

# AN ANALYSIS OF ZIMBABWE'S LEGAL FRAMEWORK FOR TRADEMARKS AND TOBACCO CONTROL

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## Abstract

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*The article analyses the legal framework for tobacco control in Zimbabwe and its effect on trademark rights. The analysis adopts a doctrinal review of primary legal sources such as case law and legislation. It also reviews academic literature on tobacco control measures that have been done at the international level, thus Europe, Asia and other African countries. Since Zimbabwe is a member to the World Health Organisation Framework Convention on Tobacco Control (WHO FCTC), it has certain obligations to advance the measures that are stipulated in the convention. Some of the measures that are provided in articles 11 and 13 of the WHO FCTC require that the country adopt labelling measures that are not misleading on tobacco products. It also imposes a total advertisement ban for tobacco products. These two measures impact the use of trademarks on tobacco products in many ways. In line with its international obligations, Zimbabwe enacted the Public Health (Control of Tobacco) Regulations, 2002 SI 264 of 2002. This article carries an exposition of the contents of the statutory instrument, comparing it to the demands of the convention and laws of other countries that have done well in this respect. This comparison leads to the conclusion that the Zimbabwean law in its current form and shape is inadequate and does not meet the requirements of the convention. This suggests that there is need to review and upgrade the law to make it compliant with the demands of the WHO FCTC.*

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## Key words

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Tobacco control, trademarks, logos, labelling, advertising, health

## Introduction

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Zimbabwe ratified the World Health Organisation Framework Convention on Tobacco Control (hereinafter referred to as WHO FCTC) in 2014. A number of curtailing measures are set up by the WHO FCTC to deal with the tobacco epidemic across the world. The promulgation of an international instrument has had a lasting impact on the use of tobacco globally. Prior to the international treaty, national governments had adopted varying measures at country level. However, these national measures proved ineffective as they were easily overridden by big tobacco producers (Delobelle, 2019). One of the objectives of the WHO FCTC is to curtail or limit some of the enablers of tobacco appeal especially to the youth (article 5 of the Convention). In the Zimbabwean context, prior to the ratification of the treaty in 2014, the government introduced a statutory instrument introducing some control measures. Some of the measures in the statutory instrument are very close to the principles found in the WHO FCTC. For a law made in 2002, the Public Health (Control of Tobacco) Regulations, 2002 were very positive. Notwithstanding, the early attempts to incorporate control measures in Zimbabwean law, the impetus appears to have waned since then.

The key features of the statutory instrument (SI) are the creation of a Tobacco Control Committee through s12 of the SI, limitation of advertising of tobacco, control of smoking in public premises and on public transport. This is done through s3 and s4 of the SI. Sections 5 deals with the issue of smoking signs, while s7 handles the prohibition of trading of tobacco to or by children. The same section 7 also deals with health warning messages on tobacco products and ingredients while s8 handles the promotion of tobacco products in Zimbabwe. The law became effective on the 31<sup>st</sup> of October 2002. These provisions have far reaching impact on the public health of tobacco users and non-users alike in Zimbabwe. However, the legal framework in Zimbabwe does not compare with that in other countries such as Australia and Thailand. After the ratification of the WHO FCTC, the country has not made a new law or upgraded the existing SI to meet its international obligations.

## Methodology and Scope of the Article

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A doctrinal review of primary legal sources namely legislation and case law is done (Baude, Chilton and Malani, 2017). This is also coupled with a literature review of academic writings. The WHO FCTC provides a number of control strategies such as labelling and advertisement measures for tobacco (articles 11 and 13), price and tax measures (article 6) and reduction in the growing of tobacco (article 17). These are all aimed at reducing the impact of tobacco on human health. This article focuses on the measures set out in articles 11 and 13 of the Convention that restrict the labelling and advertising function on tobacco products and packages. These aspects have an interface with trademark law in so far as they restrict and prevent certain trademark and design rights on tobacco products and packages.

## Labelling and Advertising Rules in the WHO FCTC

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Article 11 of the convention provides that members shall adopt packaging and labelling measures that ensure that tobacco packaging does not promote tobacco products in any manner that is false or misleading. Article 11 (1) (a) and (b) provides that:

- (a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, *trademark, figurative or any other sign* that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as “low tar”, “light”, “ultra-light”, or “mild”; and
- (b) each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages.....

Two issues are dealt with in article 11 namely tobacco labelling and health warnings. Raslan (2016) notes that the FCTC provides for the prevention of any false, misleading, deceptive tobacco packaging and labelling or packaging and labelling which is likely to cause confusion about the product characteristics or health effects. This refers to words like “low tar”, “mild” and “cool”. The article also provides for the inclusion of health warnings in a particular font and size on tobacco packages. Health warnings are a key preventative measure to the tobacco epidemic.

It is apparent from this article that the Convention by itself does not compel immediate adoption of plain packaging rules (Zvolska and Kralikova, 2019). What is proscribed in the Convention is the use of misleading, false or deceptive “term, descriptor, trademark, figurative or any other sign”. The section does not use the language of plain packaging or related wording. Liberman (2018) observes that standing alone, the WHO FCTC packaging and labelling provisions do not appear as restrictive as the plain packaging legislation plays out to be. However, the adoption of guidelines on the implementation of Articles 11 and 13 of the Convention, both of which recommend that Parties consider the adoption of plain packaging, increases the threshold.

The Guidelines encourage members to adopt plain packaging rules in tobacco marketing (paragraph 16 of the Guidelines to implementing Article 11). Members are further required to prohibit the use of all graphics, trademarks, fancy design elements, logos, imagery and branding, with the exception of brand names. The same paragraph 16 requires that brand names be in a standardized and mandated font, size, colour and position on the tobacco product packages. The European Union has, as an example, domesticated the WHO FCTC framework into the Union through the Tobacco Prevention Directives 2014/40/EU (TPD) and various countries have now moved to plain packaging (Cohen, Zhou, Goodchild, et al, 2020). Australia, Ireland, France and the United Kingdom have followed the route provided in paragraph 16 of the Guidelines.

Zvolska and Kralikova (2019) defines a plain cigarette package as a unified design without any unregulated space and a dominant pictorial warning. It does not restrict the number of brands, but company and product names are printed in the same font, the same size and same colour (Zvolska & Kralikova, 2019). Plain packaging has also been called generic packaging or standardized packaging. The concept was not new at the time it was proposed through the WHO FCTC Guidelines. Liberman (2018) notes that Canada had proposed it in 1986. Anderson (2014) has argued strongly that plain packaging measures are a valid exercise of regulatory authority for a state for the protection of public health, and does not affect legal titles of tobacco trademarks.

Related to branding rules in article 11, is article 13, which deals with tobacco advertising, promotion and sponsorship. The article introduces an immediate ban on advertising, promotion and sponsorship by tobacco industries. Article 13 guidelines are rooted on the understanding that “packaging and product design are important elements of advertising and promotion”. As a result,

parties are urged to consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Over and above that, article 13 (4) (b) and (c) require that health warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship. The use of direct or indirect incentives to encourage the purchase of tobacco products by the public is also restricted.

These restrictions are justifiable and in line with the TRIPs agreement and national laws of some countries. The laws seek to resolve the challenge of the tobacco epidemic. The tobacco epidemic has grave consequences to the health of the public (for both users and non-users) and negates a number of human rights recognised by law through international instruments such as the right to health, life, education and the right to a clean environment among others (Smith, Kraemer, Johnson et al, 2020). By taking away the appeal and attraction power of the tobacco packaging through plain packaging measures, the law takes a necessary public health step (Bonfrer, Chintagunta, Roberts, et al, 2020).

The rationale for adopting plain packaging measures were that tobacco manufacturers were using the tobacco packages as the medium for promotion of their products. The tobacco package had become a moving bill board (Smith, Kraemer, Johnson et al, 2020). Other than being mere packages of a product, the tobacco package had become a mobile advertisement, singling out the alleged positive features of a particular brand (Rundh, 2016). As a result, information like 'with menthol', 'low tar', 'light' or 'mild' were common on cigarette or other tobacco packages. Such words are misleading and deceptive. This deception was done in unison with the manufacturer's trademarks and logos. According to Rundh (2016) some tobacco trademarks had adopted as their logos words that accentuated such deceptive messages. In addition, some producers had adopted as their logos, misleading statements about their tobacco products.

## **Standardised Packaging in the United Kingdom**

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In response to its Treaty obligations and in line with the EU Directives, the United Kingdom (UK) introduced standard tobacco packaging measures in 2015. In doing so, the United Kingdom became the second country after Australia to introduce such measures in the world (Crosbie, Eckford and Bialous, 2017). The Standardised Packaging of Tobacco Products Regulations of 2015 were meant to



reduce the attraction and appeal of tobacco products. Standardised tobacco packaging rules came into force in the UK on 20 May 2016 (Evans-Reeves, Hiscock, Lauber, et al, 2019).

The Regulations standardise the material, shape, opening and content of the packaging of readymade cigarettes (articles 3, 4 and 6). Similar controls are applied in relation to roll your own cigarettes through articles 7 and 9 of the regulations. The Regulations also include specific prohibitions in relation to the labelling of tobacco products (article 3 as read with 10). The objective of the Regulations is to introduce plain or standardised packaging and, in substantial measure, to restrict the branding permitted on tobacco packaging. The Regulations achieved this by mandating the design elements of a package (article 3 and 4). Other than standardised text as to the number of cigarettes and the producer, only the brand name and the variant of the cigarette are permitted. Permitted text must adopt a uniform presentation with a specified font, case, colour, type face, orientation and placement identifying the brand and variant name (articles 3, 4 and 6 of the regulations). In addition, colours and sounds associated with trademarks were also proscribed in terms of the schedule to the regulations.



*Cigarette packs prior and after plain packaging rules in Australia (Rimmer, 2016)*

## Benefits of the Packaging Measures in England

After the adoption of plain packaging, tobacco consumption decreased in both Australia and the United Kingdom (Bonfrer et al, 2020; Hiscock, Augustin, Branston and Gilmore, 2021). In the case

of the UK, tobacco stick sales declined. Monthly sales declined from around 3.29bn individual cigarettes in May 2015, but fell to 3.16bn in April 2018. Sales of cheap tobacco brands, previously increasing, stagnated after implementation of standardised packaging. The four authors further noted that company monthly net revenues declined by 13% from a stable of around £231 million to £198 million in April 2018. The drop in revenues for the producers/suppliers affected the fiscus in an equal measure as tax revenue declined. The drop referred above took place just two years after implementation of the measures. Breton et al, (2021) agrees that the number of smokers greatly reduced after implementation of the measures in the UK. The public health system gained economically and from a reduced burden from the measures. The UK government (Public Health England, 2014) predicted that a 3.4% fall in tobacco sales by volume in the first year could result in public health savings of around £500 million per annum. As noted above, the real drop in sales for tobacco was 13% meaning there was increased public health savings in practice.

## **Tobacco Control Measures in Zimbabwe**

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As stated in the introduction above, Zimbabwe introduced a tobacco control statutory instrument in 2002. This was followed up by accession to the WHO FCTC in 2014. Zimbabwe effectively became a member in 2015. The Tobacco Control measures of 2002 have a number of requirements that should be followed in the market. The sections that follow look at the rules that were introduced by the SI and how they are being implemented in Zimbabwe.

It must be noted that the above measures were made in a context where in Zimbabwe tobacco production, manufacturing and export are key economic factors (Rusere, 2019). Tobacco is seen by the government as critical to Zimbabwe's economy. For many years the country was the top tobacco-producing nation in Africa, and in the top ten in the world (Lown, McDaniel and Malone, 2016). Of this production, 98 % of Zimbabwe's tobacco is exported, making it the country's largest foreign currency earner (Lechcha et al, 2020). According to Lencucha et al (2020), this accounts for 10–20 % of the country's gross domestic product and over a quarter of the agricultural GDP. The same authors note that there are over 170,000 registered tobacco farmers in Zimbabwe. Because of the above facts, tobacco contributes significantly to employment and to foreign currency earnings in Zimbabwe. As a result of tobacco status as a major foreign currency earner, tobacco is nationally referred to as the 'the green gold' of Zimbabwe. Because of this, the Zimbabwean government regards tobacco production as a key

industry which must be supported and protected (Lown, McDaniel and Malone, 2016). The tobacco control measures are therefore seen as a necessary evil and production matters take precedence over control measures.

## **Advertising and Health Messages on Tobacco Products**

Tobacco advertising is still permitted in Zimbabwe in terms of SI 264 of 2002. The only limitation placed on advertising is provided by section 7 which requires that tobacco products must carry mandatory health messages. Section 7 provides that tobacco products shall be sold or distributed in a container on which is prominently displayed messages that:

- “Smoking is harmful to health” - for cigarettes, cigars and loose tobacco.
- “Smoking causes cancer” - for nasal and oral snuff: or
- “Tobacco is addictive” - for sinus tobacco.

This requirement has a limited bearing on the right of tobacco producer to advertise or use their trademarks freely on tobacco products. The same negative obligation is also placed on any advertising or promotion of tobacco products. Advertising is defined in the regulations as “any communication by or on behalf of a tobacco company to consumers which has the aim of encouraging them to select one brand of tobacco over another” (Section 2). Likewise, promotion is referred to as the sale or other distribution of merchandise bearing a cigarette brand name or logo as well as other activities, such as sampling, intended to promote the sale of a particular brand of cigarettes to adult consumers (Section 2 of SI 264 of 2002). In order to advertise, all what a tobacco producer needs to do is include the health message on the product or promotional material. The limitation, if any, is very minimal in this instance.

Advertising, promotion or commending the use of tobacco without the health message is a crime in terms of s7 (2). This means that, at the pain of a criminal sanction, advertising or promotion of tobacco can only be done alongside the health messages. However this requirement does not go far enough. In Botswana for example, the Control of Smoking Act (1992) totally prohibits tobacco promotion and advertising (Mbongwe, 2004). Both direct and indirect advertising of tobacco products is not permitted in Botswana. As a result of the law, in Botswana all tobacco billboards were removed and no advertising is allowed on the print media, radio or television. The same situation is true in South Africa where an advertising ban of tobacco exists. A court challenge of the law introducing the ban



as unconstitutional failed in the case of *BATSA v Minister of Health* (463/2011) [2012].

In Zimbabwe, advertisements have to comply with the demands of s7 (2) which require that in auditory advertisement, the warnings shall be clearly audible while in written advertisements the warning label should have defined font sizes. For example, the font size should be 16 point if the container is less than 37 cm<sup>2</sup> or 21 point if the container is greater than 37cm<sup>2</sup> but less than 85cm<sup>2</sup>. More elaborate and rigid rules are provided for adverts in the schedule of the SI. For example, in written advertisements the message must be at the front top across the full width of the package. This must cover 15% of the front of the package. Compared to other jurisdictions, the 15percent restricted to health warnings is too low. In Thailand, for example, the law imposes 85% of the package largest surface area for health warnings which must be in pictorial format (See Thailand Ministerial Regulations B.E. 2561, 2018). In the UK, 65% is restricted for that purpose. In addition, a total ban on tobacco advertising is given by article 30 of the TPCA of Thailand. See also the dispute in *Philip Morris (Thailand) Limited et al. v. Ministry of Public Health, Central Administrative Court*, (2013).

For nasal or oral tobacco, the message must be at the back at the top across the full width of the package covering an area of 25%. As already stated above the surface restricted for these messages is in favour of the trademark right holder and not for the public health interest. Unlike the Thai position (Jetly, Mohammed- Nawi, Ghazali & Manaf, 2022), there is no requirement for pictorial warnings nor is there a total ban on all forms of tobacco advertisement in Zimbabwe.

For radio and spoken advertisements, the message must come at the end of the advert after the information. In terms of warning duration, it must be of sufficient duration to be clearly understood in the same voice and speed as the rest of the advertisement. For nasal or oral tobacco, the message should be at the end of the message. These rules apply to all forms of marketing whether on radio, television or in the print media. What this means is that a trademark owner who would otherwise have used fifty percent or more of the package area no longer has that liberty. At most the logos or trademarks can only cover the unregulated space on the package. To that extent, trademark rights are limited by this law. Subsection (3) of s7 requires that every tobacco product shall bear accurate information on the percentage of the tar and nicotine content and any other ingredients of the brand of the tobacco product concerned.

## Trademarks and Logos Cannot be used in Isolation

Section 8(5) says that trademarks, logos or other identifiable associated features of tobacco product packaging may not be used except where the product itself is identified and promoted, with the appropriate health warnings. The emphasis is on trying to prevent advertisement or promotion of tobacco products without the health warnings. This means that trademarks of tobacco products are prohibited from being used in abstract. While tobacco trademarks can be used, they may not be indirectly used without the product itself. This provision prevents an ingenious use of tobacco trademarks without resort to the health warnings required by the SI. This ensures that wherever tobacco products are promoted or advertised, the health warnings and other important notices are also used. This is a good provision which prevents businesses from avoiding their obligations through ingenuity. In the final analysis however, the provision is limited in scope. In many countries in the region and beyond such as Botswana, South Africa, France, United Kingdom, Australia and Thailand, any form of tobacco advertising and promotion is prohibited (See for example Cohen, Zhou, Goodchild & Allwright, 2020; s3 (l) (a) of the Tobacco Products Control Act 83 of 1993, South Africa; *British American Tobacco SA v Minister of Health* (463/2011) [2012] ZASCA 107 (2012). In terms of s8 of the SI anyone below the age of 18 cannot legally participate in any tobacco promotion. Section 8(2) further provide that only adults shall be permitted access to promotional events.



*A picture of a tobacco billboard on a highway in Zimbabwe (Author, July 2023)*

Properly applied this means that all activities meant to promote and advertise tobacco products should not involve children. However, this is defeated by open advertisements of tobacco and unregulated access to tobacco cigarettes through street vendors (Rusere, 2018). Those below the age of 18 years cannot receive free sample tobacco product (s8 (3) of SI 264 of 2002).

## **Enforcement of the Law**

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In terms of s11, medical officers, environmental health officers and environmental technicians employed by the Ministry Health and Child Care or by any local authorities have the duty to enforce the law. Further, any police officer or any other person generally authorized by the Minister or by the local authority may carry out inspections and ensure that the provisions of these regulations are complied with.

Enforcement of the regulations is also done by way of criminal penalties. Section 17 provides that any contravention of section 3, 4, 5, 6 or 7 attracts a criminal penalty. Those found guilty of an offence are liable to a level 4 fine or imprisonment for a period not exceeding six months or to both such fine and such imprisonment. One major weakness of this enforcement mechanism is that it is not deterrent enough. In 2022, a level 4 fine was pegged at RTGS10 000. See for example, Munguma (2019) where an analysis of the role of criminal penalties for breach of intellectual property laws is done. Rusere's research (2019) established that there is a lax enforcement of the country's existing tobacco-control instrument. Lown et al. (2016) attributed the poor enforcement to inadequate financial and human resources and a lack of staff capacity within government, to drive tobacco-control efforts. The influence of tobacco industry and interference in control matters has also been pin-pointed in literature as a significant challenge to the effective implementation of tobacco-control policy (Rusere, 2019; Lown et al., 2016).

An alliance between the government and the tobacco industry has also been blamed for poor enforcement of tobacco control rules in Zimbabwe. Ruckert, et al (2022) notes that the Zimbabwean government regards the tobacco industry as a key industry and works hand in hand with the industry to the extent of getting loans from it. Delobelle (2019) is of the same view, noting that the big tobacco players have influenced adoption of poor laws and limited enforcement of the laws through a number of strategies.

The law does not provide for any administrative or civil penalties for contravention of tobacco control laws. For example, an administrative penalty for contraventions such as the withdrawal of an operating licence for a defined period or suspension from dealing in tobacco products for a defined period, can be a deterrent penalty in some cases. Such a remedy may be more deterrent as it has the threat to take away the livelihood of the errant business operator. In April 2022, a fine of RTGS10 000 translated to about USD33 at the official exchange rate.

## **Tobacco Control Committee**

One important feature of the tobacco control law is the creation of a Tobacco Control Committee in s12 of the SI. A Committee of this nature is also present in Thailand, Botswana, South Africa and Australia. See for example, the Control of Smoking Act, 1992 of Botswana, article 6 of Thailand's Tobacco Prevention and Control Act, of 2018 and the Tobacco Products Control Act 83 of 1993, South Africa. In Zimbabwe, the Committee is created in terms of 12 of the SI and is made up of 12 members appointed by the Minister of Health and Child Care. Of these members 3 are appointed to represent health workers employed by the State, mission and or local authority health facilities; one representing health workers in private practice; and one representing voluntary associations engaged in activities associated with the tobacco industry. A further three are appointed to represent manufacturers and distributors of tobacco products; one is appointed to represent tobacco growers, one is appointed to represent the Ministry of Industry and International Trade and finally one represents the Ministry of Lands, Agriculture and Rural Resettlement. A representative of the Consumer Council of Zimbabwe is the final appointee to the Committee. Members of the Committee are appointed for a period of three years but may be earlier removed for a cause.



*Zimbabwean cigarette packs designed in accordance with the law (Pick n Pay, 2023)*

The functions of the Committee are generally advisory in nature. Section 13 provides that the Committee shall advise the minister on policies for the protection of youth from smoking; advise on the development of informational and educational materials for the protection of youth from smoking. It also advises on the general policy to be adopted in relation to the control of tobacco management and advice on matters relating to the enforcement of the regulations. The Committee also reviews reports of contraventions and recommend to the Minister on action to be taken in terms of these regulations.

The Committee also monitors the enforcement of the regulations and also carries out research on matters relating to tobacco control. The Committee is required to carry out examinations and to screen informational and educational materials and warnings in terms of sections 7, 8 and 11 of the regulations. The Committee has power to recommend appropriate action to be taken in relation to matters it delves in. It can also perform any other function in relation to tobacco control imposed on it by the Minister of Health.

## **The Challenges in the Enforcement Framework in Zimbabwe**

One major weakness of the enforcement mechanism provided in the regulations is that it is not deterrent enough. In 2022, a level 4 fine was pegged at RTGS 10000,00 in terms of the Criminal Law Codification and Reform (Standard Scale of Fines) Notice, 2021 published in Statutory Instrument 209 of 2021. A fine of RTGS10000 translated to about USD33 at the official exchange rate as at April 2022. This penalty cannot by any standard be deterrent to a business which is contravening the law for their selfish economic interests. It is as such, not in line with article 41 (1) of TRIPS, which calls for deterrent penalties for breach of IP laws. It is also not in tandem with the WHO FCTC framework which calls for penalties that can lead to reduction of tobacco usage.

The remedies provided do not provide an administrative penalty for contraventions such as the withdrawal or revocation of an operating licence for a defined period or suspension from dealing in tobacco products for a defined period. Such a remedy may be more deterrent as it has the threat to take away the livelihood of the errant business. If one considers the public health impact of the simple act of say, selling tobacco to underage children, the penalties provided do not take into account the impact of such acts. The lack of hard hitting penalties has been attributed to the tobacco



industry power and influence in Zimbabwe. Rusere (2019) asserts that tobacco industry in Zimbabwe has historically lobbied the government to support their interests. This is supported by Lown et al, (2016) and Ruckert et al, (2022). Producers and manufacturers such as the Zimbabwe Tobacco Association, continue to promote the state's support of the crop.

The WHO FCTC has both criminal and civil liability provisions in Article 19 (1) which include compensation where appropriate. Unfortunately the Zimbabwean regulations do not provide for any civil remedies at all. All that is provided are criminal remedies which do not provide any benefit to the wronged party such as a young smoker. In the event of the young smoker developing health complications in later life, they have no recourse in terms of the SI to seek compensation from the tobacco producer or retailer who sold them tobacco contrary to the law. The only route available would be invoking the common law through a delictual claim. The only remedy available in terms of the current law is a paltry fine or a very short prison term. The prison term is not applicable to corporate offenders since companies cannot be put in prison.

S10 of the SI allows the Minister to exempt anyone from the application of s3 and 4 of the SI, upon an application being made to him. With respect to the drafters of the law, there is no justification why any person or business should be exempted from complying with the demands of a law of this nature. It must be remembered that this law is meant to protect the public health of society, to then give the Minister, the power to exempt certain players from the ambit of the law sounds unfair. Allowing someone to side line the law which is meant to protect the public safety amounts to exposing the public to danger. No such discretion should have been given to the Minister. Considering the circumstances, it is urged that this power should be removed from the law.

## **The Tobacco Control Committee Composition**

A number of weaknesses appear in the composition, appointment and tenure of the Committee. Firstly, there is no representation from Ministry of Justice which is responsible for IP matters and the law generally in Zimbabwe. Neither is there any wider representation for the people of Zimbabwe. There is no adoption of the total government approach (Labonté, Lencucha, Drope, Packer, Goma & Zulu, 2018) in the membership of the Committee. There is no government departmental coordination in the Zimbabwean context as would be seen in the Thailand context where over 12 ministries are included in the national organ. In Zimbabwe, only

fragmented and heavily conflicted departments such as agriculture are included (Rusere, 2019; Ruckert et al, 2022) to the exclusion of any representation from ministries of Finance, Justice and Home Affairs which is responsible for the police. This can be compared with the broad representation provided by articles 6, 16 and 21 of the Thai Act. The police act as enforcement officers in terms of Zimbabwean law (s17 of the 2002 instrument), hence the minister or at least a representation from the ministry responsible for the police would be justified.

The composition of the Committee is skewed in favour of Health Ministry officials and those from the agriculture ministry, yet the right to health applies to all people. While the inclusion of health professionals is justifiable on the basis of their profession, the same cannot be said for the rest of the membership particularly from the tobacco industry. A comparison with the setup of the Thai Tobacco Control Board exposes the Zimbabwean counterpart as inadequate in many respects. For example, there are no women, children or civil society representations in the Committee. Professional bodies are also not represented at all as is the case in Thailand (Jetly, Mohammed- Nawi, Ghazali & Manaf, 2022; article 6 (4) of the TPC Act, 2018 Thailand).

The composition of the committee leads one to agree with Rusere (2019) where she says tobacco industry's influence lobbied government for a weak instrument. Otherwise, there is no rational justification why there should be more members coming from the industry's side in a body mandated to control tobacco use. The only sector which is appointed to the Committee which has a semblance of representing the public at large is the one representative from the Consumer Council of Zimbabwe, otherwise the bulk of the sectors from which members are drawn are interested parties. The majority of the members are people who are direct beneficiaries from tobacco products marketing. There is no plausible justification why there are three nominees from tobacco growers, tobacco voluntary associations and tobacco manufacturers and distributors (section 12 (1) c to e of the Act). It can be argued that all these sectors have one interest of protecting tobacco products which is their livelihood (Ruckert et al, (2022). The question is, how these men and women can be independent arbiters in the case of tobacco? It is submitted that this is a serious flaw in the makeup of the Committee.

Labelling and advertising issues are peripheral in the function of the committee. The SI does not include as much demand reduction strategies for tobacco as set out in the WHO FCTC. Aspects of labelling and advertisement prescribed by the WHO FCTC are not

included in the Zimbabwean law. This is a serious weakness that needs remedying.

## Conclusion

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The enactment of SI 264 of 2002 as a tobacco control law in 2002 was a step in the right direction. However, that law has over the years been overtaken by events such as the subsequent ratification by the country of the WHO FCTC. When Zimbabwe became a member of the treaty, it had obligations to comply with the treaty by setting up local structures to implement the provisions of the WHO FCTC. Contrary to its obligations, Zimbabwe has not introduced any new laws or measures that are required by the WHO FCTC since 2015. Instead, the country is still relying on the now outdated statutory instrument of 2002 which is over 20 years old. The use of trademarks and logos of any kind on tobacco products is still permitted by the country's laws just as general advertisement of tobacco products. This means trademarks and logos that directly promote tobacco are being used freely on the market. As a result, in the Zimbabwean context, the tobacco pack or package is still being used as a moving advertisement for tobacco products. This is unsatisfactory. In addition, Zimbabwe's streets, highways, public through fares and point of sale areas are littered with tobacco billboards and other forms of advertisements. Some of those bill boards are located close to schools (Sibanda, 2022), hospitals and places of worship, contrary to the WHO FCTC provisions and the 2002 statutory instrument. As has been discussed earlier, many countries including Zimbabwe's immediate neighbours, South Africa, Mauritius and Botswana have done away with every form of tobacco advertisement. This means Zimbabwe is behind in its obligations to the WHO FCTC. With regard to health warnings, the level of compliance is still limited since such warnings cover a very small space on the cigarette pack as compared to what happens in countries like Australia, Thailand and England. The fifteen percent of the front space area compared to 85% in the Thai context is a huge far cry. To compound things, the 2002 statutory instrument does not require the use of pictorial warnings. Studies have shown that pictorial and graphic warnings (Cohen, Zhou, Goodchild & Allwright, 2020; Smith et al, 2020) have a more deterrent effect on would be smokers or those at the risk of relapsing. All this is missing in Zimbabwe. It might be time to consider plain or standardised packaging in Zimbabwe to deal with tobacco use.

## References

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- Agreement on Trade Related Aspects of Intellectual Property (TRIPS)
- Anderson, A. (2014). The Legality of Plain Packaging under International Law, *Economic and Political Weekly*, Vol. 49, No. 11
- BATSA v Minister of Health (463/2011) [2012].
- Baude, W, Chilton, A, S and Malani, A. (2017) Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews, *University of Chicago Law Review* 84 Issue 37, pp 37-58
- Bonfrer A, Pradeep K, & Chintagunta et al (2020.) Assessing the Sales Impact of Plain Packaging Regulation for Cigarettes: Evidence from Australia, *Marketing Science* 39(1):234-252. <https://doi.org/10.1287/mksc.2019.1164>
- Breton M, O, Britton, J, Brown, J et al, (2021). Was the implementation of standardised tobacco packaging legislation in England associated with changes in smoking prevalence? A segmented regression analysis between 2006 and 2019, *Tobacco Control*, <http://dx.doi.org/10.1136/tobaccocontrol-2021-056694>
- Cohen, J E, Zhou S, Goodchild M et al. (2020). Plain packaging of tobacco products: lessons for the next round of implementing countries, *Tobacco Induced Diseases* 2020;18:1-3 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7670849/>
- Control of Smoking Act, 1992 of Botswana
- Criminal Law Codification and Reform (Standard Scale of Fines) Notice, 2021 published in Statutory Instrument 209 of 2021, Zimbabwe
- Crosbie, E., Eckford R, & Bialous S. (2017). Containing diffusion: the tobacco industry's multipronged trade strategy to block tobacco standardised packaging, *Tobacco Control BMJ*, pp.195 <http://dx.doi.org/10.1136/tobaccocontrol-2017-054227>
- Delobelle, P. (2019). Big Tobacco, Alcohol, and Food and NCDs in LMICs: An Inconvenient Truth and Call to Action, *International Journal of Health Policy and Management*, 8(12) pp. 727-731
- Evans-Reeves KA, Hiscock R, Lauber K et al (2019). Prospective longitudinal study of tobacco company adaptation to standardised packaging in the UK: identifying circumventions and closing loopholes, *BMJ Open*; 9:e028506. doi:10.1136/bmjopen-2018-028506
- Guidelines for implementation Article 11 (Packaging and labelling of tobacco products) WHO FCTC

- Hiscock R, Augustin J, Branston R et al (2021). Longitudinal evaluation of the impact of standardised packaging and minimum excise tax on tobacco sales and industry revenue in the UK, *Tobacco Control*, 30 (5) <http://dx.doi.org/10.1136/tobaccocontrol-2019-055387>
- Jetly K, Mohammed Nawi A, Mohd Ghazali Q et al (2022). Plain packaging and Pictorial Warning in Asia Countries: Where are we? *International Journal of Public Health Research*, 12(1). Retrieved from <https://spaj.ukm.my/ijphr/index.php/ijphr/article/view/374>
- Labonté R, Lencucha, R, Drope J et al (2018). The institutional context of tobacco production in Zambia, (2018) *Globalization and Health*, 14:5 DOI 10.1186/s12992-018-0328-y
- Lencucha, R, Drope, J, Labonte R, et al, (2020). The Political Economy of Tobacco in Mozambique and Zimbabwe: A Triangulation Mixed Methods Protocol, *Int. J. Environ. Res. Public Health*, 17, 4262; doi:10.3390/ijerph17124262
- Liberman, J. (2018). Plainly constitutional: the upholding of plain tobacco packaging by the High Court of Australia, *American Journal of Law and Medicine*
- Lown, E, A, McDaniel PA & Malone R, E (2016). Tobacco is “our industry and we must support it”: Exploring the potential implications of Zimbabwe’s accession to the Framework Convention on Tobacco Control’ (2016) *Globalization and Health*, 12:2 DOI 10.1186/s12992-015-0139-3
- Mbongwe B. (2004). Country report on tobacco advertising and promotion ban – Botswana, UCSF WHO Tobacco Control Papers
- Mirandah, D.(2019). Thailand: Plain Cigarette Packaging Law Takes Effect, *Lexicology*, <https://www.lexology.com/library/detail.aspx?g=071d21b2-11e6-41a8-90d7-3445cde62a5a>
- Munguma, C. (2019). Criminal Law Enforcement of Intellectual Property Rights in Zimbabwe, *African Journal of Intellectual Property*, 2019 Vol 2 No 1
- Philip Morris (Thailand) Limited et al. v. Ministry of Public Health, Central Administrative Court, Case No. 1324/2556, (2013)
- Public Health (Control of Tobacco) Regulations, SI 164 of 2002 Zimbabwe
- Raslan, R.A.A. (2016). Are Trade Interests Shaping Intellectual Property Law? The Example of Plain- Packaging of Tobacco Products and Trademark Law’, *African Journal of Intellectual Property*, Vol 1 Number 1 p. 14



- Ruckert A, Ciurlia D, Labonte R, et al (2022). The Political Economy of Tobacco Production and Control in Zimbabwe: A documentary Analysis
- Rundh B. (2016). The role of packaging within marketing and value creation, *British Food Journal*, 118(10):2491-2511, DOI: 10.1108/BFJ-10-2015-0390
- Rusere, C, Y. (2018). Tobacco control in Zimbabwe and the WHO Framework Convention on Tobacco Control (WHO FCTC): State of Affairs, Master's thesis submitted to the University of Cape Town
- Sibanda, F, F. (2020, July 25). Outrage over Cigarettes Billboard at High School, *The Chronicle Newspaper*, <https://www.chronicle.co.zw/outrage-over-cigarettes-billboard-at-high-school/>
- Smith, N. N., (2020). The 4th Industrial Revolution Requires Strong Intellectual Property Laws: Where does Thailand Stand? *Walailak Journal of Science and Technology (WJST)*, 17(12), 1294-1306. <https://doi.org/10.48048/wjst.2021.6504>
- Smith C N, Kraemer J D, Johnson AC et al (2015). Plain packaging of Cigarettes: do we have sufficient evidence? *Risk Managing Health Policy*; 8: 21-30. doi: 10.2147/RMHP.S63042
- The Standardised Packaging of Tobacco Products Regulations of 2015, United Kingdom
- Tobacco Prevention Directives 2014/40/EU
- Tobacco Products Control Act 83 of 1993, South Africa
- Tobacco Prevention and Control Act, Thailand
- World Health Organisation 'Thailand becomes first in Asia to introduce tobacco plain packaging; WHO commends efforts' (2019) <https://www.who.int/thailand/news/feature-stories/detail/thailand-becomes-first-in-asia-to-introduce-tobacco-plain-packaging-who-commends-efforts>
- World Health Organisation Framework Convention on Tobacco Control 'Thailand: the plain packaging legislation enters into force' (2019), United Nations WHO Framework Convention on Tobacco Control <https://untobaccocontrol.org/impldb/thailand-the-plain-packaging-legislation-enters-into-force/>
- World Health Organisation Framework Convention on Tobacco Control, United Nations
- Zvolska, K. and Kralikova, E. (2019). Cigarette Plain Packaging - Facts and Myths, *Hygiene*, 64 (2): 60-66 doi: z1101/hygiene.a171





