessary & Damaging for UK plc: Why Standardised Packaging is a Bad Policy Idea that would not Work*, 7 August 2014 [3.2]-[3.3]; Philip Morris Ltd, *Response to the Consultation on "Standardised Packaging"*, 7 August 2014, 3-4.

[59] British American Tobacco UK Ltd, *Response of British American Tobacco UK Ltd to the 2014 Consultation*, 28.

[60] This argument was supported by Lord Hoffmann in an Opinion commissioned by Philip Morris Ltd and appended to that company's submission to the 2012 consultation. See Philip Morris Ltd, *Standardised Tobacco Packaging will Harm Public Health and Cost UK Taxpayers Billions: a Response to the Department of Health Consultation on Standardised Packaging of Tobacco Products*, 9 August 2012, Appendix 5.

[61] See for example, R Taylor, "Cigarette Packaging", *Law Society Gazette*, 19th January 2015; CR Zocco, "Plain Packaging: a Growing Threat to Trademark Rights", *Les Nouvelles*: *The Journal of the Licensing Society International*, June 2013, 140; C Morcom, Trademarks, Tobacco and Human Rights, *Trademark World,* No. 210 (September 2008), 20-21; B Goebel, "Trademarks as Fundamental Rights—Europe" (2009) 99 Trademark Reporter 931, 950-953.

If the Industry is correct in this claim that the fundamental guarantee of property rights within the European legal order has been breached, the Regulations (or the relevant provisions of the Regulations) will be quashed.. Under the Human Rights Act 1998, secondary legislation must comply with the rights protected under the ECHR (including A1P1).[62] Any challenge to the Regulations on this basis will be brought by means of an application for judicial review.[63] If the Industry is dissatisfied with the outcome of such proceedings, it will potentially be able to bring an application at Strasbourg for alleged violation of A1P1.

The legal structure within which the claim for violation of Art 17 would be tested is more complex. Following the coming into force of the Lisbon Treaty, the Charter has the same status as the founding EU Treaties.[64] All secondary legislation passed by EU institutions must be compatible with the rights protected under the Charter[65] and member states must ensure that they comply with those rights when they act within the scope of EU law.[66] There has been uncertainty as to the circumstances in which a state will act within the scope of EU law, particularly in the wake of the Lisbon Treaty. However, this issue has been now been resolved by the CJEU in a manner that defines member states' obligations in broad terms.[67] Under the approach adopted by the Court, it is

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[62] Human Rights Act 1998, s.6(1), 1(1)(b). Legislation made by the Scottish Parliament or the Northern Irish or Welsh Assemblies can also be challenged for incompatibility with A1P1. See Scotland Act 1998, s 29(2)(d); Northern Ireland Act 1998, s 6(2)(c); Government of Wales Act 2006, s 81. For previous challenges to tobacco control legislation on this basis under the Scotland Act, see *Sinclair Collis Ltd v Lord Advocate* [2012] CSIH 80, [2013] SC 221 (Court of Session, Inner House).

[63] Such a challenge would already appear to be underway. See C Cooper, "Tobacco Companies File Lawsuits against UK Government over Plain Packaging Laws", *The Independent*, 22nd May 2015. In considering the claim for judicial review, a court will be required to take into account the jurisprudence of the European Court of Human Rights (HRA 1998, s 2(1)(a)). For consideration of the obligation of UK courts to take into account the case-law of the Strasbourg Court, see 3 below.

[64] Treaty of the European Union, Art 6(1).

[65] Legislation which cannot be interpreted compatibly is invalid. See (C-236/09) *Association belge des Consommateurs Test-Achats ASBL* [2011] ECR I-773; (C-92/09 & 93/09) *Volker und Markus Schecke GbR,* 9 November 2010; (C-293/12) *Digital Rights Ireland Ltd v Minister for Communications, Marine & Natural Resources,* 8 April 2014.

[66] EU Charter, Art 51(1).

[67] While Art 51(1) states that the provisions of the Charter are addressed to member states only when they are "implementing Union law", this restriction has been held not to depart from the position adopted by the CJEU before the coming into force of the Lisbon Treaty (ie, that members states are obliged to ensure compliance with EU fundamental rights both when implementing EU obligations and when acting within a derogation from such obligations. See (C-617/10) *Åklagaren v Hans Åkerberg Fransson* [2013] 2 CMLR 46 (CJEU, Gd

highly likely that the United Kingdom's decision to introduce standardised packaging legislation will be regarded as falling within the scope of EU law. While the Regulations do not implement EU secondary legislation, they fall within a discretion explicitly provided for under the revised Tobacco Products Directive.[68] Furthermore, when the Regulations come into force, they will undoubtedly affect the free movement of goods within the European Union because tobacco products packaged in accordance with the laws of other member states will not be marketable in the United Kingdom. Accordingly, the Regulations will be covered by Art 34, TFEU, which prohibits all quantitative restrictions on imports and all measures having equivalent effect, and will have to be justified under Art 36, TFEU.[69] In derogating from the principle of free movement of goods (on the ground of the protection of health and life), the United Kingdom will be regarded as acting within the scope of EU law. Consequently, it must ensure that EU fundamental rights, including the right to property, are protected.[70] Within this framework, the Industry's claim that the United Kingdom had breached Art 17 must be brought in the domestic courts through an application for judicial review.[71] If the claim is upheld, the Regulations will be struck down.[72]

3 The fundamental right of (intellectual) property in the European legal order

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Chamber); (C-390/12) *Proceedings brought by Pfleger* [2014] 3 CMLR 47; cf (C-106/13) *Fierro & Marmorale v Ronchi*, 30 May 2013; (C-14/13) *Cholakova*, 6 June 2013. For discussion, see D Sarmiento, "Who's Afraid of the Charter?" (2013) 50 Common Market Law Rev 1267; B van Bockel & P Wattel, "New Wine into Old Wineskins; the Scope of the Charter of Fundamental Rights of the EU after *Åklagaren v Fransson*" (2013) 38 European Law Rev 866; J Snell, "Fundamental Rights Review of National Measures: nothing New under the Charter?" [2015] European Public Law 285.

[68] See Directive 2014/40/EU of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, Recital 53. See (C-411/10) *NS v Secretary of State for the Home Department* [2012] 2 CMLR 9 [64]-[69]. See also F De Cecco, "Room to Move? Minimum Harmonization and Fundamental Rights" (2006) 43 Common Market Law Rev 9.

[69] For a discussion of the application of Arts 34 and 36 in cases concerning the advertisement and sale of tobacco products, see A Alemanno, "Out of Sight, Out of Mind – Towards a New EU Tobacco Products Directive" (2012) Columbia Journal of European Law 197.

[70] See (C-390/12) *Proceedings brought by Pfleger* [2014] 3 CMLR 47.

[71] It would appear that this step has already been taken. See C Cooper, "Tobacco Companies File Lawsuits against UK Government over Plain Packaging Laws", *The Independent*, 22nd May 2015.

[72] See (C-617/10) *Åklagaren v Hans Åkerberg Fransson* [2013] 2 CMLR 46 (CJEU, Gd Chamber).

In order to establish whether the Regulations violate the right of property under A1P1 or Art 17, it is necessary to understand the scope of that right in greater detail.[73] A1P1 provides that:

> "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."[74]

The ECtHR has developed a substantial jurisprudence on this provision.[75] It has defined the protected form ("possessions") as extending not only to assets recognised as property at national level, but also as covering certain

[73] In some member states, the question would also arise as to whether or not standardised packaging legislation is compatible with the right to property in a national constitution. This issue has been raised in Ireland. See Law Society of Ireland, Opening Remarks of the President of the Law Society of Ireland, Mr John P Shaw, to the Joint Oireachtas Committee on Health & Children, 13th February 2014, 3-4. In areas which are completely regulated by EU law, member states are not entitled to grant more extensive protection to fundamental rights than is provided under EU law (see (C-399/11 *Melloni v Ministerio Fiscal* [2013] 2 CMLR 43 [55]-[64]; *Opinion 2/13 of the Court (re Accession to the European Convention on Human Rights* [2015] 2 CMLR 21 [187]-[188]*)*. However, it seems unlikely that standardised packaging legislation would be regarded as falling within an area of law completely regulated at EU level. For an argument that plain packaging legislation violates the right of property in South African law, see OH Dean, "Trademarks & Human Rights – the Issue of Plain Packaging" in P Torremans (ed) *Intellectual Property Law & Human Rights*, 3rd ed (Kluwer Law International, 2015) 571. In terms that might politely be described as trenchant, Dean argues that the introduction of plain packaging legislation in South Africa would constitute an "arbitrary deprivation" of the Industry's property and thus violate section 25(1) of the South African constitution ("…[T]he rationale seems to be that by prohibiting the use of the word DUNHILL in a fancy form, and making it necessary for it only to be used in plain print on a cigarette pack, smoking cigarettes will be made a less attractive proposition. Such a proposition is patently nonsensical." (597).

[74] For detailed analysis of the scope and interpretation of A1P1, see AR Çoban, *Protection of Property Rights Within the European Convention on Human Rights* (Ashgate, 2004); D Harris et al, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 3rd ed (OUP, 2014) 862-905.

[75] The ECtHR is not formally bound to follow its previous judgments. However, in the interests of legal certainty, it will not easily depart from them. See *Hermann v Germany* (2013) 56 EHRR 7 [78].

expectations of benefit[76] and other interests that are "sufficiently established or weighty" in national law.[77] It has confirmed that intellectual property rights, including many of the rights relied on by the Industry, constitute "possessions" in this context.[78] The only relevant form of property over which any doubt hangs is the "goodwill" in trading signs protected in the law of passing off. While existing business is undoubtedly a recognized "possession" under the Strasbourg case-law, the Court has been hesitant to accept that "future trade" can be protected under the right of property.[79]

A1P1 has been interpreted as encompassing three linked rights (i) a right against deprivation of possessions, (ii) a right against the control of the use of property and (iii) a more general right to peaceful enjoyment of possessions.[80] Where a complainant suffers *deprivation* of possessions, compensation will generally be required.[81] In certain circumstances, A1P1 has even been held to impose a *positive* obligation on contracting parties to ensure the enjoyment of the protected right (or to remedy its violation).[82] However, it is also clear that A1P1 grants a right to the peaceful enjoyment of *existing* possessions within a national legal system, rather than a "right to property" (ie. a right to be put into the position of property owner).[83]

It is important to remember that any claim that the Regulations violate A1P1 must be brought initially in the domestic courts under the Human Rights Act. Under s 2 of that Act, any Court considering such a challenge would be obliged to

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[76] See, for example, *Gratzinger v Czech Republic* 39794/ 98 (2002) 35 EHRR CD202 [68]-[77]; *Klein v Austria* 57028/00 [2014] 59 EHRR 14 [42]-[47].
[77] *Depalle v France* [2012] 54 EHRR 17 [62]-[68]; *Brosset-Triboulet v France* 34078/02 [65]-[71]; *Fabris v France* (2013) 57 EHRR 19 [48]-[50]; *Öneryildiz v Turkey* (2004) 41 EHRR 325 [124]-[129]; *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 830 [62]-[72].
[78] See, for example, *Anheuser-Busch Inc v Portugal* 73049/01, (2007) 45 EHRR 830 (trade marks); *Ashby Donald v France* (36769/08) (copyright); *Neij v Sweden* 40397/12, [2013] ECDR 7 (copyright); *Smith Kline & French Laboratories Ltd v the Netherlands* 12633/87, (1990) 66 DR 70 (patents).
[79] See *Ian Edgar (Liverpool) Ltd v UK* 37683/97, 25th January 2000; *Malik v UK* 23780/08, 13 March 2012 [90]-[93]; cf *Van Marle v The Nether*lands 8543/79, 8674/79, 8675/79, 8685/79 [39]-[42]. For a detailed discussion of the relevant authorities, see *R (on the Application of the Countryside Alliance) v AG* (2007) UKHL 52; *Breyer Group plc v Department of Energy and Climate Change* [2015] EWCA Civ 408 [28]-[49].
[80] See, for example, *James v UK* (1986) 8 EHRR 123 [37]; *Anheuser-Busch Inc v Portugal* 73049/01, (2007) 45 EHRR 830 [62].
[81] See, for example, *Lithgow v UK* (1986) 8 EHRR 329 [120]; *Holy Monasteries v Greece* (1995) 20 EHRR 1 [71].
[82] See, for example, *Öneryildiz v Turkey* 48939/99, [2004] EHRR 325; *Immobiliare Saffi v Italy* [2000] EHRR 756; *Budayeva v Russia* 15339/02, [2014] EHRR 2.
[83] See, for example, *Marckx v Belgium* 6833/74; (1979) 2 EHRR 33; *Fabris v France* (2013) 16574/08, 57 EHRR 19 [50].

"take into account" the jurisprudence of the ECtHR. On this wording, it would appear possible for the domestic court either (i) to refuse to hold that a particular act has violated the rights protected under the ECHR, even though the Strasbourg jurisprudence indicates a violation or (ii) to go beyond the Strasbourg jurisprudence in finding a violation in circumstances in which the that jurisprudence indicates that the Convention is satisfied. The latter possibility has potential relevance here. As will be indicated in greater detail below, there is little likelihood that the ECtHR would hold the Regulations to infringe the right protected under A1P1. Nevertheless, the text of s 2 of the Human Rights Act appears to allow the Industry to argue that the right of property should be interpreted more expansively than has hitherto been the case at Strasbourg. However, the case-law on s 2 indicates that such a claim is unlikely to succeed. In *Ullah,* in a much-cited passage, Lord Bingham stated that:

> "It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."[84]

More recently, the Supreme Court has demonstrated a willingness to relax this "mirror principle" in situations in which contracting states are granted a broad "margin of appreciation".[85] States undoubtedly enjoy such a broad margin of appreciation in deciding whether an interference with property rights is necessary or not.[86] Nevertheless, the general desirability of "keeping pace" with the ECtHR and the nature of the jurisprudence on A1P1[87] mean that the domestic courts are unlikely to forge ahead in recognising more potent property rights in this instance.

In the EU, protection of the right to property has long been recognised as a general principle of law,[88] by reference to national constitutional rights and to

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[84] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 350. For criticism of this approach, see Sir J Laws, *The Common Law Constitution, Hamlyn Lectures 2013* (CUP, 2014) 71-86; Lord Irvine, "A British Interpretation of Convention Rights" [2012] Public Law 237; cf P Sales "Strasbourg Jurisprudence and the Human Rights Act: a Response to Lord Irvine" [2012] PL 253.

[85] See *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38 [67]-[76] (Lord Neuberger), [163] (per Lord Mance), [299] (Lady Hale]; [342] (Lord Kerr). See also *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173. See, also, *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173. For discussion, see N Ferreira, "The Supreme Court in a final push to go beyond Strasbourg" [2015] Public Law 367.

[86] See 6.2 below.

[87] Ibid.

[88] See, for example, (4/73) *Nold KG v Commission* [1974] ECR 491 [12]-[16]; (41/79, 121/79 & 796/79) *Testa v Bundesanstalt für Arbeit* [1980] ECR 1979

A1P1.[89] This right was codified under Art 17(1), EU Charter, which provides that:

> "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."

The Court's early case law on the right of property was relatively schematic.[90] However, more recently, under the influence of the Strasbourg jurisprudence and the explicit wording of the Charter, a more fully developed set of principles has been established.[91] The "possessions" protected by the right have been interpreted as "rights with an asset value creating an established legal position".[92] Even before the coming into force of the Lisbon Treaty, the CJEU

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[17]-[22]; (44/79) *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; (265/87) *Hermann Schräder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 2237; (5/88) *Wachauf v Federal Republic of Germany* [1989] ECR 2609 [17]-[18]; (C-280/93) *Germany v Council* [1994] ECR I-4973 [77]-[80]; (C-293/97) *R v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley* [1999] ECR I-2603 [54]-[58]; (C-84/95) *Bosphorus Hava Yollari ve Ticaret AS v Minister for Transport, Energy & Communications* 1996 ECR I-3953 [19]-[26]; (C-20 & 64/00) *Booker Aquaculture Ltd v The Scottish Ministers,* Opinion of AG Mischo [60]-[63]; (C-402/05P, 415-05P) *Kadi* ECR-I 6351 [354]-[372]. For discussion of general principles of law within the EU legal order, see T Tridimas, *The General Principles of EU Law*, 2nd ed (OUP, 2006)(3rd ed forthcoming, 2015).

[89] See, for example, (44/79) *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, 3738-9; (265/87) *Hermann Schräder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 2237 [14]; Case 5/88 *Wachauf v Federal Republic of Germany* [1989] ECR 2609 [17]; (C-293/97) *R v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte HA Standley* [1999] ECR I-2603 [54]-[58].

[90] See, for example, (4/73) *Nold* [1974] ECR 491 [12]-[16]; (41/79, 121/79 & 796/79) *Testa v Bundesanstalt für Arbeit* [1980] ECR 1979 [17]-[22]; (265/87) *Hermann Schräder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 2237 [13]-[19]; Case 5/88 *Wachauf v Federal Republic of Germany* [1989] ECR 2609 [17]-[18].

[91] See, for example, (C-402/05P, 415-05P) *Kadi* ECR-I 6351 [354]-[372]; (C-283/11) *Sky Österreich GmbH v Österreicher Rundfunk* [2013] 2 CMLR 25 [31]-[40]. It can, however, be suggested, that the CJEU's approach to fundamental rights still lacks rigour in some instances. See A Peukert, "The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature" in C Geiger (ed), *Research Handbook on Human Rights* (E Elgar, 2015); J Griffiths, "Constitutionalising or Harmonising? The Court of Justice, the Right to Property & EU Copyright Law (2013) European Law Review 65.

[92] (C-283/11) *Sky Österreich GmbH v Österreicher Rundfunk* [2013] 2 CMLR 25 [34].

recognised that the right of property covered intellectual property rights.[93] This is now acknowledged explicitly in Art 17(2) of the Charter, which states that:

> "Intellectual property shall be protected"[94]

This provision has been interpreted by the CJEU as confirmation that intellectual property rights are covered by the general guarantee of property set out under Art 17(1) rather than as a grant of a broader form of absolute protection specifically for intellectual property.[95]

There are distinctions between the texts of A1P1 and Art 17. The drafting of Art 17 takes the Strasbourg Court's interpretation of A1P1 into account. Thus, for example, the presumed right to compensation for deprivation of property developed in jurisprudence under the ECHR[96] is recognised explicitly in Art 17. There are also terminological variations between the two provisions. Interferences with property falling short of full deprivation are described as "controls" in A1P1 and as "regulations" in Art 17. Furthermore, in addition to the references to public, or general, interest justifications for limitations on the right of property shared with A1P1, Art 17 is also subject to Art 52(1), the Charter's general provision on limitations to protected rights.[97]

However, such differences of detail between A1P1 and Art 17 are not nearly as significant as their shared features. This is not surprising, given the textual and structural links between the two provisions. While it now seems unlikely that the

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[93] See, for example, (C-479/04) *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089 [62]; (C-275/06) *Promusicae v Telefonica de España* [2008] ECR-I 211 [62]. Like the Strasbourg Court, the CJEU has been reluctant to grant protection to future trade. See (C-155/04) *Alliance for Natural Health* [2005] ECR I-6451 [122]-[130]; (C-210/03) *Swedish Match AB v Secretary of State for Health* [2004] ECR I-11893 [73] (no property in a market share).

[94] "Protection of intellectual property, one aspect of the right of property, is explicitly mentioned in paragraph 2 because of its growing importance and Community secondary legislation. 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." (Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02)). For discussion of Art 17(2), see P Torremans, "Article 17(2)" in S Peers et al (eds) *The EU Charter of Fundamental Rights: a Commentary* 489-517*;* C Geiger, "Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Uncertain Scope" [2009] EIPR 13; J Griffiths & L McDonagh, "Fundamental Rights and European IP Law: the Case of Art 17(2) of the EU Charter" in C Geiger (ed) *Constructing European Intellectual Property: Achievements and Perspectives* (Edward Elgar, 2013).

[95] See, for example, (C-70/10) *Scarlet Extended v SABAM* ECR I-11959 [43]; (C-314/12) *UPC Telekabel v Constantin Film Verleih GmbH* [2014] ECDR 12 [61].

[96] See 6.1 below.

[97] For further discussion, see 6.2 below.

EU will adhere to the ECHR in the near future,[98] there are a number of mechanisms within EU law designed, so far as possible, to ensure the coherent development of European fundamental rights law. Thus, for example, Art 52(3) of the Charter provides that:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"[99]

The Explanatory Note to this provision confirms that Art 17 "corresponds to" A1P1 and states that:

> "The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the ECtHR and by the CJEU."[100]

Thus, the Strasbourg Court's interpretation of the right of property is highly relevant to the scope and requirements of Art 17. The Explanatory Note to Art 17 emphasises that, while the wording of A1P1 has been "updated:"

> "…the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there."[101]

The CJEU regularly makes explicit reference to the case law of the Strasbourg Court in interpreting Art 17[102] and, while the Charter clearly allows the Court to develop a broader conception of the right of property under Art 17, it has not

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[98] Following the coming into force of the Lisbon Treaty, Art 6(2) TEU provides that the EU is to accede to the ECHR. However, on 18th December 2014, the CJEU held that the draft accession agreement was incompatible with EU law (*Opinion 2/13*). For a discussion of the issues relating to the EU's accession to the ECHR (prior to *Opinion 2/13*), see P Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing, 2013).

[99] For full discussion of Art 52(3), see S Peers and S Prechal, "Article 52" in S Peers et al (eds) *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014) 1455-1521.

[100] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

[101] Ibid. The Explanatory Note to Art 52 provides that: "The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States."

[102] See, for example, (C-402/05P, 415-05P) *Kadi* ECR-I 6351 [354]-[372]; (C-347/03) *Regione autonoma Friuli-Venezia Giulia* [2005] ECR-I 3785 [118]-[134].

done so to date.[103]

Against this background, it is possible to identify an analytical structure that applies to both A1P1 and Art 17. Within this structure, claims must be approached through a series of questions: First, it is necessary to establish whether the rights relied upon by a claimant are "possessions" covered by A1P1/Art 17 and, secondly, to ask whether there has been an "interference" with the peaceful enjoyment of those possessions. If so, an attempt should be made to identify the form of the interference (a "deprivation", generally giving rise to a presumption of compensation, a less invasive "regulation" or "control"[104] of possessions, or some other more general form of interference) Finally, a decision-maker must consider whether the interference with the peaceful enjoyment of possessions is justifiable. This final enquiry, comprises a series of sub-questions. Does the interference at issue satisfy the condition of legality? Does it have a legitimate purpose in the general/public interest?[105] Finally, is the interference *proportionate*?[106] In the remainder of this article, the Industry's claim that the Regulations violate the guarantee of property within the European legal order is approached through this sequence of questions.

4 Do the Regulations i*nterfere* with the tobacco industry's intellectual property rights?

In this instance, it is not difficult to answer the first question. As noted above, the Industry's intellectual property rights will certainly be recognised as "possessions" for the purpose of A1P1 and Art 17.[107] The second question is more challenging. The Regulations undoubtedly interfere with the Industry's

[103] EU Charter, Art 52(3). Although there are distinctions between the ways in which the two courts approach the justification of interferences with the right of property. For discussion, see 6 below.

[104] The term "control" is employed to describe an interference with the use of possessions falling short of a deprivation under the ECHR. Under the Charter, this concept is described as a "regulation". In this article, "regulation" is used throughout.

[105] Although "general interest" and "public interest" are separately referred to in both A1P1 and Art 17, there is no distinction of substance between the two concepts in this context; AR Çoban, *Protection of Property Rights within the European Convention on Human Rights* (Ashgate, 2004); D Harris et al, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 3rd ed (OUP, 2014) 876. In this article, the term "public interest" is employed to cover both concepts throughout.

[106] The ECtHR's requirement that a "fair balance" be achieved between recognition of a right and competing interests has not generally equated to a strict, formal test of proportionality. See J Christoffersen, "Human Rights and Balancing: the Principle of Proportionality" in C Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 19.

[107] See 3, above.

ability to apply its brand signs to tobacco products.[108] However, it is much less clear that they interfere with the property rights themselves. There are at least two reasons for this.

4.1 Intellectual property rights as negative rights

Entitlements in Intellectual property law are generally considered to be negative rights. That is, they are rights to prevent others from carrying out specified acts rather than positive rights of use. From this perspective, the Regulations do not interfere with the rights at issue because they do not prevent right-holders from bringing infringement proceedings against third parties. Nevertheless, the Industry argues that intellectual property rights (and, in particular, trade mark rights) are not purely negative, but necessarily and implicitly encompass a positive right of use.[109] The question of whether or not intellectual property rights have a positive aspect was relevant to the constitutional claim brought by Japan Tobacco International in the Australian courts[110] and is also a critical issue in the proceedings brought against Australia under the TRIPS Agreement. In the latter context, a great deal of acrimonious ink has been spilt on the negative/positive question.[111] Those favouring a positive right of use have argued, as matter of principle, that there would be little point in granting rights in a registered trade mark if the proprietor were not also provided with a right to use the mark.[112] In support of this position, the Industry has also relied on provisions of the Paris Convention and the TRIPS Agreement, which are said to provide implicit authority for the existence of such a right.[113] Counter-arguments

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[108] Here, "brand signs" is a term employed to describe the full range of the Industry's indicia affected by the Regulations, whether protected by trade marks (registered or unregistered), designs or copyright works.

[109] For discussion of this issue in relation to earlier measures to control the advertising of tobacco products, see A Kur, "The Right to Use One's Own Trademark: a Self-Evident Issue or a New Concept in German, European and International Trade Mark Law" [1996] EIPR 198.

[110] *JT International SA v Commonwealth* [2012] HCA 43; (2012) 291 ALR 669. For discussion, see S Ricketson, "Plain Packaging Legislation for Tobacco Products and Trade Marks in the High Court of Australia" (2013) 3 Queen Mary Journal of Intellectual Property 224. Under Australian law, by contrast with the position in the United Kingdom, the statute governing the law of registered trade marks explicitly recognises a right of use. See Trade Marks Act 1995, s 20(1)(a).

[111] For a detailed (and critical) analysis of the arguments on this issue, see E Bonadio, "Bans and Restrictions on the Use of Trade Marks and Consumers' Health" [2014] IPQ 326.

[112] See, for example, the Opinion of Lord Hoffmann, commissioned by Philip Morris Ltd; Philip Morris Ltd, *Standardised Tobacco Packaging will Harm Public Health and Cost UK Taxpayers Billions: a Response to the Department of Health Consultation on Standardised Packaging of Tobacco Products*, 9 August 2012, Appendix 5, [6].

[113] See, for example, P Johnson, "Trade Marks without a Brand; the Proposals on 'Plain Packaging' of Tobacco Products" [2012] EIPR 461; D Gervais, "Analysis of

have been marshalled.[114] Perhaps most convincingly, it has been suggested that the recognition of a right to use would involve a very substantial transformation of trade mark law. As a result, it could be expected that the grant of such a right would have been accomplished more explicitly than has been suggested by those advocating the existence of such a right.

However, our focus here is on European fundamental rights law. Would intellectual property rights (and particularly trade mark rights) be regarded as giving rise to a positive right of use within this body of law? The Strasbourg Court has occasionally held that the right to peaceful enjoyment of possessions encompasses a positive right of use (or access). However, it has done so in circumstances differing very significantly from the situation with which we are concerned here. The successful applicants in cases in which the ECtHR has upheld a right of use have typically sought access to domestic premises.[115] It seems unlikely that a Court considering a claim against the Regulations would be willing to draw a direct analogy between such situations and the Industry's claim to a right to use its brand signs. In any event, it is important to recall that the fundamental property guarantee in the European legal order is a secondary form of right. A1P1/Art 17 protects the peaceful enjoyment of assets established within national legal systems.[116] Initial responsibility for "the ascription and identification of property rights is for the [national] legal system".[117] Thus, in

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the Compatibility of certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention, Report Prepared for Japan Tobacco International, 30 November 2010.

[114] See M Davison, "Plain Packaging and the TRIPS Agreement: A Response to Professor Gervais" [2013] Australian Intellectual Property Journal 160; M Davison, "Plain Packaging of Tobacco and the "Right" to use a Trade Mark" (2012) EIPR 498; E Bonadio, "Bans and Restrictions on the Use of Trade Marks and Consumers' Health" [2014] IPQ 326.

[115] See, for example, *Loizidou v Turkey* (1997) 23 EHRR 513 [60]-[64]; *Doğan v Turkey* (2005) 41 EHRR 15 [138]-[156].

[116] See, for example, *Depalle v France* 34044/02 [2012] 54 EHRR 17 [68]; *Brosset-Triboulet v France* 34078/02 [71].

[117] D Harris et al, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 3rd ed (OUP, 2014) 865. Under the Charter, see (C-283/11) *Sky Österreich GmbH v Österreicher Rundfunk* [2013] 2 CMLR 25 [34]. In relation to copyright in Germany, Dreier & Ganzhorn have written that: "…[A]s regards the exceptions and limitations to copyright, according to the German Federal Constitutional Court the legislator is basically free to define what exactly makes out property. True, the legislature cannot take property away as a whole and cannot take away the core of the right. But at the outer edges of the right, the legislator is relatively free to make a political choice as to which acts should be covered by the exclusivity of copyright and which not." (T Dreier & M Ganzhorn, "Intellectual Property in Decisions of National Constitutional Courts in Europe" in C Geiger (ed) *Research Handbook on Human Rights & Intellectual Property* (Edward Elgar, 2015) 219, 230). See, also A Peukert, "The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature" in C Geiger (ed), ibid, 132.

considering whether intellectual property rights are positive, as well as negative, rights, the European Court of Human Rights defers to national law. In the absence of arbitrariness, a domestic court's view will be determinative.[118] In the EU, the position is different. The CJEU has ultimate authority both for the interpretation of European trade mark law and for the interpretation of the scope of Art 17. However, even in this context, the question of whether or not an intellectual property right encompasses a positive right of use is not a question that falls within the scope of fundamental rights law.[119] In the case of trade marks, for example, the answer should depend on the Court's interpretation of the Trade Marks Directive and Regulation (viewed in the light of the EU's obligations under international treaties such as TRIPS). Art 17 ought to function purely as a secondary control on interferences with the peaceful enjoyment of property rights so defined. On this basis, it is therefore far from certain that the Regulations will be regarded as *interfering* with the Industry's intellectual property rights because, as noted above, the arguments in favour of a positive right of use in trade mark law are heavily contested.

4.2 Regulations as a definition of scope of property rather than an interference with property?

However, even if a positive right of use is held to exist within trade mark law (and/or copyright and design law), the Regulations may still not be viewed as *interfering* with that right. As has been indicated above, initial responsibility for the determination of the scope of a property right lies with the national legal system. As a result, the Strasbourg Court has sometimes held that a court within a contracting party has not violated A1P1 where it has simply defined or clarified the scope of an intellectual property right in national law.[120] Clearly, there is an important distinction between such cases and the situation under discussion here. The alleged interference with intellectual property rights arising as a result of the Regulations is legislative rather than judicial and therefore cannot so

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[118] For an example of a case in which a national court's interpretation of copyright law was considered to be arbitrary, see *Balan v Moldova* [2009] ECDR 6.

[119] See (C-283/11) *Sky Österreich GmbH v Österreicher Rundfunk* [2013] 2 CMLR 25 [31]-[40]; (C-277/10) *Luksan v Van der Let* [2013] ECDR 5.

[120] See, for example, *Anheuser-Busch Inc v Portugal* 73049/01, (2007) 45 EHRR 830 [81]-[87] ; *Dima v Romania* (58472/00) admissibility decision of 28 May 2005; cf *Balan v Moldova* (19247/03) Judgment of 29 January 2008. For discussion, see J Griffiths & L McDonagh, "Fundamental Rights & European IP Law: the Case of Art 17(2) of the EU Charter" in C Geiger (ed) *Constructing European Intellectual Property: Achievements and Perspectives* (Edward Elgar, 2013) 75. This situation is less likely to arise in the EU context as references for a preliminary reference under Art 267 will not generally require the CJEU to adjudicate on a prior judgment of a national court. However, see F Wollenschläger, "Article 17 – Right to Property" in S Peers et al (eds) *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014) 465, 477-8.

readily be viewed as a definition or clarification of the scope of the rights at issue. Nevertheless, there may be relevant parallels between such cases and the Industry's claim against the Regulations under A1P1 and Art 17.[121]

In *R v Secretary for State for Health ex p BAT,* the Industry challenged the first Tobacco Products Directive.[122] The United Kingdom High Court referred a series of questions to the CJEU for preliminary ruling,[123] including one that concerned a prohibition on the use of certain signs and words (including "Mild") in the marketing of tobacco.[124] In the national court, tobacco companies claimed that this provision interfered with their fundamental right to intellectual property. Unsurprisingly, on the preliminary reference, the Court held that any interference arising under the contested provision was proportionate to the aim of securing a high level of protection for human health. This ruling was in line with the Opinion of Advocate General Geelhoed.[125] However, the Advocate General had also suggested that the companies' challenge to the Directive should have been rejected on more fundamental grounds, arguing that the prohibition on the use of marks such as "Mild Seven" should not even be viewed as an interference with intellectual property rights:

> "A trademark coming under the public-law ban on designations in Article 7 of the Directive for the protection of public health is, in my view, invalid as being contrary to public policy.[126]

That is to say, there could be no interference with a property right where, even without the contested regulation, it would not be possible to exercise the right.

The Advocate General's reasoning cannot be applied directly to the situation under discussion here. In *BAT*, the marks at issue were deceptive. By contrast, the marks (and other signs) affected by the Regulations are not all deceptive and are thus less readily characterised as "contrary to public policy,"[127] particularly

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[121] See also (C-283/11) *Sky Österreich GmbH v Österreicher Rundfunk* [2013] 2 CMLR 25 [31]-[40] (no interference with right to peaceful enjoyment of possessions because protected asset circumscribed by statutory public interest limitation at point of acquisition).

[122] Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products.

[123] (C-491/01) *R v Secretary for State for Health ex p BAT* [2002] ECR I-11453.

[124] "…[T]exts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products (Art 7).

[125] See (C-491/01) *R v Secretary for State for Health ex p BAT* [2002] ECR I-11453, CJEU [147]-[153], Opinion of AG Geelhoed [273].

[126] Ibid, Opinion of AG Geelhoed [272].

[127] Under the Trade Marks Act 1994, s 3(3)(a), trade marks shall not be registered if they are contrary to public policy or to accepted principles of morality. There is a parallel provision in the Community Trade Mark Regulation

as the Regulations include a provision stating that nothing in, or done in accordance with, the Regulations "causes any trade mark to be contrary to public policy or to accepted principles of morality" for the purposes of trade mark registration.[128] In this narrow sense, then, the Advocate General's reasoning in *BAT* does not apply to the Regulations.

In a broader sense, however, his understanding of intellectual property rights as inherently limited by public policy remains relevant. Generally, the subsistence of intellectual property rights does not preclude (or in any way affect) public law prohibitions on the use of marks, signs, works or inventions protected by those rights. Thus, for example, while the dissemination and display of indecent works is regulated under criminal and administrative law, such works are generally protected under United Kingdom copyright law.[129] Nevertheless, this protection does not deter legislators from imposing new controls on such material. Pornographers have not yet sought to rely on A1P1 or Art 17 in resisting increased regulation of their trade. Similarly, the marketing of pharmaceuticals is heavily regulated. Public bodies are empowered to prohibit the distribution of pharmaceutical products completely or to prevent them from being sale under a particular name. In fulfilling these functions, they do not take account of the fact that a particular drug is protected by a patent or the fact that its name has been registered as a trade mark - even where a decision deprives the rights in question of all value and provides no compensation.

A1, P1 and Art 17 are not considered to be relevant in such situations. In part, this may be because intellectual property rights are generally assumed to be negative rights, as discussed above. However, it may also be because intellectual property rights are viewed as limited *ab initio* by a state's power to regulate the use of a protected form. If this is so, there are clear parallels with the situation under consideration here. The Regulations function as a public law control on the use of branding. As such, it may be suggested, they do not fall primarily within the domain of intellectual property law in much the same way that the regulation of indecency does not fall within copyright law and the regulation of pharmaceutical marketing does not fall within the domain of the law of registered trade marks or patents. The exercise of such powers is to be expected, regardless of the existence of intellectual property rights in the regulated forms. On this basis, even if registered trade marks are held to entail a positive right of use, all rights in such marks can be regarded as implicitly curtailed by public law powers to regulate the use of signs in the public interest.

(Council Regulation 207/2009 of 26 February on the Community trade mark (codified version), reg Art 7(1)(f). For discussion of the interpretation of these provisions, see L Bently & B Sherman, *Intellectual Property Law*, 4th ed (OUP, 2014) 961-3.

[128] Reg 13(2)(a). The Regulations also provide similarly in the case of registered designs (reg 14(2)).

[129] See N Caddick, G Davies & G Harbottle, *Copinger & Skone James on Copyright*, 16th ed (Sweet & Maxwell, 2013) 3-305.

5. What form of interference (if any?)

Nevertheless, as is demonstrated further below, neither the ECtHR nor the CJEU has been keen to engage with the niceties of property theory; preferring, wherever possible, to resolve claims about the application of the right of property through the application of the proportionality test. In *BAT*, the CJEU ultimately relied on proportionality in upholding the legality of the prohibition on the use of certain marks on tobacco products.[130] Indeed, in reasoning thus, it could be regarded as having implicitly treated the legislative restriction on tobacco packaging as an interference that required justification. Accordingly, despite significant doubt whether the Regulations should even be regarded as an interference with Industry's intellectual property rights, it is appropriate to move on to consider the next stages of the analytical framework applied to claims for violation of the right of property within the European legal order. If the Regulations interfere with the Industry's intellectual property rights, what form does that interference take?

As has been noted above, the European property guarantee encompasses three linked sub-rights – prohibitions against deprivation of possessions, against the regulation of the use of possessions and a more general prohibition on interference with the peaceful enjoyment of possessions.[131] In the case of deprivation of property, compensation is generally required.[132] This is not necessarily so where an interference falls within either of the other sub-rules, although compensation may play an important role in ensuring that a restriction satisfies the test of proportionality. On the face of it, the Regulations do not appear to deprive the Industry of its intellectual property rights. Restrictions are imposed on the use of brand signs, but affected right-holders retain their property interests. Nevertheless, it has been argued that the Regulations constitute an effective deprivation of those rights. In a commissioned Opinion

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[130] See (C-491/01) *R v Secretary for State for Health ex p BAT* [2002] ECR I-11453, CJEU [147]-[153].

[131] See *Sporrong & Lönnroth v Sweden* (1982) 5 EHRR 35 [61], *James v United Kingdom* (1986) 8 EHRR 123 [37]; *Lithgow v United Kingdom* (1986) 8 EHRR 329 [102]. For examples of cases which have been treated as falling under the third general head, see *Loizidou v Turkey* (1997) 23 EHRR 513 [63]; *Doğan v Turkey* (2005) 41 EHRR 15 [138].

[132] See *James v United Kingdom* (1986) 8 EHRR 123 [54]; *Kozacioğlu v Turkey* (2011) 53 EHRR 34 [64]; *Vistins v Latvia* (2014) 58 EHRR 4 [110]. In exceptional circumstances, a failure to pay compensation for the deprivation of property may not violate A1P1. See, for example, *Jahn v Germany* (2005) 42 EHRR 1084. In the EU Charter, the obligation to pay compensation in cases of deprivation is explicitly noted in Art 17(1). In German constitutional law, the legislature may curtail an intellectual property right entirely in the interests of a compelling public interest. See T Dreier & M Ganzhorn, "Intellectual Property in Decisions of National Constitutional Courts in Europe" in C Geiger (ed) *Research Handbook on Human Rights & Intellectual Property* (Edward Elgar, 2015) 219, 230.

appended to Philip Morris's submission to the 2012 consultation,[133] Lord Hoffmann suggested that standardised packaging legislation curtails the use of the Industry's rights so extensively that it undermines their very substance and must, therefore, be regarded as a deprivation of property. Furthermore, he pointed out that each of the Industry's intellectual property rights is to be viewed as a separate property entitlement. As such, even though use of certain word marks remains possible under the Regulations, the Industry is deprived entirely of its ability to apply other protected signs (including graphic marks and packaging designs) to its products.

At first sight, the decision of the Australian High Court in *JT International SA v Commonwealth* appears to offer some support for this position.[134] In that case, the Court held that there was no violation of the constitutional right of property because the Commonwealth did not "acquire" the tobacco companies' intellectual property rights. Nevertheless, some of the judgments in that case appear to accept that the intellectual property rights of the claimant companies had been "taken".[135] However, it is important to recall that the Australian legal context is different from that with which we are concerned here. In particular, the Australian constitutional right of property is only violated where the state "acquires" property without adequate compensation[136] and, as a result, the question of whether or not the intellectual property rights had been "taken" was not determinative of the case's outcome.

More importantly, however, there are a number of features of the Strasbourg Court's jurisprudence on A1P1 that suggest very strongly that the Regulations will not be regarded as depriving the Industry of its possessions. First, although there are three sub-rules under A1P1, the Court has often gone out of its way to avoid distinguishing clearly between these rules in practice; preferring to regard the concepts of "deprivation" and "control" as particular reflections of a broader right to peaceful enjoyment of possessions:

> "The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in

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[133] See, the Opinion of Lord Hoffmann, commissioned by Philip Morris Ltd; Philip Morris Ltd, *Standardised Tobacco Packaging will Harm Public Health and Cost UK Taxpayers Billions: a Response to the Department of Health Consultation on Standardised Packaging of Tobacco Products*, 9 August 2012, Appendix 5 [9]-[20].
[134] *JT International SA v Commonwealth* [2012] HCA 43; (2012) 291 ALR 669.
[135] Ibid, [44] French CJ, [137]-[143] Hayne & Bell JJ.
[136] The constitutional right of property is considered to be implicit in the power granted to the Commonwealth Parliament under s 51(xxxi) of the Constitution: "The Parliament shall, subject to this Constitution, have powers to make laws for the peace, order and good government of the Commonwealth with respect to: ….. (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has powers to make laws".

the first rule."[137]

This tendency to soften the boundaries between the three "rules" is particularly marked in the Court's recent jurisprudence.[138] Thus, for example, in considering a claim against a contracting state for restitution of ownership of a dwelling in *Dokić v Bosnia and Herzegovina*, the Court stated that:

> "…The complexity of the legal situation in the present case prevents its being classified in a precise category: on the one hand, the impugned purchase contract is regarded as legally valid and, on the other hand, the applicant is unable to have his flat restored to him and to be registered as its owner pursuant to that contract. While this situation resembles a de facto expropriation, the Court does not consider it necessary to rule on whether the second sentence of the first paragraph of art 1 applies in this case…[T]he situation envisaged in the second sentence of the first paragraph of art 1 is only a particular instance of interference with the right to peaceful enjoyment of property as guaranteed by the general rule set forth in the first sentence. The Court therefore considers that it should examine the situation complained of in the light of that general rule.[139]

The Court has also often held very serious interferences with the peaceful enjoyment of possessions to be "controls" rather than "deprivations".[140]

A further reason for suggesting that the Regulations would not be regarded as a "deprivation" of intellectual property rights is the fact that the Strasbourg Court, in particular, has tended to view the concept of "possessions" as an undivided whole rather than as a "bundle" of separable rights.[141] As Çoban has explained:

> "The established case-law suggests that the right to property is a single right which gives different use rights. The right of disposal also should be understood as a way of use. Each use right does not constitute a distinct property right, so interference with such use does not constitute deprival of property. It can be inferred that the Strasbourg jurisprudence does not accept the idea of a bundle of rights theory of property. This conclusion is

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[137] *James v UK* (1986) 8 EHRR 123 [37]. See also, *Mellacher v Austria* (1990) 12 EHRR 391 [42]; *Anheuser-Busch Inc v Portugal* (2007) 45 EHRR 830 [62]; *Beyeler v Italy* (2001) 33 EHRR 52 [98], [106]; *Jokela v Finland* (2003) 37 EHRR 26 [49]; *Dokić v Bosnia and Herzegovina* [2013] EHRR 38 [56]-[57].

[138] See R White & C Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights*, 5th ed (OUP, 2010) 503; D Harris et al, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 3rd ed (OUP, 2014) 876. See, for example, *Klein v Austria* (2014) 59 EHRR 14 [49].

[139] *Dokić v Bosnia and Herzegovina* [2013] EHRR 38 [56].

[140] See, for example, *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 [64]-[66].

[141] This approach will be more familiar to civil, than common, lawyers. See Y-C Chang & HE Smith, "An Economic Analysis of Civil versus Common Law Property" (2012) 88 Notre Dame Law Review 1.

> important for the distinction between deprivation of property and the control on use of property. This distinction is a key element for the jurisprudence on [A1P1]."[142]

Under this holistic approach, a deprivation of possessions will only occur where *all rights* in an applicant's possessions are extinguished.[143] Thus, for example, in *OAO Neftyanaya Kompaniya Yukos v Russia*, the enforcement of tax obligations through the seizure and sale of the applicant company's subsidiary companies was treated, without discussion, as a regulation of the applicant's possessions rather than as a deprivation of the subsidiaries as separate possessions.[144] While the Luxembourg Court's jurisprudence on the right of property is not as fully developed as that of the European Court of Human Rights, there are indications that it will also be reluctant to regard anything other than a complete transfer of possessions as a deprivation.[145]

6. Justifying Interference with the Industry's Intellectual Property Rights

On this basis, the Regulations will be regarded, at worst, as a regulation, or control, of the Industry's use of its possessions. Within the analytical structure applied to A1P1 and Art 17, it is therefore necessary to ask next whether this interference can be justified. In order to withstand scrutiny under the ECHR and the Charter, the Regulations must surmount three hurdles. They must (i) be "provided for by law"; (ii) pursue a "legitimate aim" and (iii) be proportionate. While serious objection has not been brought against the Regulations on either of the first two grounds, a number of the Industry's arguments address the question of proportionality. It has, for example, been suggested that there is inadequate evidence that the legislation will achieve its stated goals, that undesirable side-effects will occur and that compensation must be paid if a "fair

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[142] AR Çoban, *Protection of Property Rights Within the European Convention on Human Rights* (Ashgate, 2004) 162. See also 176.

[143] As noted by D Harris et al:

> "If ownership is seen as a bundle of rights, the fact that an owner has been deprived of one right will not usually be sufficient to say that he has been deprived of ownership: rather it is a control of the use of property." (*Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 3rd ed (OUP, 2014) 886.

[144] *OAO Neftyanaya Kompaniya Yukos v Russia* (2012) 54 EHRR 19 [646]. See also *Mellacher v Austria* (1990) 12 EHRR 391 [42]-[44]; *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309; *Fredin v Sweden* (1991) 13 EHRR 784; *Pine Valley Developments v Ireland* (1992) 14 EHRR 316 [55]-[56]; *Chassagnou v France* (2000) 29 EHRR 615 [74]; *Hutten-Czapska v Poland* (2007) 45 EHRR 52 [160]-[161].

[145] See, for example, (C-491/01) *R v Secretary for State for Health ex p BAT* [2002] ECR I-11453 [152].

balance" between competing interests is to be achieved.[146] There are significant distinctions between the methodologies applied by the Strasbourg and Luxembourg courts on this issue.[147] Accordingly, the two systems are considered in separate sections below.

6.1 European Convention on Human Rights

Under A1P1, the Regulations will undoubtedly be regarded as "provided for by law". They are clear in scope and detailed in form.[148] The legitimacy of the UK legislature's aim in introducing the Regulations is also beyond question. The Strasbourg Courts has repeatedly stated that contracting parties enjoy a broad margin of appreciation in determining the legitimacy of their public policy goals under A1P1.[149] The national authority's assessment on this issue will only be questioned in extreme circumstances. In the case of the Regulations, the public policy aim is clear. They are directed at the protection of public health (and, in particular, the protection of young people's health).

This brings us to the question of proportionality. The ECtHR has stated that the "search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" is inherent throughout the Convention.[150] The "fair balance" concept has played a particularly important role when the Court has considered limitations to the rights protected under the Convention. In such circumstances, various factors have been considered to be relevant to the establishment of a "fair balance". These have included the importance of the objective of the

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[146] See British American Tobacco UK Ltd, *Response of British American Tobacco UK Ltd to the 2014 Consultation* 5-7; Imperial Tobacco, *Illegal, Unnecessary & Damaging for UK plc: Why Standardised Packaging is a Bad Policy Idea that would not Work*, 7 August 2014, 4-6; Philip Morris Ltd, *Response to the Consultation on "Standardised Packaging"*, 7 August 201412-23; *JTI's Response to the UK Department of Health Consultation on the Introduction of Regulation on the Standardised Packaging of Tobacco Products*, 6 August 2014, 2-5.

[147] See See *R (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41 [26].

[148] For application of the "provided for by law" condition under A1P1, see *Vistins v Latvia* (2014) 58 EHRR 4 (Gd Chamber) [100], [105]; *Khodorkovskiy v Russia* (2014) 59 EHRR 7 [876]-[885]; *NKM v Hungary* 66529/11, 14th May 2013. For discussion, see D Harris et al, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 3rd ed (OUP, 2014) 878-880. For discussion of the "provided for by law" requirement under art 52(1) of the EU Charter, see S Peers and S Prechal, "Article 52" in S Peers et al (eds) *The EU Charter of Fundamental Rights: a Commentary*, 1470-1474.

[149] Under A1P1, see *Vistins v Latvia* (2014) 58 EHRR 4 (Gd Chamber) [106]-[107]; *Wieczorek v Poland* [2013] 56 EHRR 36 [59]. See also Harris et al, ibid, 876-877; AR Çoban, *Protection of Property Rights Within the European Convention on Human Rights* (Ashgate, 2004) 199-204.

[150] *Soering v United Kingdom* (1989) 11 EHRR 439 [89].

interference and the strength of the protected interest,[151] the availability of less intrusive means of attaining the state's objective,[152] the effectiveness of the measure at issue,[153] the existence of procedural safeguards,[154] delay in the implementation of an interference[155] and the payment of compensation.[156] However, in considering proportionality, the Court has rarely applied the disciplined approach characteristic of other European legal systems, such as for example, that employed in German administrative law.[157] Indeed, in many situations, it has permitted member states a broad "margin of appreciation" in recognition that there may be a broad divergence of cultures within the contracting parties on certain issues and that, in some cases, national authorities are in a better position to judge what is necessary under local conditions.[158]

In considering proportionality under the Human Rights Act, domestic courts do not simply mirror the approach of the Strasbourg Court.[159] Influenced by domestic administrative law, a more structured and rigorous methodology is employed. This was recently summarised by Lord Reed:

> "[I]t is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."[160]

In the case of the Regulations, the application of this stricter general proportionality standard would require a domestic court to consider whether there is evidence that the Regulations are likely to have an impact on smoking

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[151] See further below.
[152] See *Riener v Bulgaria*, 46343/99, 23 May 2006 [125]..
[153] See *Weber v Switzerland* (1990) 12 EHRR 508; *Observer & Guardian v United Kingdom* (1991) 14 EHRR 153.
[154] See, for example, *Jokela v Finland* (2003) 37 EHRR 26 [45].
[155] See, for example, *Moskal v Poland* (2010) 50 EHRR 20.
[156] See below.
[157] The Strasbourg Court has been described as applying the proportionality/"fair balance" test in a "relatively broad- brush way" (see *Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700 [70] (per Lord Reed).
[158] For discussion of the "margin of appreciation" concept, see A Legg, *The Margin of Appreciation in International Human Rights Law* (OUP, 2012); Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).
[159] *Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700 [72] (per Lord Reed).
[160] Ibid, [74]. In formulating the test thus, he drew particularly on the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103 (Supreme Court of Canada)..

amongst young people, whether this effect could have been achieved through other less intrusive means and whether there is a proportionate relationship between the beneficial effect of the Regulations and their impact on the Industry's intellectual property rights. This is a more exacting level of scrutiny than the Regulations would receive at Strasbourg. However, whichever of these two approaches is adopted, it can be suggested that there are a number of features of the jurisprudence on A1P1 which suggest that, in the particular case of the Regulations, the test of proportionality would be passed.

First, despite the apparent generality of the form of analysis described above, the standard of review applied to A1P1 is more relaxed than that applied to other rights protected under the ECHR. In its early case law on the right of property, the Strasbourg Court contented itself with considering only legality and the legitimacy of a contracting state's purpose.[161] This approach was tightened up in *Sporrong & Lönnroth v Sweden*, though the identification of an implicit requirement for a "fair balance" between the right of property and the public interest.[162] The Court elaborated on this concept in *James v United Kingdom*, holding that:

> "…[T]here must…be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This latter requirement was expressed in other terms in the *Sporrong and Lônnroth* judgment by the notion of the 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden'."[163]

Subsequently, with particular reference to "controls" on the peaceful enjoyment of possessions, the Court noted that:

> "… States enjoy a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question."[164]

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[161] Y Windisdoerffer, "Margin of Appreciation and Article 1 of Protocol No 1" (1998) 19(1) Human Rights Law Journal 18, 19. See *Handyside v United Kingdom* (1979-80) 1 EHRR 732 [62]; *Marckx v Belgium* (1979-80) 2 EHRR 330 [64].

[162] "…[T]he Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1." (1983) 5 EHRR 35 [69] (footnotes omitted).

[163] (1986) 8 EHRR 123 [50] (footnotes omitted). See also *CEM Firearms Ltd v United Kingdom*, 37674/97 & 37677/97, 26 September 2000 (admissibility).

[164] *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 [55]. See also *James v United Kingdom* (1986) 8 EHRR 123 [50]-[56]; *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309 [62]; *Immobiliare Saffi v Italy* (2000) 30 EHRR 756

Thus, by contrast with references to "pressing social need" elsewhere in the Court's jurisprudence, the standard of review applied to interferences with the peaceful enjoyment of possessions under A1P1 ("reasonable relationship of proportionality") is not a stringent one.[165] As long as an unfair "individual and excessive burden" is not imposed upon a right-holder,[166] the Court will be slow to intervene. This is particularly so where an interference is classified as a control on the use of property, rather than as a deprivation.[167]

There are further features of the jurisprudence on A1P1 which make it unlikely that the Regulations will be held to violate the right of property. The Strasbourg Court has exercised particular restraint in reviewing state intervention on matters of public policy. In considering a claim for deprivation of possessions in *James v United Kingdom*, the Court stated that:

> "…The decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation."[168]

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[49]; *Chassagnou v France* (2000) 29 EHRR 615 [75]; *Zvolský and Zvolská v Czech Republic* 46129/99, 12 November 2003 [69]; *Brosset-Triboulet v France* 34078/02, 29 March 2010; *Hermann v Germany* (2013) 56 EHRR 7 [74]; *NKM v Hungary* 66529/11, 14 May 2013 [61]. For discussion, see D Harris et al, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 3rd ed (OUP, 2014) 874, 904; AR Çoban, *Protection of Property Rights Within the European Convention on Human Rights* (Ashgate, 2004) 206-210; D Spielmann, "Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review" [2011] *Cambridge Yearbook of European Legal Studies* 381.

[165] The relatively weak form of protection offered to property rights has also been recognised by domestic courts. See, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport & the Regions* [2001] UKHL 23, [2003] 2 AC 295 [71]-[72] (per Lord Hoffmann); *Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700 [128] (per Lord Reed, right "not of the most sensitive character").

[166] See, for example, *Kjartan Asmundsson v Iceland* (2005) 41 EHRR 42.

[167] *Gillow v United Kingdom* (1985) 11 EHRR 335.

[168] *James v United Kingdom* (1986) 8 EHRR 123 [46]. See also *Valkov v Bulgaria* 2033/04 and others, 25 October 2011 [92]; *Hatton v United Kingdom* [2003] 37 EHRR 28 [97]; *Jahn v Germany* (2006) 42 EHRR 49; *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 [71]. See also *Wilson v First County Trust Ltd* [2003] UKHL 40 [70], [138], [169]; *R (On the application of the Countryside Alliance) v AG* [2007] UKHL 52 [47], [78], [129], [155].

In *Friend v United Kingdom*, the Court considered claims relating to legislation prohibiting fox hunting and took into account the fact that the legislation had been adopted after extensive Parliamentary debate, in which various proposals had been considered before an outright ban on fox-hunting was enacted. It concluded that the judgment that it was in the public interest to ban hunting was "one for the House of Commons to make".[169]

While national courts do not need to extend a comparable "margin of appreciation" to the legislator, the idea that some deference is due to democratic institutions is also reflected in the domestic case-law on proportionality under the Human Rights Act. Thus, for example, in the recent case of *Nicklinson*, Lord Mance stated that the assessment of proportionality under the Human Rights Act should take into account "institutional competence and legitimacy" and that, as a result:

> "[S]ome judgments on issues such as the comparative acceptability of differing disadvantages, risks and benefits have to be and are made by those other branches of the state in the performance of their everyday roles, and that courts cannot and should not act, and do not have the competence to act, as a primary decision-maker in every situation."[170]

This reluctance to intervene will be particularly strong in the case of legislation that has been recently enacted and which has been subject to extensive public and Parliamentary discussion.[171]

Property owners' reasonable expectations of the legislative environment are also relevant to the question of proportionality under A1P1. Regulatory interference is more readily accepted when it is predictable. Thus, for example, in *Ian Edgar v United Kingdom*, a wholesale distributor of firearms argued that it had suffered an individual and excessive economic burden as a result of the introduction of a prohibition on the sale of handguns. The Court held that the legislation did not offend the "fair balance" requirement under A1P1, taking into account the fact that the trade in firearms had been subject to statutory control in the United Kingdom for many years and that, as a result, the applicant company had no reasonable expectation that it would be able to continue to trade in any particular type of firearm.[172] Similarly, at the point when the United

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[169] *Friend v United Kingdom* 16072/06 & 27809/08, 24th November 2009 [56]. See also *Animal Defenders v United Kingdom* (2013) 57 EHRR 21 [116].
[170] *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38 [166]. See also *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38 [102]-[103] (per Lord Neuberger); [231] (per Lord Sumption). Although, for the limits of this principle, see *R (Countryside Alliance) v AG* [158] (Lord Brown); *R (on the application of Nicklinson) v Ministry of Justice* [347]-[348] (Lord Kerr).
[171] See *R (Countryside Alliance) v AG* [2007] UKHL 52, [2008] 1 AC 719 [45].
[172] *Ian Edgar (Liverpool) Ltd v United Kingdom* 37683/97, 25 January 2000 (admissibility). See also *CEM Firearms Ltd v United Kingdom*, 37674/97 & 37677/97, 26 September 2000 (admissibility); *London Armoury Limited v United*

Kingdom government first proposed standardised packaging legislation, the Industry could have had little expectation that its ability to brand its products would continue unchanged in future. The progressive eradication of smoking was an explicit goal of public policy[173] and, over decades, ever more restrictive controls on tobacco packaging and marketing had been introduced. Standardised packaging rules had been under discussion at international, supranational and domestic levels for years. .

In this context, the Industry would appear to have a number of difficulties in arguing that the Government's decision to proceed with standardised packaging legislation in the face of competing evidence violates A1P1. The legislation was preceded by two full public consultation exercises and was supported by a review of the scientific evidence commissioned from an independent expert. Other policy options were considered and rejected.[174] The Regulations were tailored to meet the authorising purpose set out in the Children and Families Act 2014 and were eventually passed with substantial Parliamentary majorities.[175] There is clear evidence that the legislature sought to balance the public interest in health with private economic interests.[176] The protection of life, public health and public safety are considered to be interests "of the first importance" under the ECHR[177] and the Industry had clear notice of the need to accommodate itself to a hostile legislative environment. In these circumstances, whatever one's view of the desirability of the legislation, it is difficult to see how the Strasbourg Court could consider the legislature's decision to be arbitrary or "manifestly without reasonable foundation". Even under the more rigorous scrutiny of a domestic court, there are also strong reasons for believing that the Regulations would be considered to be compatible with A1P1.

Kingdom 37666/97 and others, 26 September 2000 (admissibility); *Andrews v United Kingdom*, 37657/97, 26 September 2000 (admissibility).

[173] See, for example HM Government, *Healthy Lives, Healthy People: a Tobacco Control Plan for England*, 9 March 2011, 6.

[174] See *Explanatory Memorandum* [7.4].

[175] Members of Parliament voted 367:113 in favour. See *Hansard*, 11 March 2015, col 379.

[176] As noted above, the Regulations contain transitional provisions, They do not cover tobacco products that are seldom consumed by young people. They ensure that registered trade marks are not lost through non-use and that branding signs can still be employed in a non-consumer setting. See section 1 above. By contrast, in some cases, the ECtHR has held that policy decisions taken by state contracting parties have violated rights protected under the ECHR where a state has made no attempt to balance competing rights and interests. See, for example, *Hirst v United Kingdom (No 2)* (2004) 38 EHRR 40 [51].

[177] *Pinnacle Meat Processors Company v United Kingdom* 33298/96, 21 October 1998. Under Art 2, ECHR (the right to life), a contracting party has a positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction (see *Hristozov v Bulgaria*, 47039/11 and 358/12, 13 November 2012). While this obligation would not oblige a state to implement standardised packaging legislation, its existence ought to be relevant to an assessment of the "fair balance" in any challenge to the Regulations.

It has, nevertheless, been argued that the Regulations violate A1P1 because they do not compensate the Industry for interference with intellectual property rights. As noted above, the jurisprudence of the Strasbourg Court indicates that compensation must generally be paid where an applicant is deprived of possessions.[178] In such circumstances, there is an initial assumption that compensation should bear a reasonable relationship with market value.[179] The award of an arbitrary, or seriously disproportionate, sum in compensation has been held to violate A1P1.[180] However, payment of full market value is not always required, particularly where a state acts to achieve important policy goals.[181] In any event, as explained above, the Regulations do not "deprive" the Industry of its possessions under the Strasbourg system.[182] Compensation is not always required for a control on the use of property;[183] although it may play an

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[178] See, for example, *James v United Kingdom* (1986) 8 EHRR 123 [54]; *Lithgow v United Kingdom* (1986) 8 EHRR 329 [120]; *Kozacioğlu v Turkey* (2011) 53 EHRR 34 [64]. However, the obligation to pay compensation is not absolute. In exceptional circumstances, compensation has not been required for the deprivation of property. See, for example, *Jahn v Germany* (2006) 42 EHRR 49.

[179] See *Lithgow v United Kingdom* (1986) 8 EHRR 329 [121]; *Vistins v Latvia* (2014) 59 EHRR 21 [36].

[180] See, for example, *Platakou v Greece* 38460/97, 11 January 2001; *Jokela v Finland* (2003) 37 EHRR 26; *Vistins v Latvia* (2014) 58 EHRR 4.

[181] *James v United Kingdom* (1986) 8 EHRR 123 [54]; *Lithgow v UK* (1986) 8 EHRR 329 [121]; *Jokela v Finland* (2003) 37 EHRR 26 [53]; *Broniowski v Poland* (2006) 43 EHRR 1 [182]; *Vistins v Latvia* (2014) 58 EHRR 4 [112]; (2014) 59 EHRR 21; *Budayeva v Russia* (2014) 59 EHRR 2 [180]-[182]. See also, See *R (on the application of SRM Global Master Fund LP) v Treasury Commissioners* [2009] EWCA Civ 788 [56] (explaining that, in some instances, that the "policy aim of the measure in question may be diminished or undermined or even contradicted by a requirement of full value").

[182] See section 5 above.

[183] See, for example, *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 [79]. See also *CEM Firearms Ltd v United Kingdom*, 37674/97 & 37677/97, 26 September 2000 (admissibility) in which the Court quoted the words of the Shadow Home Secretary (as he then was) explaining the consequences if compensation always had to be paid by those affected by legislation designed to improve public safety:

> " …[W]hen next we felt that there was a need to improve public safety through legislation, whether in respect of furniture, the pharmaceutical industry, the transport industry or firearms control, Governments and the House [of Commons] would always be constrained and often prevented from making decisions in favour of public safety by the enormous cost involved. Yes, as the European Court of Human Rights said, there is a balance to be struck between individuals' fundamental freedoms and the general interest of the community, but in my judgment and that of my honourable Friends, the balance on this issue must be struck in favour of the general interests of the community as a whole." (Debate on Firearms (Amendment) Bill, 18 February 1997).

important role in securing a fair balance between the public interest and property right-holders. In the Strasbourg case law, the principles governing the relationship between the grant of compensation and the achievement of a fair balance are incompletely developed. However, it is clear that contracting parties are accorded a broad margin of discretion in deciding whether compensation should be paid for interferences with property rights arising from legislation that prohibits activities deemed to be socially undesirable. In *Friend v United Kingdom*, for example, the Court stated that:

> "…[A] ban on an activity which is introduced by legislation will inevitably have an adverse financial impact on those whose businesses or jobs are dependent on the prohibited activity…. Nevertheless, the domestic authorities must enjoy a wide margin of appreciation in determining the types of loss resulting from the measure for which compensation will be made. As stated in *CEM Firearms Limited,* 'the legislature's judgment in this connection will in principle be respected unless it is manifestly arbitrary or unreasonable'. This applies, *a fortiori*, to cases where the interference concerns control of the use of property under the second paragraph of Article 1 rather than deprivation of possessions under the first paragraph of the Article."[184]

In that case, the Court concluded that the absence of compensation under the contested legislation was neither manifestly arbitrary nor unreasonable. Furthermore, it did not impose an individual and excessive burden on the applicants. Even where the Court concludes that the payment of compensation is necessary to secure a fair balance, there remains considerable leeway in identifying an appropriate sum.[185]

In the case of the Regulations, it seems unlikely that the decision not to compensate the Industry from public funds for the loss of its ability to apply brand signs to tobacco packaging can be regarded as either manifestly arbitrary or unreasonable. The gradual eradication of the market for tobacco products is a clear public policy goal of European and national institutions and the Industry has operated in an increasingly restrictive regulatory environment for many years. If compensation were paid for the loss of branding opportunities, it is likely that a proportion of these funds would be applied in the promotion of the Industry's commercial goals. In such circumstances, there is a clear risk that public policy goals would be "diminished or undermined or even contradicted."[186]

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[184] *Friend v United Kingdom* 16072/06 & 27809/08, 24th November 2009 [57].
[185] D Harris et al, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights*, 3rd ed (OUP, 2014) 890. Thus, even if compensation had been a requirement to ensure the proportionality of the Regulations, it would appear that the tobacco companies' prediction that "billions of pounds" (a figure presumably representing a generous estimate of the market value of their brands) is likely to be something of an over-statement.
[186] *R (on the application of SRM Global Master Fund LP) v Treasury Commissioners* [2009] EWCA Civ 788 [56].

6.2 European Union

In EU law, the framework within which limitations on protected rights are considered is more complex. The Union is an economic legal order within which the protection of fundamental rights developed gradually and incidentally. The CJEU's early, rather uncertain, jurisprudence on limitations often diverged from that of the Strasbourg Court.[187] Indeed, the relationship between the Treaty rules on the internal market and fundamental rights has still not been delineated with total clarity.[188] It must also be borne in mind that the CJEU does not simply exercise a supervisory jurisdiction, but has ultimate responsibility for the interpretation of the Treaties and the co-ordination of the relationship between the EU and its member states. Accordingly, it has had no need to provide member states with a "margin of appreciation" equivalent to that relied upon frequently by the Strasbourg Court..

Nevertheless, under the influence of the Charter and through a developing body of jurisprudence, the CJEU's approach to limitations has become progressively more coherent.**[189]** Art 52(1), the Charter's general provision on limitations has offered an organising framework for this process. It states that:

> "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 only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to

[187] See, for example, early cases on the right of property, such as (265/87) *Hermann Schräder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 2237; (5/88) *Wachauf v Federal Republic of Germany* [1989] ECR 2609; (C-293/97) *R v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley* [1999] ECR I-2603 [54]-[58].

[188] For discussion, see G Anagnostaros, "Balancing Conflicting Fundamental Rights: the *Sky Österreich* Paradigm" [2014] European Law Rev 111; F de Cecco "Fundamental Freedoms, Fundamental Rights and the Scope of Free Movement Law" (2014) German Law Journal 383; V Trstenjak and E Beysen, "The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case law of the CJEU" (2013) 38 European Law Rev 293; S Peers and S Prechal, "Article 52" in S Peers et al (eds) *The EU Charter of Fundamental Rights: a Commentary* 1478-9; N Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP, 2013); (C-36/02) *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 (Opinion of AG Stix-Hackl) [48]-[73].

[189] See, for example, (C-20 & 64/00) *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411*;* (C-283/11) *Sky Österreich GmbH v Österreicher Rundfunk* [2013] 2 CMLR 25.

protect the rights and freedoms of others." [190]

Art 52(1) is generally considered to impose three distinct requirements. These bear a structural resemblance to the conditions applied under A1P1. To be justified, interferences with protected rights must be "provided for by law" and, must serve an "objective of general interest recognized by the Union or the need to protect the rights and freedoms of others". The condition of legality has not been analysed in detail by the CJEU in this context.[191] Indeed, it has often been overlooked entirely when the Court has reviewed the application of limitations on the application of fundamental rights. However, it can be assumed it will be interpreted in line with the equivalent jurisprudence of the Strasbourg Court. As noted above, there is little doubt that the Regulations will surmount this hurdle. Similarly, the protection of public health certainly qualifies as an objective of general interest recognised by the Union.[192]

A third category of conditions must also be satisfied under Art 52(1). Interferences with protected rights must "respect the essence" of that right, must be proportionate, necessary and must genuinely meet their intended objectives. These requirements are conceptually connected and are not always clearly distinguished in the CJEU's jurisprudence. As a result, they are often considered together as aspects of the proportionality enquiry. The relationship between proportionality and the "necessary" and "genuinely meet" conditions is readily apparent[193] but Art 52(1)'s requirement that the "essence" of a right must be respected demands further explanation. On the face of it, the existence of this condition appears to indicate that all Charter rights have an absolute and inviolable core.[194] However, it has not been applied by the Court in this manner. Failure to respect the essence of a right has generally been treated as synonymous with disproportionality.[195] Where the "essence" requirement has been applied separately, the Court has generally concluded that it has been respected as long as the right-holder is not deprived of all aspects of the

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[190] For detailed discussion, see S Peers and S Prechal, "Article 52" in S Peers et al (eds) *The EU Charter of Fundamental Rights: a Commentary* 1455-1521.

[191] For mention of the legality condition in the context of fundamental rights, see (C-314/12) *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2014] ECDR 12 [54]; (C-129/14 PPU) *Criminal Proceedings against Spasic* (2015) 2 CMLR 1 [57].

[192] See, TFEU, Art 9. See also (C-154/04 & 155/04) *R (on the Application of Alliance for Natural Health) v Secretary of State for Health* [31]; (C-101/12) *Herbert Schaible v Land Baden- Württenberg*, 29th May 2013 [35]; (C-544/10) *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September 2012 [48]-[49].

[193] See (C-92/09 & 93/09) *Volker und Markus Schecke GbR* 9 November 2010 [72]-[82].

[194] See R. Schütze, *EU Constitutional Law* (CUP, 2012), .419. Cf F Wollenschläger, "Article 17(1)" in S Peers et al (eds) *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014) 465, 485-6.

[195] See, for example, (C-20 & 64/00) *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411 [86]; (C-544/1) *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September 2012 [56]-[58].

protected interest.[196] On this basis, it can be suggested that the Regulations would not be regarded as a violation of the essence of the Industry's intellectual property rights.[197]

More generally, the CJEU's approach to proportionality is long-established and clearly structured. The concept has been developed as a general principle of EU law and has been applied in a wide range of legal contexts. In the recent judgment of Lord Reed and Lord Toulson in the Supreme Court in *R (on the application of Lumsdon) v Legal Services Board*, it has been described thus:

> "Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality *stricto sensu*: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle…."[198]

On the face of it, in cases concerning fundamental rights, this principle requires a court applying EU law to assess carefully whether an interference with a protected right is precisely and minimally tailored to the state's legitimate aim. The proportionality assessment also incorporates procedural guarantees.[199] A somewhat modified methodology is adopted when a measure under scrutiny is itself directed at the protection of a fundamental right or rights. In such a case, the CJEU has referred to the need to establish a "fair balance" between competing rights.[200] Such a "fair balance" approach inevitably accords a greater

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[196] See (C-283/11) *Sky Österreich GmbH v Österreicher Rundfunk* [2013] 2 CMLR 25 [49]; (C-293/12) *Digital Rights Ireland Ltd v Minister for Communications, Marine & Natural Resources* 8 April 2014 [38]-[40]; (C-544/10) *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September 2012 [58]; (C-314/12) *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2014] ECDR 12 [51]; (C-129/14 PPU) *Criminal Proceedings against Spasic* (2015) 2 CMLR 1 [58]-[59]. For a stricter approach, cf *Alemo-Herron v Parkwood Leisure Ltd*, 18 July 2013 [33]-[36].

[197] Cf Opinion of Lord Hoffmann, commissioned by Philip Morris Ltd; Philip Morris Ltd, *Standardised Tobacco Packaging will Harm Public Health and Cost UK Taxpayers Billions: a Response to the Department of Health Consultation on Standardised Packaging of Tobacco Products*, 9 August 2012, Appendix 5 [7].

[198] [2015] UKSC 41 [33].

[199] See (C-402/05P, 415-05P) *Kadi* ECR-I 6351 [366]-[367].

[200] See, for example, (C-275/06) *Promusicae v Telefónica de España* [2008] ECR I-271 [61]-[70]; (C-70/10) *Scarlet Extended SA v SABAM* [2011] E.C.R. I-11959 [53]; (C-314/12) *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2014] ECDR 12 [46]-[64]. In some cases, the Court has appeared to conduct a "fair balance"-type analysis alongside a more orthodox assessment of

degree of leeway to EU institutions and member states than might be available under a strict application of the proportionality principle.[201] This, then, is the structure within which the UK Government's argument that any interference with property rights can be justified under Art 52(1) will be assessed. On the surface, at least, the approach would appear to be more intensive than that adopted by the Strasbourg Court under A1P1.

However, in cases concerning proportionality, a significant degree of discretion has been granted to the EU legislator; particularly where legislation has required the making of complex judgments on political, economic or social issues. Indeed, in such circumstances, the Court has stated that it will only intervene where a measure is "manifestly inappropriate".[202] The same degree of discretion is not necessarily available to member states, particularly when they derogate from protected internal market freedoms. Such a differential standard of review for proportionality has been justified by the need to promote harmonisation and to guard against disguised protectionism.[203] The United Kingdom government may not, on this basis, be judged against a "manifestly inappropriate" standard. Nevertheless, there are several features of the CJEU's jurisprudence on limitations that will make it easier for the Government to sustain its claim on proportionality.

First, even though the standard of review may, as a matter of general principle, be more intensive under Art 17 than under A1P1, the case-law of the CJEU indicates that member states will be accorded a significant degree of leeway when they implement public health policies. Thus, for example, in areas in which the law has not been fully harmonised at EU level, member states have significant freedom to determine the level of public health protection that they wish to attain.[204] The fact that other member states have not introduced comparable levels of regulation will not, in itself, mean that a measure is

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proportionality. See, for example, (C-544/10) *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September 2012; (C-283/11) *Sky Österreich GmbH v Österreicher Rundfunk* [2013] 2 CMLR 25; (C-30/14) *McDonagh v Ryanair* [2013] 2 CMLR 32.

[201] For discussion, see G Anagnostaros, "Balancing Conflicting Fundamental Rights: the *Sky Österreich* Paradigm" [2014] European Law Review 111.

[202] See (C-154/04 & 155/04) *R (on the Application of Alliance for Natural Health) v Secretary of State for Health* [52]; (C-491/01) *R v Secretary for State for Health ex p BAT* [2002] ECR I-11453 [59]; (C-101/12) *Herbert Schaible v Land Baden-Württenberg*, 29th May 2013 [47].

[203] See *R (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41 [37]-[38]. Although, as applied to fundamental rights, it is not clear that such a differential approach is compatible with a true commitment to the protection of such rights.

[204] Ibid [64]; (C-171/07 & C-172/07) *Apothekerkammer des Saarlandes v Saarland and Ministerium für Justiz, Gesundheit und Soziales* [2009] ECR I-4171; (E-16/10) *Phillip Morris Norway AS v Norway*, 12 September 2011 [80].

disproportionate.[205] Furthermore, many of the principles that the CJEU applies in scrutinising EU legislation in this area ought also to be relevant to any challenge to the Regulations. Public health and safety remain interests of "foremost" significance, whether pursued by the EU institutions or by a national law-maker.[206] Member states ought therefore to benefit from the application of the "precautionary principle" without risking retrospective criticism when they intervene on the basis of imperfect scientific evidence.[207] They ought also to be able to take firm steps to combat well-known threats to public health and safety, such as alcohol and tobacco consumption and gambling.[208]

The Charter itself incorporates a right to healthcare (Art 35), which provides that:

> "Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities." [209]

Under the Charter, this right is classified as a right of solidarity rather than as a fundamental freedom under the Charter and does not therefore have equivalent status to the right of property within the European legal order. Nevertheless, the fact that standardised packaging legislation falls within the scope of the second sentence of Art 35 means that, when considering the compatibility of the Regulations with Art 17, a court applying EU law will be obliged to consider whether a "fair balance" has been struck between competing rights, rather than simply to apply a strict analysis of proportionality. The CJEU has already

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[205] (C-36/02) *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 [38]; (C-390/12) *Proceedings brought by Pfleger* [2014] 3 CMLR 47 [85]; (E-16/10) *Phillip Morris Norway AS v Norway*, 12 September 2011 [80].

[206] (C-421/09) *Humanplasma v Austria* [2010] ECR I-12869 [32](and cases cited in that paragraph); (E-16/10) *Phillip Morris Norway AS v Norway*, 12 September 2011 [77]; (C-210/03) *The Queen, on the application of Swedish Match AG v Secretary of State for Health* [2004] ECR I-11893 [56]; (C-491/01) *R v Secretary for State for Health ex p BAT* [2002] ECR I-11453 (Opinion of AG Geelhoed) [229].

[207] See (E-16/10) *Phillip Morris Norway AS v Norway*, 12 September 2011 [82]-[83]. While a member state would have to furnish evidence permitting a court to conclude that legislation is proportionate, it may not have to rely on scientific reports (see (390/12) *Pfleger*, ibid [50)-[51]).

[208] See (C-544/10) *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September 2012 [48]-[49].

[209] For further discussion of the rights to health and healthcare in the EU legal order, see T Hervey & J McHale, "Art 35 - the Right to Health Care" in S Peers et al (eds) *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014) 951; T Murphy, *Health & Human Rights* (Hart Publishing, 2013).

recognised that such a "fair balance" analysis is appropriate when an interference with protected rights aims to secure interests in public health.[210]

The importance of the contested right is also relevant to an assessment of proportionality under EU law.[211] As has been seen, states are afforded a particularly broad margin of appreciation in regulating the use of property rights under A1P1. A similar principle applies in EU law, although it has not been acknowledged so overtly. In upholding interferences with the right of property, the CJEU has repeatedly noted that property has a "social function". Thus, for example, in (C-491/01) *R v Secretary for State for Health ex p BAT*, it stated that:

> "[T]he Court has consistently held that, while [the right of property] forms part of the general principles of Community law, it is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed."[212]

The identification of this functional basis, suggests that Art 17 is a tool for the achievement of social goals rather than a guarantee of absolute control.[213] From this perspective, some forms of property, and some exercises of the right of property, can be expected to be valued more highly than others.

The CJEU has identified important social and economic functions for intellectual

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[210] For an example of a case in which the CJEU has relied on Art 35 in performing such a "fair balance" assessment, see (C-544/10) *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September 2012 [45]-[47].

[211] See (C-293/12) *Digital Rights Ireland Ltd v Minister for Communications, Marine & Natural Resources* 8 April 2014 [37], [48].

[212] (C-491/01) *R v Secretary for State for Health ex p BAT* [2002] ECR I-11453 [149]. See also, for example, (265/87) *Hermann Schräder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 2237 [15]; (C-280/93) *Germany v Council* [1994] ECR I-4973 [78]; (C-293/97) *R v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley* [1999] ECR I-2603 [54]; (C-155/04) *Alliance for Natural Health* [2005] ECR I-6451 [126]; (C-347/03) *Regione autonoma Friuli-Venezia Giulia* [2005] ECR-I 3785 [119]; (C-210/03) *R (on the application of Swedish Match AB) v Secretary of State for Health* [72]; (C-20 & 64/00) *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411 [68].

[213] The right to conduct a business (Art 16) has also often been described as having a "social function". Less often, the functional approach has been applied to other rights. See (C-92/09 & 93/09) (C-92/09 & 93/09) *Volker und Markus Schecke GbR,* 9 November 2010 [48]. It has been suggested that this approach should now pass into a "dignified retirement" (see S Peers and S Prechal, "Article 52" in S Peers et al (eds) *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014) 1478-9)

property rights. It has, for example, noted that the functions of trade marks:

> "…include not only the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services, but also its other functions, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertising."[214]

In the case of the Industry's marks, the "essential function" of designating origin is preserved under the Regulations.[215] Brand and variant name will continue to be applied in text on the packaging of tobacco products. By contrast, the "communication, investment [and] advertising" functions" of the marks are seriously curtailed. However, in the case of tobacco products, these extended functions are of questionable social value.[216] The Industry's branding is designed to attract customers and, as such, has an aim that is directly opposed to EU and member state public health policies,[217] which aim to reduce, and ultimately eradicate, tobacco use.[218] In such circumstances, the adoption of a "social function" approach to the right of property, as opposed to an absolutist view of the right, makes it much more likely that the Regulations will be regarded as compatible with Art 17.

It can thus be seen that there are a number of features of the CJEU's jurisprudence which will ease the United Kingdom Government's burden in responding to a challenge under Art 17. A national court implementing EU law will certainly be required to review the rationality and procedural propriety of the decision to introduce standardised packaging legislation. It will also have to consider whether the domestic legislator has taken steps to limit the adverse impact of the Regulations on the Industry wherever possible. The existence, or absence, of checks and safeguards has often been crucial in the CJEU's assessment of proportionality.[219] In the case of the Regulations, the extended legislative

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[214] (C-487/07) *L'Oréal v Bellure NV* [58].

[215] Specific functions have also been identified for copyright, designs and patents. However, they have no played as significant a role in the development of the law at European level.

[216] More generally, some trade mark scholars have criticised the identification of these "functions" on the grounds that the introduce unhelpful uncertainty into the law. See, for example, Max Planck Institute for IP and Competition Law, *Study on the Overall Functioning of the European Trade Mark System*, 15 February 2011, 103-105.

[217] The Court acknowledged a similar danger in the encouragement of competition in the gambling market (C-390/12) *Proceedings brought by Pfleger* [2014] 3 CMLR 47 [46].

[218] See Art 168(5) TFEU. For discussion of EU policy relating to tobacco control, see P Cairney et al, *Global Tobacco Control* (Palgrave Macmillan, 2012) 72-98.

[219] See, for example, ((C-491/01) *R v Secretary for State for Health ex p BAT* [2002] ECR I-11453; C-92/09 & 93/09) *Volker und Markus Schecke GbR* 9 November 2010 [79]-[86]; (C-544/10) *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September 2012 ;(C-283/11) *Sky Österreich GmbH v Österreicher*

procedure, the detailed restrictions on the scope of the restricted activities and the transitional provisions may prove significant in this respect.

Conclusion – keeping things in proportion

The Industry has acknowledged no doubts in arguing that the Regulations violate the European right of property. However, as has been seen, its claim is very far from accurate. Even if standardised packaging legislation is held to interfere with the Industry's intellectual property rights, it will not be regarded as a deprivation of intellectual property under A1P1 or Art 17. As a regulation on the use of possessions, there would appear to be a strong chance that the Regulations will be regarded as a justified response to a serious public health problem. While it is not possible to predict the outcome of any proportionality assessment on the facts, the principles outlined above mean that the Industry will be fighting an uphill battle in arguing that the Regulations do not achieve a fair balance between competing rights. This conclusion ought not to come as a surprise. The idea that a widely-supported public health measure might not be implemented because it would restrict the fundamental right of tobacco companies to apply branding to product packaging is instinctively unappealing.

The fact that this idea has been circulated so widely despite its many weaknesses bears testimony to the controversial lobbying power of the Industry.[220] However, it also reveals something significant about the "IP Community". Lawyers and other IP professionals have played a prominent (and sometimes controversial) role in the campaign against standardised packaging laws.[221] Within the culture of this Community, it would appear that intellectual property has come increasingly to be viewed as inviolable. In lobbying on the Regulations, right-holders referred without irony or embarrassment to their "fundamental right to differentiate our brands from those of our competitors".[222] Extraordinarily, it has even been suggested that, while a state might lawfully ban smoking, the right of intellectual property prevents it from introducing

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Rundfunk [2013] 2 CMLR 25 [61]-[63]; (C-314/12) *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [2014] ECDR 12; (C-461/10) *Bonnier Audio AB v Perfect Communication Sweden AB*, 19 April 2012.

[220] For discussion of the Industry's lobbying see, RN Proctor, *Golden Holocaust: Origins of the Cigarette Catastrophe and the Case for Abolition* (University of California Press, 2012); T Cave & A Rowell, *A Quiet Word: Lobbying, Crony Capitalism & Broken Politics in Britain* (Bodley Head, 2014).

[221] See, for example, the controversy surrounding the Law Society of Ireland's submission to the legislative consultation on the Irish standardised packaging legislation. See "Plain Packaging, Conflicts of Interest and the Law Society", 19 August 2014, http://aclatterofthelaw.com/2014/08/19/plain-packaging-conflicts-of-interest-and-the-law-society/

[222] See Imperial Tobacco, "Statement on UK Plain Packaging", 11 March 2015.

standardised packaging legislation falling short of total prohibition.[223] These claims are striking in the disproportionate significance they accord to the protection of intellectual property.

Suggestions that particular policy options cannot be pursued because they would contravene the fundamental right to intellectual property within the European legal order have become relatively commonplace.[224] They are often self-serving and are almost always advanced without detailed reference to the jurisprudence of the ECtHR or the CJEU.[225] On close examination, they often prove to be over-stated or positively misleading. Nevertheless, there is a real risk that they will have an unjustified impact on the formation of policy. In this context, it is hoped that this detailed analysis of the weaknesses of the Industry's challenge to the Regulations will not only make a contribution to the debate about standardised packaging, but will also serve to foster greater scepticism of all such claims based on the fundamental right of intellectual property under A1P1 or Art 17.

[223] Opinion of Lord Hoffmann, commissioned by Philip Morris Ltd; Philip Morris Ltd, *Standardised Tobacco Packaging will Harm Public Health and Cost UK Taxpayers Billions: a Response to the Department of Health Consultation on Standardised Packaging of Tobacco Products*, 9 August 2012, Appendix 5 [20]. Cf (C-544/10) *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September 2012 [57]-[58].

[224] In the United Kingdom, see, for example, UK Intellectual Property Office, *Government Response to the Consultation on Reducing the Duration of Copyright in Certain Unpublished Works*, 29 January 2015, 4; *R on the application of the British Academy of Songwriters, Composers & Authors v the Secretary of State for Business, Innovation & Skills* [2015] EWHC 1723 (Admin) [133], [143], [147].

[225] Cf Lord Hoffmann, *Philip Morris Opinion*: "The jurisprudence of the ECHR on A1P1 is complicated and I do not think it would be helpful to subject it to prolonged analysis." [8]