



Zeitschrift für das gesamte Lebensmittelrecht

22. Juni 2018

45. Jahrgang

Seiten 299–430

Inhalt

Editorial

Unland, Petra-Alina/Grube, Markus
Von Topflappen, Steinkrügen und Pommes Frites 299

Abhandlungen

Schroeder, Werner
Nationale Höchstmengen und Warenverkehrsfreiheit .. 302
Shmatenko, Leonid/Shaverdov, David K.
Packaging-Related Measures for Alcohol and Unhealthy Food and their Impact on Trademarks – The Perspective of Article 17(2) CFRE 315
Schneiderhan, Peter
Artikel 139 Kontroll-VO 2017/625 – Kontrollverstöße als Straftatbestand gegen Amtsträger 336

Rechtsprechung

Bundesgerichtshof, Urteil vom 6.12.2017 – VIII ZR 245/16 – „Untersuchungspflicht bei mangelhafter Futtermittellieferung“ – § 276 Abs. 1 S. 1, § 280 Abs. 1, § 305c Abs. 2, § 307 Abs. 1 S. 1, Abs. 2 Nr. 1, § 434, § 437 Nr. 3 BGB; § 110 VVG; § 24, § 40 LFGB; § 15 Nr. 2, Nr. 4 AGB-GROFOR; § 377 Abs. 1, Abs. 2 HGB – Zur verschuldensunabhängigen Haftung des Futtermittelunternehmers – Anforderungen an die schlüssige Darstellung eines Handelsbrauchs – Unwirksamkeit der Formalklausel zur Untersuchungspflicht 349

Funk, Sebastian

Verschuldensunabhängige Haftung des Futtermittelverkäufers und Untersuchungspflichten des Futtermittelkäufers 261

Oberlandesgericht Hamburg, Urteil vom 26.10.2017 – 3 U 65/17 – „Gut für die Stimme“ – §§ 8 Abs. 1 u. 3, 3a UWG; Art. 2 Abs. 2 Nr. 5, Art. 1 Abs. 3 u. 4, 10 Abs. 1 u. 3, Art. 28 Abs. 5 Verordnung (EG) Nr. 1924/2006 – „Gut für die Stimme“ ist eine spezifische gesundheitsbezogene Angabe – Keine Anwendbarkeit

der Übergangsregelung für Botanicals ohne Bezug auf konkrete Pflanzenstoffe – „Gut für die Stimme“ geht über die Bezeichnung als Hustenbonbon hinaus 365

Holle, Martin

Schlecht für die Stimmung: Widersprüche zwischen deutscher und europäischer Rechtsanwendungspraxis.. 379

Oberlandesgericht Hamburg, Urteil vom 22.3.2018 – 3 U 250/16 – „Plattformverbot bei Nahrungsergänzungsmitteln“ – Art. 101 Abs. 1 und 3 AEUV; Art. 1 lit. e), 2 Abs. 1, 4 lit. c) Verordnung (EU) Nr. 330/2010; §§ 1, 19, 20 GWB – Einrichtung eines diskriminierungsfrei angewendeten qualitativen selektiven Vertriebssystems – Kein Verstoß gegen Art. 101 Abs. 1 AEUV oder § 1 GWB auch bei nicht technisch hochwertigen Erzeugnissen oder Luxusgütern – Zur Zulässigkeit der Untersagung des Vertriebs über eine bestimmte Online-Verkaufsplattform 384

Eggers, Christofer

Plattformverbot im selektiven Vertrieb – Ping Pong oder Klärung? 397

Stellungnahmen und Berichte

Groß, Detlef/Windhausen, Manuela

Aktuelle Entwicklungen im Trinkwasserrecht und Aufbereitung in der Lebensmittel-Industrie 402

Weimann, Mónica/Sánchez Weickgenannt, Cristina

Das spanische „Wundermitteldekret“ 421

Wallau, Rochus

Warum nicht auch im Lebensmittelsektor? Anmerkungen zu Moosmayer/Hartwig, Interne Untersuchungen, 2. Aufl. 2018 426

Die Autoren 428

Packaging-Related Measures for Alcohol and Unhealthy Food and their Impact on Trademarks – The Perspective of Article 17(2) CFRE

Rechtsanwälte *Leonid Shmatenko*, Geneva, and *David K. Shaverdov*, Düsseldorf *

Many packaging-related measures are discussed or even applied yet to prevent or reduce the excessive consumption of alcoholic drinks or food regarded as unhealthy because of high amounts of fat, saturated fatty acids, sugar or salt. Model for them are measures partially regulated for tobacco products like, e.g., health warnings or plain packaging. They have an impact on the value and usability of trademarks. The authors examine the compatibility of such measures for foodstuffs with the right to (intellectual) property of Art 17 CFRE.

I. Introduction

According to the World Health Organization (WHO), 56 million people died worldwide during 2012. 38 million (68 %) of those deaths can be attributed to non-communicable diseases (NCDs), including cardiovascular diseases, diabetes, cancer and chronic respiratory diseases.¹ NCDs are strongly associated with and causally linked to four particular human behaviours: tobacco use, physical inactivity, unhealthy diet and the excessive consumption of alcohol.² Further, these behaviours are not only linked with NCDs, but are associated with adverse mental and sociological impacts on individuals. For instance, recent studies of these behaviours prove that if consumption begins at an early age,³ when peer groups consider “smoking and drinking [to be] a desired behaviour [that] is used as a ritual to demonstrate group cohesion”,⁴ it can lead to addiction.⁵

In an attempt to curb tobacco usage, on 1 December 2012, Australia introduced plain packaging for tobacco products. It was the first interventionist measure by a government to protect its citizens from a perceivably harmful lifestyle choice.

Two years later, namely, on 14 March 2014, the Council of the EU and the European Parliament adopted the new EU Tobacco Products Directive. Although the Directive

* The views expressed herein are the authors' own. The authors' thank Ms. Michelle Larin, Legal Counsel at the Port Authority of New South Wales, for her input and suggested technical edits.

1 *World Health Organization*, Global status report on noncommunicable diseases 2014, p. xi.

2 *Id.*, at p. 14.

3 Cf. e.g. *Blomeyer, Friemel et al.*, Impact of pubertal stage at first drink on adult drinking behavior, *Alcoholism: Clinical and Experimental Research* vol. 37 (2013) pp. 1804–1811.

4 *Lesch, Walter et al.*, Alcohol and Tobacco Medical and Sociological Aspects of Use, Abuse and Addiction, Springer 2011, p. 42.

5 *Pretlow*, Addiction to Highly Pleasurable Food as a Cause of the Childhood Obesity Epidemic: A Qualitative Internet Study, *Eating Disorders* 19 (2011) 295 – 307.

ZLR 3/2018 *Shmatenko/Shaverdov*, Packaging-Related Measures for Alcohol and Unhealthy Food and Their Impact on Trademarks

does not prescribe plain packaging *per se*, it expressly permits any Member State to, at their discretion, advance beyond the combined warnings and labelling requirements prescribed in the Tobacco Directive to mandate plainly branded tobacco products. As a result, the United Kingdom and Ireland adopted plain packaging in 2014 and others, such as France and Sweden, began evaluating the introduction of plain packaging for tobacco products, marking the start of a global battle to combat unhealthy lifestyle behaviours.

Following the initial success of plain packaging for tobacco products⁶ in Australia, other governments considered introducing plain packaging for other products such as alcohol and foods that are high in fat, salt or sugar (HFSS). Although few health warning label laws have been introduced worldwide, such labelling laws are instrumental in progressing the promotion of healthy lifestyle choices.

For example, in 2010 Thailand attempted to introduce labels, which would cover 30 percent of a liquor bottle's surface area and include explicit warnings on risks associated with alcohol consumption.⁷ However, Australia and other nations intervened and claimed that such labels breached the WTO Agreement on Technical Barriers to Trade (TBT-Agreement). Accordingly, Thailand was forced to consider less trade-restrictive alternatives, which ultimately led to a modification of the law. Despite Thailand's failing, in 2014 Turkey proposed a new law prescribing pictorial warnings on alcoholic beverages⁸ and forbidding any kind of advertisement of such products.⁹ Furthermore, although not actively discussed among governments, experts also proposed to "put health warnings on sugary drinks"¹⁰ and other HFSS foods or lifestyle products.

On 29 April 2015, the EU Parliament adopted a new resolution¹¹, urging the EU Commission to submit a new alcohol strategy to include plans for labelling the calorie content of alcoholic beverages.¹²

6 *Mays, Niaura et al.*, Cigarette packaging and health warnings: the impact of plain packaging and message framing on young smokers, *Tobacco Control* (2014), 1–6.

7 *Barta and Passariello*, Global Liquor Makers Fight Graphic Labels in Thailand, *The Wall Street Journal*, 17 September 2010, <http://online.wsj.com/news/articles/SB10001424052748704392104575475513718846130>.

8 Cf. Communiqué on Warning Messages to be Affixed on the Packaging of Alcoholic Beverages, http://www.oneillinstitutetradeblog.org/wp-content/uploads/2013/11/13_3072_00_e.pdf.

9 See Turkish law forbids alcohol advertising, *news.com.au*, 7 June 2014, <http://www.news.com.au/world/breaking-news/turkish-law-forbids-alcohol-advertising/story-e6frfkui-1226946685856>.

10 *Hope*, Put health warnings on sugary drinks: Experts say soft drinks should be treated like cigarettes, *The Daily Mail Online*, 27 May 2014, <http://www.dailymail.co.uk/health/article-2641069/Put-health-warnings-sugary-drinks-Experts-say-soft-drinks-treated-like-cigarettes.html>; Plain packaging for fizzy drinks 'in the next 10 years', *One News*, 30 May 2014, <http://tvnz.co.nz/national-news/plain-packaging-fizzy-drinks-in-next-10-years-5985869>.

11 European Parliament, Motion for a Resolution further to Question for Oral Answer B8-0108/2015 pursuant to Rule 128(5) of the Rules of Procedure on Alcohol Strategy (2015/2543(RSP)), 22 April 2015, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B8-2015-0357+0+DOC+PDF+V0//EN>.

12 *EurActiv.com*, Parliament urges Commission to submit new alcohol strategy, 30 April 2015, <http://www.euractiv.com/sections/health-consumers/parliament-urges-eu-commission-submit-new-alcohol-strategy-314211>.

NCDs are complex and any regulatory mechanisms governments seek to impose with the aim of encouraging their citizens to live healthier lifestyles is likely to generate a multitude of legal issues for consideration.

Consequently, the first part of this paper discusses in brief the history of the world's public health policy regarding unhealthy dieting practices and alcohol consumption (II.), whilst the second part addresses the possible violations of the right to intellectual property (as it can be found in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union (III.)) and potential further regulation that may occur in this area (IV.).

II. Development of the World's Public Health Policy in Nutrition and Alcohol in a Nutshell

The history of the world's public health policies and initiatives in nutrition are a relatively new phenomenon. Whereas alcohol has been subject to several prohibition periods in countries including the USA,¹³ Russia¹⁴ (and USSR¹⁵), Norway¹⁶ and Finland,¹⁷ unhealthy diets have evaded such limitations.

However, it is worth noting that while alcohol has been known to human beings since the pre-historic era,¹⁸ the prevalence of an unhealthy diet, represented by industrially manufactured and fast prepared food only gained salience in the late 1940's, early 1950's with the invention of the McDonald's brothers' "Speedy Service System" and its later purchase by Ray Kroc.¹⁹ Both junk food and HFSS food (high-fat, high-salt, and high-sugar) in general led to a change of the modern nutrition. Experiences have shown that there is a high degree of food insecurity in households with incomes

13 18th Amendment of the United States Constitution, Prohibition of Liquor, Passed by Congress 18 December 1917. Ratified 16 January 1919. Repealed by the 21st Amendment, 5 December 1933. See text at <http://constitutioncenter.org/constitution/the-amendments/amendment-18-liquor-abolished>.

14 See for the description of the prohibition campaign of the late Russian Empire *e.g.* *Herlihy*, *The Alcoholic Empire: Vodka & Politics in Late Imperial Russia* (Oxford University Press, 2001).

15 See *e.g.* Decree No. 850 of the Ministry of Health of the USSR, dated 25 June 1985, "On Measures to Fight Alcoholism", available in Russian at http://www.lawrussia.ru/bigtexts/law_2546/index.htm. These measures were preceded by several prohibition campaigns in 1918, 1929, 1958 and 1972.

16 See for the history of the Norwegian prohibition between 1914 and 1927 the website of the Norwegian monopolist "Vinmonopolet" at <http://www.vinmonopolet.no/artikkel/om-vinmonopolet/in-english/history-233864>.

17 The Finish prohibition was introduced in 1919 and lifted after a referendum held in 1931. The statistics are available at https://www.doria.fi/bitstream/handle/10024/67217/kieltol_1931.pdf?sequence=1. Thereupon the public Alcohol Monopoly "Alko" has been founded, which to date has the monopoly on all alcoholic beverages above 4.7 % of alcohol.

18 *Sherratt*, "Cups that cheered: the introduction of alcohol to prehistoric Europe" in Waldren, W.; Kennard, R.C. (eds.) *Bell Beakers of the Western Mediterranean: definition, interpretation, theory and new site data*. The Oxford International Conference 1986. Oxford: British Archaeology Reports. pp. 81–114.

19 *Schlosser*, *Fast Food Nation – What the All-American Meal is Doing to the World* (Penguin 2002, iBooks Edition), p. 53.

at the level of the UK national minimum wage or lower²⁰ thus leading to a rise in obesity.²¹ Early initiatives to improve public health by nutrition policies only arose after the first findings of the health effects in the early 1990's²² and increased in the 2000's²³, eventually reaching an all-time high in 2015. These newer initiatives will be the subject of the following section.

III. Intellectual Property, ECHR and CFRE

Any effort to impose mandatory consumer information schemes is likely to entail significant legal consequences. In particular, consumer information schemes such as warnings may clash with a set of fundamental rights, such as the right to freedom of expression and the right to property insofar as it encompasses intellectual property rights. Mandatory pictorial health warnings or even plain packaging, when confronted with its compatibility with the right to (intellectual) property of Art 17 Charter of Fundamental Rights of the European Union (CFRE), might lead to unforeseen consequences for both the legislator and the manufacturers. Whenever the state as a legislator takes the initiative to stress the manufacturer's social obligations of its property, the latter sees an infringement of its (intellectual) property and economic interest.

It is against this backdrop that this article discusses whether consumer information schemes, such as pictorial warnings and other labelling schemes currently spreading across industries are likely to breach the right to intellectual property contained in Art 17(2) CFRE. It also evaluates whether such breaches are justified by the means of the protection of public health.

1. The Right to (Intellectual) Property – Article 17 CFRE

The right to property is considered a key fundamental right in the European constitutional law. Without a market-based prerequisite of private property, numerous regulations of the European business constitutional law would become futile.²⁴

According to Art 17(1) CFRE, “[e]veryone 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[.] [...] The use of property may be regu-

20 *Tingay, et al.*, Food insecurity and low income in an English inner city, 25(2) *Journal of Public Health Medicine*, pp. 156–169.

21 See *e.g. Swinburn, et al.*, The global obesity pandemic: shaped by global drivers and local environments, DOI: [http://dx.doi.org/10.1016/S0140-6736\(11\)60813-1](http://dx.doi.org/10.1016/S0140-6736(11)60813-1),

22 *Willett*, Challenges for public health nutrition in the 1990s, *American Journal of Public Health* 80.11 (1990), 1295–1298.

23 *Pereira, et al.* “Fast-food habits, weight gain, and insulin resistance (the CARDIA study): 15-year prospective analysis”, *The Lancet* 365.9453 (2005), 36–42.

24 Cf. *Calliess*, in *Calliess/Ruffert*, EUV/AEUV, (4th ed, Beck 2011) Art 17 CFRE, para. 1; *Ruffert*, *Die Wirtschaftsverfassung im Vertrag über eine Verfassung für Europa*, Zentrum für Europäisches Wirtschaftsrecht, Vorträge und Berichte, Nr. 144, Bonn 2004.

lated by law in so far as is necessary for the general interest". In accordance with Art 17(2) CFRE "[i]ntellectual property shall be protected". In this context, the protection of intellectual property is explained.

a) Scope of Protection

The scope of protection of Art 17 CFRE is comparable to Art 1(1) of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which provides that "[e]very 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," thus, protecting legal entities.

Nevertheless, for plain packaging and health warnings, a different view will need to be adopted. It is undisputed that Art 17 CFRE guarantees only a certain level of protection incorporating a so-called grandfather clause, *i.e.* a basis of trust rendering the law inapplicable in certain circumstances due to pre-existing facts.²⁵ The grandfather clause is, according to the case law of the ECJ, limited to "vested rights" which need to be distinguished from mere odds and expectation.²⁶ Further, neither market shares nor legitimate expectations are protected.²⁷ To provide clarification, the following description points out the scope of application and protection of Art 17 CFRE by referring to the relevant case law.

Art 17(2) CFRE, which explicitly includes intellectual property covering patents and trademark rights, makes Art 17 CFRE also applicable in an objective way. Intellectual property means intangible goods, which have a property-like value that satisfies the threshold of originality.²⁸ It encompasses exclusive rights in intangible goods, such as literary and artistic property recognised and protected by copyright law, the patent and publishing law, as well as trademark law and alike.²⁹ Immaterial goods are, however, not protected by the means of Art 17(2) CFRE as long as they are accessible to anyone. This is illustrated by the *Winzersekt* case. Prior the *Winzersekt* case traders would market sparkling wine using the wording of "*méthode champenoise*" and subsequently convey an impression that the sparkling wine was similar to *Champagne*. However, Council Regulation (EEC) No. 2333/92 of 13 July 1992 regulated that an expression relating to a method of production which includes the name of a specified region or of another geographical unit, or a term derived from either of these, may only

25 See for the historical background of grandfather clauses: *Summers* "The "Grandfather Clause"" 7 Law & Banker; S Bench B Rev (1914), 39.

26 *Calliess*, in *Calliess/Ruffert* (eds), EUV/AEUV (4th ed, Beck 2011), Art 17 CFRE, margin no 8.

27 *SA Biovilac NV v European Economic Community*, ECJ Case 59/83, Judgment of 6 December 1984, para. 22 *et seq.*; *Alessandrini Srl and Others v Commission of the European Communities*, ECJ Case C-295/03 P, Judgment of 30 June 2005, para.55; *Alliance for Natural Health and others*, Joined Cases C-154/04 and C-155/04, Judgment of 12 July 2005, para. 128.

28 *Jarass*, Charta der EU-Grundrechte, Art 17, margin no. 9.

29 *Balan v Moldova*, App No. 19247/03, [2008] ECHR 81; [2009] ECDR 6, para. 34 *et seqq.*; see also *The Queen v Licensing Authority*, ECJ Case C-368/96, [1998] ECR I-7967, para.78.

ZLR 3/2018 *Shmatenko/Shaverdov*, Packaging-Related Measures for Alcohol and Unhealthy Food and Their Impact on Trademarks

be ascribed to a quality sparkling wine from the region. The ECJ, referring to Art 1(1) of Protocol No. 1 ECHR held that “[w]ith regard to the infringement of the right to property alleged by Winzersekt, the designation ‘*méthode champenoise*’ is a term which, prior to the adoption of the regulation, all producers of sparkling wines were entitled to use. The prohibition of the use of that designation cannot be regarded as an infringement of an alleged property right vested in Winzersekt.”³⁰

Explicitly referring to Art 17(2) CFRE and the decision in *Winzersekt*, in 2005 the ECJ adopted a similar approach in the *Friuli-Venezia Giulia* case, where it considered further limitations of the term ‘*Tocai friulano*’ for the description and presentation of certain Italian quality wines.³¹

These examples clearly demonstrate that insofar as only immaterial goods are affected which are moreover accessible to an unlimited target group, the scope of protection of Art 17 (2) CFRE is not established. In respect of plain packaging and health warnings it means that these regulatory measures need to be exceeding in the level of interference.

Furthermore, the emphasis of intellectual property in Art 17(2) does not represent a renunciation from the principles set forth in Art 1(1) of the Protocol No. 1 to the ECHR.³² Intellectual property rights are undoubtedly protected by the ECHR.³³ Even if there are only few decisions of the ECtHR relating to intellectual property, it is quite clear that the latter is protected as a fundamental right.³⁴ Art 1(1) of the Protocol No. 1 to the ECHR provides for an “autonomous meaning” that leaves it to the discretion of the ECtHR to adopt decisions “whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by” Art 1(1) of the Protocol No. 1 to the ECtHR.³⁵

30 *SMW Winzersekt GmbH v Land Rheinland-Pfalz*, ECJ Case C-306/93, Judgment of 13 December 1994, para.23.

31 *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestali*, ECJ Case C-347/03, [2005] ECR I-3785, paras. 118–134.

32 *Grabewarter*, ‘Die Charta der Grundrechte der Europäischen Union’, DVBl. 2001, 5. Cf. for a different opinion *Depenheuer*, in Tettinger/Stern (eds), Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta (Beck 2006), Art. 17 margin no. 29. In that regard Art 17(2) CFRE seems to indicate a higher protection threshold of intellectual property than the one in Art 17(1) CFRE. On the contrary, it shall be mentioned that its protection is not diminished just because the *travaux préparatoires* speak of a *mutatis mutandis* application of Art 17(1) CFRE.

33 See *Peukert*, in Frowein/Peukert (eds), Europäische Menschenrechtskonvention (Beck 2009), p 768; *Peukert*, Der Schutz des Eigentums nach Art. 1 des Ersten Zusatzprotokolls zur Europäischen Menschenrechtskonvention, EuGRZ 1981, p. 103; *Riedel*, Entschädigung für Eigentumsentzug nach Artikel 1 des Ersten Zusatzprotokolls zur Europäischen Menschenrechtskonvention: Zur Herausbildung eines gemeineuropäischen Standards, EuGRZ 1988, p. 334; but also the decision of the ECtHR in *Smith Kline & French Lab Ltd v The Netherlands*, App No. 12633/87, [1990] ECDR 70, 79 (admissibility decision).

34 See e.g. regarding patent law *British American Tobacco Company Ltd. v The Netherlands*, Judgement of 20 November 1995, Series A no. 331. See also *Anheuser-Busch Inc v. Portugal*, App No. 73049/01, [2007] ECHR 40; *Paeffgen GmbH v Germany*, App no 25379/04 et al., [2007] ECHR 25379/04, available at [http://hudoc.echr.coe.int/eng?i=001-82671#{"itemid":\["001-82671"\]}](http://hudoc.echr.coe.int/eng?i=001-82671#{); and *Balan v. Moldova*, App No. 19247/03, [2008] ECHR 81; [2009] ECDR 6.

35 *Öneryıldız v Turkey*, App No. 48939/99, [2004] ECHR 657, at p. 127 (Grand Chamber).

The ECtHR subsequently applied this standard and expanded its boundaries on the most economically important types of tangible and intangible property. This includes land, chattels, licenses, leases, contractual rights, corporate securities, business goodwill and, as described in detail below, intellectual property.³⁶

In this context, one particular case, *i.e. Anheuser-Busch Inc. v Portugal* will be outlined³⁷. It is a dispute between two breweries, the American brewery conglomerate *Anheuser-Busch* and its rival *Budejovický Budvar*, which became a classic in modern intellectual law. The competitors raged nearly fifty disputes across Europe with a particular emphasis on the question concerning the relationship between trademarks and regional specifics and between national and international property laws. It began in 1981 when *Anheuser-Busch* applied to the National Institute for Industrial Property to register “Budweiser” as a trademark. *Budejovický Budvar* opposed the registration, citing its 1968 Portuguese registration of an appellation of an origin for “Budweiser Bier”.³⁸ In 1995 a lower court ruled in favour of *Anheuser – Busch*, stating that “Budweiser Bier” is not a valid appellation of origin as defined in the *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration*. As a result of this ruling the industrial property office registered *Anheuser-Busch*’s trademark.³⁹ In response, the Czech brewer applied to Portuguese courts, invoking a 1986 bilateral treaty between Czechoslovakia and Portugal that provided reciprocal protection for each country’s indications of source and appellations of origin. *Budejovický* believed that the bilateral agreement required Portugal to register “Budweiser Bier”. Yet the lower court held that only “Ceskobudejovický Budvar”, namely a Czech phrase indicating a beer from České Budejovice region in Bohemia where the brewer is based, was an appellation of origin.⁴⁰ The legal dispute was escalated to the Supreme Court of Portugal, which affirmed an intermediate appellate court decision to cancel *Anheuser-Busch*’s trademark.⁴¹ The court ruled that the 1986 bilateral treaty protects each signatory’s national products in translation as well as in their original language. Therefore, the German name of České Budejovice, namely Budweis was eligible for protection under the named treaty. With this verdict, the Portuguese litigation came to an end.⁴² The American brewery conglomerate filed a complaint to the ECHR and argued that the Portuguese Supreme Court had expropriated its property when it invoked the 1986 bilateral treaty between Czechoslovakia and Portugal. In this regard, the ECtHR held: that both (a) registered trademarks and (b) applications to register such trademarks fall within the sphere of the ECHR. However, applying the facts to the case, the ECtHR held that the Portuguese

36 *Helper*, ‘The New Innovation Frontier? Intellectual Property and the European Court of Human Rights’, 49(1) *Harvard International Law Journal* 1, 8.

37 *Anheuser-Busch Inc v. Portugal*, App No. 73049/01, [2007] ECHR 40.

38 *Helper*, in: Torremans (ed.), *Intellectual Property and Human Rights (Third Edition)*, pp 43 *et seq.*

39 *Helper*, in: Torremans (ed.), *Intellectual Property and Human Rights (Third Edition)*, p. 44.

40 *Anheuser-Busch Inc v. Portugal*, App No. 73049/01, [2007] ECHR 40, p. 7, para. 21.

41 *Helper*, in: Torremans (ed.), *Intellectual Property and Human Rights (Third Edition)*, p. 45.

42 *Anheuser-Busch Inc v. Portugal*, App No. 73049/01, [2007] ECHR 40, p. 8, para. 24; *Laurence R Helper*, in: Torremans (ed.), *Intellectual Property and Human Rights (Third Edition)*, pp. 45 *et seq.*

ZLR 3/2018 *Shmatenko/Shaverdov*, Packaging-Related Measures for Alcohol and Unhealthy Food and Their Impact on Trademarks

government had not violated Art 1 of the Protocol No. 1 to the ECHR. The ECHR's judgment "reflects the widely-held belief that those who produce 'intellectual property' should in one way or another enjoy protection on the level of human rights".⁴³ Subsequently, the ECtHR ruled that patents, trademarks, copyrights, and other economic interests in intangible goods are protected by the ECHR.⁴⁴

Hence, it can be effortlessly argued that such trademarks as the "contour bottle" by Coca-Cola, the "bottle" of the Crystal Head Vodka, the steel bottle of Danzka, or the PEZ dispenser and other containers for alcoholic beverages and HFSS foods, which are protected by trademark laws, fall under the protection of Art 17 CFRE.

The case for labels and logos and the use of a brand should, however, be distinguished from the one above. Although Art 17(2) CFRE encompasses intellectual property, it remains disputed whether the right is a positive right. Legal scholars such as *Schroeder*⁴⁵ or the expert opinion of the *Bund für Lebensmittelrecht und Lebensmittelkunde* (BLL)⁴⁶ refer to the *L'Oreal*⁴⁷ case of the ECJ stating that the scope of protection of Art 17 CFRE does not only encompass the guarantee of the existence of a brand but also the positive right of use by the owner, as well as the negative right to exclude third parties from using it.

This opinion cannot be shared. Entitlements in intellectual property law are generally considered to be negative rights.⁴⁸ This means that these rights prevent others from carrying out specified acts rather than positive rights of use.⁴⁹ Art 17 CFRE encompasses provisions made to safeguard existing standards and thus a protection of legitimate expectations of the owner is guaranteed. However, such a protection of legitimate expectations is limited by ECJ case law that protects only vested rights,⁵⁰ which need to be explicitly distinguished from expectations and odds.⁵¹ Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of general interest pursued by the institutions of the EU.⁵²

43 *Beiter*, "The Right to Property and the Protection of Interests in Intellectual Property: A Human Rights Perspective on the European Court of Human Rights' Decision in *Anheuser-Busch Inc. v. Portugal*" 39(6) *International Review of Intellectual Property and Competition Law* (2008), 714.

44 See *Dima v Romania*, App No. 58472/00, para. 87 (admissibility decision); *Melnychuk v Ukraine*, App No. 28743/03, para. 8; *Anheuser-Busch Inc v Portugal*, App No. 73049/01, [2007] ECHR 40, at p. 42.

45 *Schroeder*, *Plain Packaging und EU-Grundrechte*, ZLR 2012, 405, at p. 411.

46 *BLL*, *Einheitsverpackungen als Instrument des Verbraucherschutzes*, ZLR 2012, 388, at p. 391.

47 *L'Oreal*, ECJ Case C-487/07, Judgment of 18 June 2009, para. 56.

48 See for a more detailed discussion: *Griffiths*, "On the back of a cigarette packet" – standardised packaging legislation and the tobacco industry's fundamental right to (intellectual) property, [2015] *Intellectual Property Quarterly* 343–369.

49 *Id.*

50 *Raymond Elz v Commission of the European Communities*, Case 58-69, Judgment of 25 June 1970, paras. 18 and 20; *'Eridania' Zuccherifici Nationali and Others v Commission*, Case 230/18, Judgment 27 September 1979, para. 22.

51 *Callies* in: *Callies and Ruffert* (eds.), *EU/AEUV*, (4th ed, Beck 2011), Art 17, para. 8; *Jarass* in: *Jarass* (ed.), *Charta der Grundrechte der Europäischen Union* (Beck 2010), Art 17, para. 13.

52 *Eridania' Zuccherifici Nationali and Others v Commission*, Case 230/18, Judgment 27 September 1979, para. 22; *Firma Werner Faust v Commission*, Case 52/81, Judgment of 28 October 1982, para. 27; *Ralf-Herbert Kühn v Landwirtschaftskammer Weser-Ems*, Case C-177/90, Judgment of 10 January 1992, para.

Commencing from this premise, alcohol and HFSS food producers enjoy legitimate expectations of the appearance of packaging and the interwoven brands. However, these legitimate expectations find their limits in the discretionary acts of the EU and the social obligation of the right to property. Other than tobacco policy, health policy in regard to alcohol and HFSS food has only emerged in recent years. Thus, the scope of protection of Art 17(2) CFRE encompasses the legitimate expectations of alcohol and HFSS food producers regarding their brands.⁵³

b) Possible Infringements

Given that alcohol and HFSS food producers are covered by the scope of protection of Art 17(2) CFRE, it is questionable whether the possible restrictions would constitute an infringement of the right to property.

An infringement of the right to property has different facets. First and foremost, by means of a direct expropriation, Art 17(1) sentence 2 CFRE; meaning the complete and permanent deprivation of property⁵⁴. Second, by means of a *de-iure* expropriation, *i.e.* by the transfer of a person's property to the state or a third party.⁵⁵ Third and finally, by so-called *de-facto* expropriation.⁵⁶ *De-facto* expropriation can be defined as a substantial loss of control or economic value of property without a physical taking.⁵⁷

As a consequence of Art 17 resemblance of Art 11(1) sentence 2 and (2) ECHR, the ECtHR test requires "that the property rights are rendered totally valueless, *i.e.* the investor has been definitely and fully deprived of the ownership of his property."⁵⁸ Hence, a *de-facto* expropriation – in contrast to a *de-iure* expropriation – requires the property owner to prove that their position is reduced to a minimum so that he is unable to exploit his rights, rather than the deprivation of the ownership.

However, no infringement might be assumed if the state introduces control of use of (intellectual) property according to Art 17(1) sentence 3 CFRE⁵⁹ that also applies to Art 17(2) CFRE. Such controlled use of property could apply to plain packaging and any labelling regulation, as they allow the government to regulate private property

13; *Federal Republic of Germany v Council of the European Union (Bananas)*, Case C-280/93, Judgment of 5 October 1994, para. 79.

53 *Jarass*, in: *Jarass, Charta der Grundrechte der EU*, Art. 17, para.10.

54 *Jarass*, *Grundrechte der EU* (2010), Art 17, para. 18.

55 *Zubani v. Italy*, Appl No. 14025/88, Judgment of 16 June 1999, ECHRR 1996-IV, paras.48 *et seq.*

56 See with further references *Hindelang*, Member State BITS – There's Still (Some) Life in the Old Dog Yet – Incompatibility of existing Member State BITS with EU Law and possible remedies – A Position Paper, in *Sauvant* (ed), *Yearbook on International Investment Law & Policy 2010–2011* (Oxford University Press 2012), p. 218, at p. 227.

57 With further references *Schreuer*, *The Concept of Expropriation under the ECT and other Investment Protection Treaties*, p. 8. Available at: http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf

58 *Sauvant*, *Yearbook on International Investment Law & Policy 2010–2011* (Oxford University Press, 2012), p. 227.

59 *EU Network of Independent Experts on Fundamental Rights*, *Commentary of the Charter of Fundamental Rights of the European Union*, p. 167.

ZLR 3/2018 *Shmatenko/Shaverdov*, Packaging-Related Measures for Alcohol and Unhealthy Food and Their Impact on Trademarks

in the public interest⁶⁰ which encompass the social duties of the proprietor.⁶¹ Therefore, it is the EU jurisdiction's obligation to determine the scope and limitations of the right to property.

Nevertheless, expropriations are rare to non-existent in the EU. Hence, the ECJ case law on the right to property is rather underdeveloped.⁶²

The following paragraphs will evaluate through law and fact whether or not health warnings or plain packaging for alcoholic beverages and unhealthy diet represent an infringement of the producers' right to property.

aa) The case for alcoholic beverages

The case for plain packaging or health warnings⁶³ or a combination of both for alcoholic beverages differs from the case for plain packaging of tobacco products.

(1) Plain packaging

Alcoholic beverages define themselves through different means of marketing, spanning from varied glass shapes⁶⁴ to special marketing efforts for young drinkers. Plain packaging for alcoholic beverages would prohibit the use of logos and brand names on any bottle; it would also lead to unification of bottle forms prohibiting any special shape.

Although this means that brands can still be used by the alcohol manufacturers for any other form of marketing, *e.g.* posters, postcards, bookmarks, pens, etc., as well as for internal use, this can, as outlined *infra*, amount to a *de-facto* expropriation.

The packaging of a beverage is effectually the "business card" of an alcohol producer, making it the most important form of advertisement for, and of, the relevant brand. It is, in essence, a "mobile advertising medium".⁶⁵ Prohibiting a certain glass shape – *e.g.* the typical "Danzka" bottle in a standardized bottle – will deprive the alcohol

60 *Id.*

61 *Mellacher v. Austria*, Appl No. 10522/83, 11011/84 and 11070/84, Judgment of 19 December 1989, Series A, No. 169; *Spadea and Scalabrino v. Italy*, Appl No. 12868/87, Judgment of 28 September 1995, Series A, No. 315 B.

62 *Streinz/Streinz*, EUV/EGV, Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union (2nd ed., Beck 2012), Art 17 CFRE, para. 10 with further references.

63 *E.g.* proposed graphic warnings by the Thai government: http://www.eurocare.org/library/updates/thailand_notifies_wto_members_of_plans_to_introduce_alcohol_warning_labels. The graphic warnings, which should have been proposed to cover not less than 30 % up to not less than 50 % of the total surface space of the package, were criticized by the EU stating that "[...] a label should provide adequate and correct information to consumers, and avoid being misleading." See http://ec.europa.eu/growth/tools-databases/tbt/tbt_repository/THA332_EN_4.pdf.

64 See *e.g. Attwood, et al.*, Glass Shape Influences Consumption Rate for Alcoholic Beverages, PLoS ONE 7(8): e43007. doi:10.1371/journal.pone.0043007.

65 See regarding plain packaging of tobacco products *Alemanno/Bonadio*, Do you mind smoking? Plain Packaging of Cigarettes under the TRIPS Agreement, 10 The John Marshall Review of Intellectual Property Law (2011), 450, 456.

producer of a significant form of advertising and its sole distinctive feature from other manufacturers. However, plain packaging does not involve the complete ban on the production of any alcoholic beverage and, moreover, it does not involve any confiscation of production sites. Alcohol manufacturers will be still permitted to produce their beverage with its original taste, although they will be required to present it in a uniform way. In this regard, early studies show that this might be not be particularly problematic as participants can distinguish between *e.g.* different brands of whisky.⁶⁶ Thus, even though they might not use their different-shaped glasses anymore, they can still utilise the brand.

Thus, plain packaging is a limitation of use in the sense Art 17(1) sentence 3 CFRE, which also applies to Art 17(2) CFRE.

(2) Pictorial Health Warnings

In respect of pictorial health warnings, the case has to be seen from another point of view. When assuming that alcoholic beverages would only be marketed with pictorial health warnings, one can directly deduce the parallelism between health warnings on alcoholic beverages and health warnings on tobacco products, which were introduced in the last decade.

Referring to graphic health warnings on tobacco packaging, the German Constitutional Court held that the duty to print graphic warnings would diminish the turnover and profits of the relevant company, but would not violate any protected property rights. The German Constitutional Court reasoned by invoking the scope of the right to property that protects the property of natural or legal persons, however, only insofar as they possess it in the present. The mere future possibility of obtaining the right to property or any economic opportunities is not protected.⁶⁷ Such a view has been confirmed by the ECJ in the *Tobacco Directive* case where it held that “[a]s regards the [...] the right to property, the Court has consistently held that, while that right 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.”⁶⁸ In the meantime, the ECJ has ruled in favor of those advocating for plain tobacco packaging laws and a ban on flavoured cigarettes. The court has found, that the European and Member state’s legislation did not infringe on free market and trade regulation by setting rules on tobacco product packaging, health warnings and

66 See *e.g. Campbell*, Ability to distinguish whisky (uisge beatha) from brandy (cognac), MJ: British Medical Journal 309.6970 (1994), 1686.

67 Decision of the German Constitutional Court, dated 22 January 1997, BVerfGE 95, 173, para. 67.

68 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.*, ECJ Case 491/01, Judgment of 10. December 2002, para.149 (references omitted).

ZLR 3/2018 *Shmatenko/Shaverdov*, Packaging-Related Measures for Alcohol and Unhealthy Food and Their Impact on Trademarks

a ban on flavoured cigarettes. Interestingly, the Court did not explicitly deal with the question whether the Regulation infringed the right to property. Rather it has transferred this question into the proportionality assessment. Within the scope of the proportionality test the court has ruled that the legal requirements are granted. Therefore, it judged that the disputed Directives “[...] must be interpreted as permitting Member States to maintain or introduce further requirements in relation to aspects of the packaging of tobacco products which are not harmonised by that directive”.⁶⁹

This judgment clarifies once again that the right to property is not an absolute right and must be viewed in relation to its social function. It is common knowledge that the long-term consumption effects of alcohol can lead to the so-called fetal alcohol syndrome and other NCDs. Also, the risks of long term tobacco consumption are commonly known across all generations. Any pictorial warning, even if it covered the back of the bottle, would point out the possible NCDs and not deprive the producer of its right to property. Hence, health warnings also represent only a limitation of use in the sense Art 17(1) sentence 3 CFRE which also applies to Art 17(2) CFRE.

(3) Conclusion

In summary, an infringement of the right to (intellectual) property of alcohol producers for health warnings and plain packaging cannot be affirmed.

bb) The case for unhealthy diet

The case for the unhealthy diet is, however, different again. Whereas tobacco has always been considered addictive and, from the 1960’s, harmful to health, the modern diet has been overlooked and, its detrimental effects, understated. Tobacco control was preceded by numerous legislative acts restricting its availability; however, unhealthy food has not been restricted in this way. Hence, the proposed suggestions to combatting an unhealthy diet encompass different approaches, such as *e.g.*

- Policies with increased taxes on unhealthy food and decreasing taxes on healthy foods; and
- Placing graphic warning labels on pop and other high-calorie foods with little to no nutritional value.⁷⁰

The main labelling measures require a separate evaluation of whether they would represent an infringement of the right to property under Art 17 CFRE.

However, the situation alters when referring to graphic warning labels. Research has focused on the effects of marketing on children’s food preferences, demands and con-

⁶⁹ Entire considerations see *Philip Morris Brands SARL v Secretary of State for Health and others*, ESJ Case 547/14, Judgment of 4 May 2016, in particular paras. 164 *et seqq.*

⁷⁰ *CBC News*, Ontario doctors urge junk food warning labels and taxes, available at <http://www.cbc.ca/news/health/ontario-doctors-urge-junk-food-warning-labels-and-taxes-1.1134148>.

sumption.⁷¹ Brands⁷² and packages aim to sell food⁷³ and beverages to children, with the result that very young children recognize popular brands.⁷⁴ When social, psychological and health researchers compare the responses of children to the same products either being wrapped in plain paper or in wrappers with company logos⁷⁵ or cartoon characters,⁷⁶ children regularly prefer the branded packaging.

The next paragraph will discuss whether graphic health warnings (1) and plain packaging (2) infringe the right to property.

(1) Graphic Warnings

As already described in the section referring to pictorial health warnings for alcoholic beverages, HFSS food producers must regard the social function of their intellectual property. Restricting the use of “fancy packaging” does not constitute a disproportionate and intolerable interference with the manufacturer’s intellectual property rights as the latter has to obey to its social duties. In that regard, the arguments regarding the Tobacco Directive, described *supra*, can be restated. As pointed out by the WHO, HFSS foods can cause high blood pressure, diabetes, abnormal blood lipids, overweight/obesity, cardiovascular diseases, and cancer.⁷⁷ Although these diseases are slightly different from the ones caused by tobacco products, it is the manufacturer’s social obligation to warn of these side-effects. Ultimately it is irrelevant whether the same diseases are caused by tobacco abuse or HFSS food. On this account, the standard of the social bond of the manufacturer are comparable. Thus, the ECJ’s line of argument can be transferred first, to unhealthy diet and second, to Art 17(2) CFRE.⁷⁸ Hence, a violation of Art 17(2) CFRE is – just as little as it is the case for tobacco – not present. Health warnings represent only a limitation of use in

71 Cf. e.g. *Gelperowic, Beharrell*, “Healthy Food Products for Children: Packaging and Mothers’ Purchase Judgments”, 96(11) *British Food Journal* (1994), 4–8; *Ogba, Johnson*, “How packaging affects the product preferences of children and the buyer behaviour of their parents in the food industry”, 11(1) *Young Consumers* (2010), 77–89.

72 *Robinson, et al.*, Effects of Fast Food Branding on Young Children’s Taste Preferences, 161(8) *Arch Pediatr Adolesc Med.* (2007), 792–797. doi:10.1001/archpedi.161.8.792.

73 *Mehta, et al.* (2012). Marketing foods to children through product packaging: prolific, unhealthy and misleading. *Public Health Nutrition* 15, 1763–1770. doi:10.1017/S1368980012001231.

74 *Connor*, Food-Related Advertising on Preschool Television: Building Brand Recognition in Young Viewers, 118(4) *Pediatrics* October 2006, 1478–1485; doi:10.1542/peds.2005-2837; *Arredondo et al.*, Brand Name Logo Recognition of Fast Food and Healthy Food among Children, 34(1) *Journal of Community Health* February (2009), 73–78.

75 *Cornwell et al.*, Children’s knowledge of packaged and fast food brands and their BMI. Why the relationship matters for policy makers, 81 *Appetite* (2014), 277–283.

76 *Keller, et al.*, The impact of food branding on children’s eating behavior and obesity, *Physiology & behavior* 106.3 (2012), 379–386; *Kraak/Story*, Influence of food companies’ brand mascots and entertainment companies’ cartoon media characters on children’s diet and health: a systematic review and research need, 16(2) *Obesity Reviews* (2015), 107–126. doi: 10.1111/obr.12237.

77 WHO, Global Strategy on Diet, Physical Activity and Health, available at: http://apps.who.int/iris/bitstream/10665/43035/1/9241592222_eng.pdf?ua=1.

78 In this sense *Gas*, Unheimliche Warnhinweise der heimlichen EG-Gesundheitsminister: grundrechtsfest?, *JURA* 2010, 700, 706.

ZLR 3/2018 *Shmatenko/Shaverdov*, Packaging-Related Measures for Alcohol and Unhealthy Food and Their Impact on Trademarks

the sense of Art 17(1) sentence 3 CFRE⁷⁹, which also applies to Art 17(2) CFRE.

(2) Plain Packaging

Plain packaging elevates the debate to another level. However, as discussed in the previous section dealing with plain packaging for alcoholic beverages, the arguments brought forward *supra* can be – without any prejudice – applied to plain packaging of unhealthy food.⁸⁰ Packaging is the most important form of advertisement. For both products, it serves as a “mobile advertising medium”.⁸¹ Just as discussed in the context to alcoholic beverages the obligation to a coherent imaging is a limitation of use in the sense Art 17(1) sentence 3 CFRE, which also applies to Art 17(2) CFRE. An infringement of the right to (intellectual) property of (unhealthy) food producers however cannot be assumed. Therefore, the question concerning a possible justification does not arise.

c) The EFTA's Decision on Alcoholic Beverages and Justification

In 2012, the EFTA Court had a distinct opportunity to position itself upon packaging regulations in *HOB-vín ehf. v The State Alcohol and Tobacco Company of Iceland*. However, it passed on doing so. Instead, it briefly addressed the issue regarding special labelling related to the alcohol concentration of alcoholic beverages in the context of Art 11 EEA.⁸² As the judiciary failed to seize the opportunity to espouse a legal view on the merits of pictorial warnings and plain packaging impacting upon the right to intellectual property, it is the author's attempt to find principles of justification beyond the mentioned case. An essential and determining influence on that question is whether or not these measures are proportionally *sensu lato*.

aa) Suitability

The first question that arises is whether pictorial warnings or plain packaging for alcoholic beverages are suitable to achieve the aim of decreasing the number of NCDs. Suitability will be affirmed if it can be substantively shown that a certain

79 Cf. with further references *Alemanno*, Out of Sight Out of Mind – Towards a New EU Tobacco Products Directive, *Columbia Journal of European Law* 2012, 40; *Alemanno/Bonadio*, Plain Packaging of Cigarettes under EU Law, in: Mitchell, Voon and Liberman (eds.), *Public Health and Plain Packaging of Cigarettes: Legal issues* (Cheltenham 2012), 232; *Henning/Shmatenko*, Tobacco Control in Europe: The Potential for Plain Packaging, in: Mitchell, Voon and Gascoigne (eds), *International Legal Dimensions of Tobacco Control* (Edward Elgar 2014), pp. 187–208.

80 See *supra*.

81 Already *supra*, *Alemanno/Bonadio*, Do you mind smoking? Plain Packaging of Cigarettes under the TRIPS Agreement, 10 *The John Marshall Review of Intellectual Property Law* (2011), 450, 456.

82 *HOB-vín ehf. v The State Alcohol and Tobacco Company of Iceland (ÁTVR)*, Case E-2/12, Judgment of 11 December 2012, [2012] OJC C 291/13.

Shmatenko/Shaverdov, Packaging-Related Measures for Alcohol and Un-healthy Food and Their Impact on Trademarks ZLR 3/2018

evolution can be expected.⁸³ Whenever economically complex and factually heavy cases, such as involving a common market, arise, the ECJ grants the states a rather big discretion and deems it as sufficient if the measure is not *prima facie* unsuitable.⁸⁴

Health researchers commenting in several studies have almost universally suggested that warning labels have the potential to contribute to positive outcomes as part of a larger range of more proven strategies, and especially if they are enhanced so as to be more noticeable, impactful and varied.⁸⁵ However, recent studies on alcohol health warnings have proven that they do not have a strong effect on influencing recall, perceptions, and behaviours. Poorly visible and ambiguous health warnings, together with the absence of pictorial warnings, muddy previous studies.⁸⁶ That said, researchers note that “[b]ased on existing evidence, labels that borrow elements from both foodstuffs (nutritional information) and tobacco (health warnings) appear to constitute the best approach to deal with the dual nature of alcohol, which is both a dietary element and a drug.”⁸⁷ In respect of labelling, the affirmative studies *supra* show that the measure is not *prima facie* unsuitable. Hence, the health warnings have proven to be suitable to reduce harmful drinking behaviours. The same applies to plain packaging of alcoholic beverages.

bb) Necessity

According to Art 52(1) sentence 2 CFRE – which also applies to intellectual property in the sense of Art 17(2) CFRE – a measure is necessary if there are no alternative measures that can be taken by the state, which are equally efficient but less or equally intrusive.⁸⁸ Compared to the fundamental freedoms set forth in Art 34 – 36 TFEU, where the ECJ, when addressing the requirement of necessity, allowed the Member State to exercise their discretionary powers but concurrently held that these powers must not be used in a manner which diminishes the effectiveness of a fundamental freedom⁸⁹, necessity is simply a minor and unimportant requirement when

83 *Agricola Commerciale Olio Srl and others v Commission of the European Communities*, Case C-223/81, [1981] ECR 2193, para. 18 *et seq.*

84 *Federal Republic of Germany v Council of the European Union*, Case C-280/93, Judgment of 5 October 1994, [1994] ECR I-4973 [91]; *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.*, Case C-491/01, Judgment of 10 December 2002, [2002] ECR I-11453, margin no 123; *The Queen, on the application of ABNA Ltd and Others v Secretary of State for Health and Food Standards Agency*, Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, Judgment of 6 December 2005, [2005] ECR I-10423 para. 69.

85 *Wilkinson/Room*, Warnings on alcohol containers and advertisements: International experience and evidence on effects. 28 *Drug and Alcohol Review*, 426–435. doi: 10.1111/j.1465-3362.2009.00055.xp, at p. 432

86 *Al-hamdani*, The case for stringent alcohol warning labels: Lessons from the tobacco control experience, *Journal of Public Health Policy* (2014) 35, 65–74. doi:10.1057/jphp.2013.47.

87 *Moreno, et al.*, *Eur J Public Health* (2013) DOI: <http://dx.doi.org/10.1093/eurpub/ckt046>, p. 5.

88 *Hermann Schröder HS Kraftfutter GmbH & Co KG, Ochtrup (Federal Republic of Germany) v Hauptzollamt Gronau*, Case C-265/87, Judgment of 11 July 1989, [1989] ECR 2263 [21].

89 See *de Vries*, Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice, 9(1) *Utrecht Law Review* (2013), p. 174 and *United Pan-Europe Communications Belgium and others*, Case C-250/06, Judgment of 13 December 2007, [2007] ECR I-11135, paras. 41–47.

dealing with fundamental rights. In cases where the ECJ is referring to this requirement, it usually examines it within the requirement of proportionality.⁹⁰ Nevertheless, case law in which the ECJ examines less intrusive measures also exists.⁹¹ Accordingly, the question at this point is whether there are less restrictive but at least equally efficient measures than pictorial health warnings or plain packaging that can be used to reduce harmful drinking behaviours.

(1) Display Ban

An alternative measure is the adoption of a display ban. Studies of display bans of tobacco products show that “[...] POS tobacco displays influence purchase behaviour. Banning them may reduce cues to smoke and unplanned tobacco purchases.”⁹² An implementation of a display ban is suitable to contain the number of NCDs. However, it is doubtful that display bans are less or equally intrusive. Since the product is kept out of the sight of the customer, and can only be shown on his or her request, the customer is not permanently exposed to the alluring temptation of the tobacco industry. The absence of marketing inside stores prevents customers from requesting and buying tobacco or alcoholic products. The implementation of a display ban would therefore be more intrusive than plain packaging or graphical warnings.

(2) General health warnings

While an implementation of a display ban would exceed the second element of the “necessity test”, in particular the requirement to be less or equally intrusive, the absence of pictorial warnings on the product itself would make the ban less effective. The pictorial illustration of damage to health leads to immediate “shock value”, which acts as a deterrent and drives change in consumer behaviour. The directness of the confrontation with the late consequences of an unhealthy lifestyle cannot be compared with the effect a mere written warning would have on the customer. A recent study in the United States showed that shocking pictures do remain in the mind of an average consumer for a lengthier period of time and evoke a much stronger emotional reluctance than a general written warning.⁹³

90 *Rechnungshof v Österreichischer Rundfunk and Others*, Joined Cases C-465/00 et al., Judgment of 20 May 2003, [2003] ECR I-4989, margin no. 82 et seqq.

91 *Federal Republic of Germany v Council of the European Union*, Case C-280/93, Judgment of 5 October 1994, [1994] ECR I-4973 [96]; *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, Joined Cases C-92/09 and C-93/09, Judgment of 9 November 2010, [2010] ECR I-11063, margin no 76 et seqq.

92 *Kim et al.*, Influence of Point-of-Sale Tobacco Displays and Graphic Health Warning Signs on Adults: Evidence From a Virtual Store Experimental Study, 104(5) *American Journal of Public Health*: May 2014, 888–895. doi: 10.2105/AJPH.2013.301723.

93 FAZ.net, Schockfotos für Raucher funktionieren, 2 January 2016, <http://www.faz.net/aktuell/wissen/schockfotos-fuer-raucher-funktionieren-13994162.html>.

(3) Increase of taxes and minimum pricing

It is therefore necessary to find a method that is less intrusive than a display ban and more effective than a general health claim to achieve the aim of decreasing the number of NCDs. Thus far, such a method has failed to be presented. Nevertheless, any such alternative which does not impinge upon intellectual property rights is likely to result in an increase in the payment of tax or the introduction of minimum pricing, although these outcomes may be easier to justify. In particular, the introduction of minimum pricing is not to be underestimated. A recent study conducted in British Columbia (Canada) suggests that a 10 % increase in the minimum price – a measure without infringing intellectual property rights – of any given alcoholic product would reduce its consumption by between 14.6 % and 16.1 %.⁹⁴ This has been confirmed by other studies, namely in Saskatchewan (Canada)⁹⁵ and Australia.⁹⁶ As a result, minimum pricing⁹⁷ is a proven effective alternative to pictorial health warnings or plain packaging for alcoholic beverages which, simultaneously, does *not infringe* intellectual property rights. Hence, health warnings or plain packaging would not pass the necessity test of Art 17(2) CFRE, because there is an equally efficient but less intrusive measure to achieve the aim of decreasing the number of NCDs.

(cc) Proportionality in the strict sense

The third requirement for the justification of an infringement of the right to intellectual property by implementing plain packaging and graphical health warnings is the requirement of proportionality, Art 52(1) CFRE. Although this requirement is not explicitly mentioned in the text of Art 52 CFRE, it can be derived from the proportionality principle which is generally recognised by the ECJ.⁹⁸ The principle of proportionality means that the charges imposed must not be disproportionate to the aims pursued.⁹⁹ Hypothetically, assuming that plain packaging and graphical health warnings would pass the necessity test, it is questionable as to how far those will be proportional. For the case at hand, this means that the positive effects for achieving a diminution of NCDs need to outweigh the negative effects stemming from intellectual property infringements.

94 *Stockwell et al.*, Does minimum pricing reduce alcohol consumption? The experience of a Canadian province. 107 *Addiction* (2012), 912–920. doi: 10.1111/j.1360-0443.2011.03763.x.

95 *Stockwell et al.*, The Raising of Minimum Alcohol Prices in Saskatchewan, Canada: Impacts on Consumption and Implications for Public Health, 102(12) *American Journal of Public Health*: December 2012, e103–e110. doi: 10.2105/AJPH.2012.301094.

96 *Gray et al.*, Beating the grog: an evaluation of the Tennant Creek liquor licensing restrictions, 24 *Australian and New Zealand Journal of Public Health* (2000), 39–44. doi: 10.1111/j.1467-842X.2000.tb00721.x.

97 According to the ECJ minimum pricing is perfectly in line with the limitation of the right to property. See *SpA Ferriera Valsabbia and others v Commission of the European Communities*, Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79, Judgment of 18 March 1990.

98 *Federation Charbonniere de Belgique v High Authority*, Case 8/55, Judgment of 16 July 1956, [1954-1956] ECR 245; *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*, Judgment of 17 December 1970, Case 11/70, [1970] ECR 1125.

99 *Hermann Schröder HS Kraftfutter GmbH & Co KG, Ochtrup (Federal Republic of Germany) v Hauptzollamt Gronau*, Case C-265/87, Judgment of 11 July 1989, [1989] ECR 2263, para.21.

The ECJ's case law considers the protection of public health as superior to any economic interest.¹⁰⁰ In the case at hand, that means the limitation of a manufacturer's interest in its intellectual property, and thereby its interest in economic success, needs to be proportional to the health benefits pursued by the possible labelling regulations. Given the health risks connected with the consumption of alcoholic beverages, extended health warnings – limiting the right to intellectual property – are not an unacceptable burden for alcohol producers. In particular, it has been shown that general written health warnings are not equally as effective as pictorial warnings. Setting aside the argument that extended health warnings or the use of plain packaging is not necessary, such measures would be proportional and in alignment with the ECJ's view that the protection of public health is paramount.

d) The Case for Unhealthy Diet and Justification of Measure

An unhealthy diet is different to tobacco and alcoholic beverages as, initially, its negative effects are not as obvious. However, diseases such as obesity, diabetes, cardiovascular diseases and other NCDs are medically recognised as being caused by an unhealthy diet. Thus, it shall be discussed whether the measures mentioned *supra* would pass the proportionality principle needed to justify the interference with intellectual property rights protected by Art 17(2) CFRE.

aa) Suitability

Plain packaging and pictorial health warnings need to be suitable to achieve the aim of decreasing the number of NCDs. Studies show that “[...] young adolescents may use [energy drinks] in a manner similar to older individuals without knowing what they are drinking and how they contribute to their personal risk of harm.”¹⁰¹ Similar to alcoholic beverages, studies show that presenting aversive images of potential health consequences with those of specific foodstuffs can change implicit attitudes, which impacts on subsequent food choice behaviours.¹⁰² Introducing restrictions on packaging for unhealthy food would subvert unhealthy behaviours and would therefore be suitable to decrease the number of NCDs.

bb) Necessity

Further alternative measures that may be taken by the state, which are equally efficient but less or equally intrusive on the right to intellectual property, might not be available. As already outlined *supra* “fat taxes” might be alternative measures to

100 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees*, Case C-183/95, Judgment of 17 July 1997, [1997] ECR I-4315 para. 43.

101 *Costa et al.*, Young adolescents' perceptions, patterns, and contexts of energy drink use. A focus group study, 80 *Appetite* (2014), 183-189.

102 *Hollands et al.*, Using Aversive Images to Enhance Healthy Food Choices and Implicit Attitudes: An Experimental Test of Evaluative Conditioning, 30(2) *Health Psychology* (2011), 195-203.

plain packaging or pictorial health warnings. However, the results of studies are divided. In general, “most of the examined studies predict a rather modest fiscal impact on unhealthy food and drinks consumption and/or nutrition intake and consequently a poor result on weight loss and obesity, by the interplay of several factors among them the effects of cross-price elasticities”,^{103,104} thus, proving such measures as less effective, *i. e.* unnecessary.

However, the impact of aversive packaging is proven by studies. These measures, although being less or equally intrusive on the right to intellectual property, are not equally effective. Whilst the necessity of plain packaging may be disputed, pictorial health warnings have been proven necessary. The latter are also less intrusive on the right to intellectual property. In order to protect intellectual property rights, plain packaging is and shall be the *ultima ratio*.

cc) Proportionality

Finally, the pursued aims need to be proportional to the negative effects caused. The weighting to the respective interests, including provisions made to safeguard existing standards and to protect legitimate expectations must be taken into account.¹⁰⁵ Given that the ECJ views the protection of public health as prevailing over any economic interest,¹⁰⁶ *in casu* that should mean pictorial health warnings outweigh the right to intellectual property. However, it might be argued that plain packaging and pictorial health warnings are intense measures not comparable to a complete sales ban and other non-defined measures, which could be introduced to combat an unhealthy diet.

One question, however, remains open for discussion: How far can manufacturers of products which cause an unhealthy diet refrain from safeguarding provisions and their legitimate expectations with regard to their intellectual property?

Studies dealing with the unhealthy diet started appearing as of the 1990's and are still in their infancy. However, their results show a clear tendency that unhealthy dieting leads to several NCDs. Recent marketing campaigns of unhealthy food producers include *inter alia* fast-food restaurants that are endorsing “healthy options”¹⁰⁷ and food

103 *Gil et al.*, Taxation of unhealthy consumption of food and drinks: An updated literature review, 207 *Review of Public Economics*, (4/2013), 119–140.

104 See also *Escobar et al.*, Evidence that a tax on sugar sweetened beverages reduces the obesity rate: a meta-analysis, 13 *BMC Public Health* (2013), 1072.

105 *Wollenschläger*, in von der Groeben, Schwarze and Hatje (eds.), *Europäisches Unionsrecht*, (7th ed, Beck 2015), Art 17 CFRE, para.36

106 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees*, Case C-183/95, Judgment of 17 July 1997, [1997] ECR I-4315 para. 43.

107 See *e.g.* McDonald's launches delightful new options in support of Health Promotion Board's Healthier Dining Programme, 14 August 2014, available at https://www.mcdonalds.com.sg/press_release/mcdonalds-launches-delightful-new-options-in-support-of-health-promotion-boards-healthier-dining-programme/.

operators introducing “green” products¹⁰⁸ with less calories and “Stevia” (a natural plant based sweetener) instead of sugar. Consequently, unhealthy food producers are aware of the negative effects of their products and are unable to rely upon legitimate expectations or safeguarding provisions, *i.e.* the market of unhealthy food not being regulated.

Public health is, as already described *supra*, one of the most important community assets which – at least for pictorial health warnings – *in casu* does not represent a stark contrast to the right to intellectual property. Accordingly, pictorial health warnings are a proportional prophylactic measure to limit the consumption of unhealthy food.

IV. Summary and Outlook

As the regulation of unhealthy diets and alcoholic beverages increasingly relies on health warnings or plain packaging to address the problem of the growing number of NCDs, this article illustrates how those interventions may face constraints insofar as they encroach upon fundamental rights, in particular the right to intellectual property which manifests itself in individual packaging. Any controversy regarding an eventual rearrangement of packaging provisions – whether by means of pictorial health warnings or the use of plain packaging – can only be solved on the level of justification which is a balancing act between the manufacturers’ right to intellectual property and the public health of the European citizens. Although one might argue that public health is a matter of the highest order, it is not a thought-terminating cliché that can defunct all fundamental rights and the right to intellectual property in case.

Public health organisations and governments also support alternative methods to legislative pictorial health warnings or plain packaging for alcoholic beverages and unhealthy food and beverages. Current ambitions are the implementation of stricter self-regulatory tools and stronger commercial sanctions against manufacturers who refuse to enlighten consumers about the harmful contents of their products. More radical voices call for a complete advertising ban, convinced that this measure is highly effective and the only way to reduce NCDs.¹⁰⁹ However, the ultimate buying decision remains with the consumer. To maintain a high level of public health, it is essential that health warnings are combined with enhanced health education and other policy tools to reduce harmful drinking and dieting behaviours. As a promising example for the volition to alter the status quo, *health literacy* has gained importance on the European health agenda. Closely linked to empowerment it can be defined as “[...] the

108 Coca-Cola Life arrives on Shelves Nationwide, 4 November 2014, available at <http://www.coca-cola-company.com/coca-cola-usbottled/coca-cola-life-to-make-us-debut>.

109 *Sir Ian Gilmore*, in: alcohol health alliance UK, AHA supports calls to protect children from alcohol marketing; The Guardian, 28 January 2017, <https://www.theguardian.com/society/2017/jan/28/plain-packaging-graphic-warning-alcohol-craft-drinks-sanctimonious-health-experts>.

ability of citizens to make sound decisions concerning in daily life – at home, at work in health care, at the market place and in the political arena [...]”.¹¹⁰ To prevent the introduction of a Nanny-State, the ultimate choice for a healthy life should remain with the individual.

Zusammenfassung

Ausgehend von packungsbezogenen Maßnahmen zur Reduzierung des Absatzes von Tabakerzeugnissen wie Warnhinweise oder Plain Packaging werden vergleichbare Maßnahmen auch für alkoholische Getränke und für aufgrund ihres hohen Fett-, Zucker- oder Salzgehaltes als ungesund geltende Lebensmittel diskutiert oder sogar angewendet. Derartige Maßnahmen können sich als Beschränkungen des in Art. 17 der Europäischen Grundrechtscharta garantierten Rechts auf (geistiges) Eigentum darstellen. Eine Beschränkung des Rechts liegt nicht vor, wenn lediglich Chancen und Erwartungen beeinträchtigt werden. Auch wenn die Nutzung des Eigentums gesetzlich geregelt werden kann, soweit dies für das Wohl der Allgemeinheit erforderlich ist, muss doch in jedem Einzelfall geprüft werden, ob derartige Maßnahmen den Anforderungen an eine zulässige Eigentumsbeschränkung entsprechen, insbesondere ob sie geeignet, erforderlich und verhältnismäßig sind. Die Autoren prüfen die verschiedenen möglichen packungsbezogenen Beschränkungen auf ihre Vereinbarkeit mit dem verfassungsmäßig garantierten Recht auf Eigentum unter Berücksichtigung der dafür entwickelten Regeln.

110 *Sørensen, et al.*, Health literacy in Europe: comparative results of the European health literacy survey (HLS-EU), 25 *The European Journal of Public Health* (2015), 1053.